

Court Finds No Duty To Defend Without Clear Allegations Defendants Sued In Insured Capacity

July 2010

The United States District Court for the Eastern District of Arkansas, applying Arkansas law, has ruled that an insurer does not have a duty to defend when there are no clear allegations that the defendants were sued in their insured capacity. *Yocum v. St. Paul Mercury Ins. Co.*, 2010 WL 2179137 (E.D. Ark. May 27, 2010).

This case involved a lawsuit against directors of numerous companies involved in catfish farming, one of which was the named insured under a management liability policy. A lawsuit alleging misrepresentations related to a private stock offering was filed that did not name the insured company as a defendant and only named the individual insureds in their respective capacities as directors of companies other than the named insured. The policy provided coverage for loss which the insureds became "legally obligated to pay on account of any Claim first made against them . . . for a Management Practices Act." The definition of Management Practices Act specifically excluded "any conduct actually or allegedly committed or attempted by any Insured Person in their capacity as a director, officer, trustee, governor, member of the board of managers, or any equivalent position, or employee of any entity other than the Company, even if service in such capacity is with the knowledge and consent of, at the direction or request of, or part of the duties regularly assigned to the Insured Person by the Company, except in their capacity in an Outside Position." The insureds ultimately filed suit seeking a declaration that the insurer had a duty to defend the insureds in the securities action.

According to the court, the insurer did not have a duty to defend because the definition of a Management Practices Act specifically excluded coverage for dual capacity claims. Therefore, because the individual insureds were acting in a dual capacity, their actions did not qualify as a Management Practices Act. Additionally, the court determined that the individual insureds were not identified in the underlying complaint in their insured capacity. In so ruling, the court noted that the insured company was not named as a defendant in the underlying complaint and the individual defendants were not identified as directors or officers of the insured company. Furthermore, the court determined that the insurer would not have a duty to defend, even if the policy did allow for dual capacity claims, because the insureds' actions as directors of the insured company and their actions as directors of other non-insured companies were "inextricably intertwined." In support of its conclusion, the court highlighted that the individual insureds were directors of both companies and owned membership interests in both, that they formed one company when the other was in

financial trouble, and that there were combined minutes for board meetings.