

Missouri Appellate Court Holds "Wrongful Termination" Exception To Insured v. Insured Exclusion Is Ambiguous

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A Missouri intermediate appellate court, applying Missouri law, has held that the term "wrongful termination" contained in a carve-back from an insured v. insured exclusion for claims brought by Insured Persons for wrongful termination was ambiguous and accordingly reversed a trial court's order granting summary judgment in favor of the insurer. *Maritz Holdings, Inc. v. Fed. Ins. Co.*, 298 S.W.3d 92 (Mo. Ct. App. Sept. 8, 2009). The court also found that a Petition in Intervention brought by a minority shareholder was related to a prior demand letter sent by other minority shareholders.

The insured company, privately held by a family, issued Class A common stock with voting rights to certain family members on the Board of Directors and Class B common stock without voting rights to company employees and other individuals and nonprofit organizations. In April 2000, after internal disagreements concerning the direction of the insured company, the majority shareholders held a special meeting of the Class A shareholders, at which meeting the majority shareholders voted to reduce the size of the Board and to remove the minority shareholders from the Board. In October 2001, the minority shareholders sent a demand letter to the insured company, stating that the minority shareholders had been wrongfully removed from the Board and demanding that the majority shareholders buy back the minority shareholders' shares, allow their shares to be sold to a strategic partner, or sell the company.

The insured company maintained a directors and officers liability policy for the period from June 30, 2001 through June 30, 2002, which provided, in relevant part, that the insurer "shall not be liable for Loss on account of any Claim made against any Insured Person brought or maintained by or on behalf of any Insured Person." The policy, however, also provided an exception to the insured v. insured exclusion for claims "brought or maintained by an Insured Person for the actual or alleged wrongful termination of the Insured Person." The policy did not define the term "wrongful termination."

The insured company submitted the minority shareholders' demand to its insurer as a notice of potential claim under its policy. Subsequently, the minority shareholders filed suit in August 2002, alleging that they were deprived of their rights and seeking to compel the company to produce its books and records for inspection. That suit was submitted for coverage as an "update and supplement [to] the previous Notice of a Potential

Claim" under the policy. The insurer denied coverage on the basis that the minority shareholders were "Insured Persons," and thus coverage was precluded by the insured v. insured exclusion in the 2001 policy. This suit was later dismissed without prejudice, and the minority shareholders filed a second suit in July 2003, alleging substantially similar allegations as in the prior suit, including that the majority shareholders unlawfully removed the minority shareholders from the Board. That action was submitted for coverage under the 2001 policy, and the insurer again denied coverage based on the insured v. insured exclusion. In December 2004, a separate minority shareholder filed a Petition in Intervention, alleging similar allegations to those contained in the prior actions and also alleging that the majority shareholders intended to disadvantage the minority shareholders. The insurer again denied coverage based upon the insured v. insured exclusion, as the petitioner was alleged to be a former "advisory director" of the company. The insured company subsequently filed suit against the insurer, seeking a declaratory judgment that coverage was not barred by the insured v. insured exclusion for the two suits or the Petition in Intervention because the term "wrongful termination" in the exception to the exclusion was ambiguous. The trial court granted summary judgment in favor of the insurer, and the company appealed.

On appeal, the Missouri Court of Appeals first held that the Petition in Intervention, filed in December 2004, was a claim "first made" during the 2001 policy period, as were both of the earlier suits filed by the minority shareholders, and that none of the suits was a claim first made under later policy periods. In so holding, the court stated that the initial demand by the minority shareholders was reported as a notice of potential claim and that the policy provided that "any claims subsequently arising from such circumstances shall be considered to have been made during the Policy Period . . . in which the circumstances were first reported" to the insurer. The court held that as the "circumstances that could (and did) give rise to a Claim were first reported" to the insurer in October 2001, and that the two suits and the Petition in Intervention were based on "Interrelated Wrongful Acts," defined in the policy as "all causally connected Wrongful Acts," because they "stem[med] from the special Board meeting" and "in fact arose out of the same nexus of conduct."

As to the insured v. insured exclusion, the appellate court held that the term "wrongful termination" was ambiguous. The court recognized that "[o]n one hand, those who are familiar with employment law understand that a wrongful discharge cause of action requires an employer/employee relationship. What meaning a layperson, presumably unfamiliar with employment law, would attribute to the phrase 'wrongful termination,' however, is not clear to us." The court stated that, under Missouri law, where a contract is ambiguous, "the intent of the parties must be established by extrinsic evidence," which created a question of fact not ripe for summary judgment. In holding that the term "wrongful termination" in the exception to the insured v. insured exclusion was ambiguous, the court stressed that it was "not prepared to strictly construe the contract in [the insured company's] favor." Instead, the court instructed that on remand, the trier of fact must determine "whether the parties intended" the exception to the insured v. insured exclusion "to apply to the circumstances and claims presented in the underlying litigation."