

No Coverage Under D&O Policy for Complaint Naming Company as Sole Defendant

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The United States Court of Appeals for the First Circuit held that a directors and officers liability policy afforded no coverage for complaints against a company that included allegations of wrongful acts by individual directors and officers but that did not name those individuals as defendants. *Medical Mut. Ins. Co. of Maine v. Indian Harbor Ins. Co.*, 2009 WL 3210599 (1st Cir. Oct. 8, 2009).

The insurer issued a D&O policy to a company that fired its CEO shortly after he had a stroke. After sending a demand letter to the company seeking compensation for alleged disability discrimination, the former CEO filed administrative complaints with the Maine Human Rights Commission and the federal EEOC. The complaints named only the company as the respondent. The former CEO later filed a civil complaint against the company after the agencies issued right-to-sue letters. The civil complaint did not name any directors or officers as defendants, but it did allege wrongful conduct by directors and officers. The litigation settled, and the former CEO released all of his claims against the company and its directors and officers. The company subsequently sought reimbursement for the settlement amount under its D&O policy. The insurer denied coverage on the grounds that no claim had been made against an insured person.

The insuring agreement at issue in the coverage dispute provided that the insurer would "pay on behalf of the Company Loss which the Company is required or permitted to pay as indemnification to any of the Insured Persons resulting from a Claim first made against the Insured Persons during the Policy Period . . . for a Wrongful Act" The policy defined "Insured Persons" as past, present and future directors or officers of the company. The definition of "Claim" included a written demand for monetary or non-monetary relief, a civil proceeding in a court of law, and "a formal civil, criminal, administrative regulatory proceeding or formal investigation of an Insured Person . . . which is commenced by the filing or issuance of a notice of charges, formal investigative order or similar document identifying in writing such Insured Person . . . as a person against whom a proceeding . . . may be commenced"

The court considered separately the questions whether the administrative complaints and lawsuit constituted "Claims" and whether a claim had been made against the company's directors and officers.

First, the court concluded that the administrative complaints were not a "Claim." The prong of the "Claim" definition applicable to administrative proceedings required the written identification of an "Insured Person" as a person against whom a proceeding might be commenced. Because the administrative complaints named the company as the sole respondent, the appellate court concluded that they did not fall within the definition of "Claim."

The court then determined that the civil lawsuit was a "Claim." However, the court also concluded that it was not a claim "made against" insured persons. The court rejected the company's argument that, despite the fact that the company was the sole defendant, the claim had been "made against" insured persons because of the allegations of wrongful conduct by individuals. After determining that the phrase "made against" was unambiguous, the court stated that the complaint "must identify the person as a defendant in the action" in order to be "made against" a person. Furthermore, according to the court, the inclusion of "free-standing allegations of wrongful conduct by an insured corporation's directors and officers" was insufficient to bring the complaint within the scope of coverage because the policy contained "complementary requirements" that the claimant allege wrongful acts by directors and officers and bring a claim against directors and officers.

The court also rejected the company's contention that the prayer for relief requesting that the court to enjoin the company and its agents from continuing to violate the former CEO's rights was a demand for non-monetary relief against insured persons. The court noted that the prayer for injunctive relief did not demand relief from the agents in their personal capacities. Furthermore, because the complaint did not name these individuals as defendants, the "complaint could not be an effective vehicle for making a meaningful demand for relief against them."

Finally, the court dismissed as a "non-sequitur" the company's argument that the release agreement, which released potential claims against directors and officers, constituted an admission that the lawsuit was a claim made against directors and officers. The broad release could not transform "a non-covered allegation of wrongdoing into a covered claim." To allow such a transformation would permit the insured "to manufacture coverage" by insisting on a release framed more broadly than the claim actually made.