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NEWSLETTER

Insured v. Insured Exclusion Does Not Apply to Defense of Claim Brought Jointly by Insured and Non-Insureds

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Applying California law, the United States District Court for the Northern District of California has held that an exclusion in a directors and officers liability policy for claims asserted by an insured did not excuse the insurer's obligation to defend the entire suit by insured and non-insured claimants. *Chartrand v. Ill. Union Ins. Co.*, 2009 WL 2776484 (N.D. Cal. Aug. 28, 2009).

The suit for which coverage was sought named as a defendant the insured entity and was brought by a number of plaintiffs, one of whom was the entity's chairman of the board. In light of the fact that the chairman was an insured under the policy, the insurer denied coverage based on the policy's insured v. insured exclusion, which applied to any claim "brought or maintained by, or on behalf of, or at the direction of any Insured in any capacity, any Outside Entity or any person or entity that is an owner of or joint venture participant in any Subsidiary in any respect and whether or not collusive."

In the coverage litigation that followed, the court first opined that it was required to construe the exclusion at issue narrowly and concluded that it did not apply to amounts associated with allegations asserted by parties who did not qualify as insureds under the policy. Next, the court noted that California law requires an allocation between covered and uncovered amounts, regardless of whether the policy itself includes an allocation provision. On this basis, the court found that while the allegations by the chairman may have triggered the exclusion, the potential for indemnity coverage under the policy remained with respect to the allegations by the other plaintiffs. As a result, the court held that the insurer had a duty to defend the suit subject to an allocation.