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NEWSLETTER

Insured v. Insured Exclusion Bars Coverage for Lawsuit By Board Member

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The United States District Court for the District of Minnesota, applying Minnesota law, has held that the insured v. insured exclusion in an insured corporation's D&O policy precluded coverage for lawsuits involving one of the corporation's board members as an adverse party. *Ideal Dev. Corp. v. U.S. Liab. Ins. Co.*, No. 10-722 (D. Minn. July 13, 2010). In doing so, the court rejected the insured's argument that the exclusion applied only when the director was suing in his capacity as a director.

The insured corporation blocked a tender offer made through a company that was solely owned by one of the insured's board members. After blocking the tender offer, the insured corporation sued the board member. The board member then counterclaimed against the corporation and brought third-party claims against some of the company's other directors. Subsequently, two additional lawsuits related to the tender offer were filed. The first lawsuit was brought against the corporation by the board member alone, and the second was filed as a shareholder derivative action involving the board member in his capacity as a shareholder.

The corporation tendered all of the lawsuits to its D&O insurer for defense and indemnity. The insurer denied coverage based on the policy's insured v. insured exclusion, which excluded coverage for "any Claim by, at the behest of or on behalf of the Organization and/or any Individual Insured." The policy defined "Insureds" to include "Directors, Officers, Managing Members of Employees of the Organization . . . ." Subsequently, the corporation sued the insurer seeking coverage.

The court determined that the policy unambiguously excluded coverage for all of the lawsuits, as they were brought by, on behalf of, or at the behest of an insured. In so doing, the court rejected the corporation's argument that the insured v. insured exclusions applied only if the claims were brought by an insured in his capacity as an insured. According to the court, such an interpretation was not supported by the plain language of the policy and was inconsistent with the first subsection of the exclusion, which provided that shareholder derivative suits are not excluded from coverage if such suits are "brought and maintained totally independent of, and without the solicitation, assistance, participation or intervention of, any of the Insureds." The court explained that the subsection clearly implied that lawsuits not brought independently of an insured are excluded from coverage, irrespective of the claimant insured's capacity. Accordingly, because the plain language of the exclusion applied to all of the suits, the court entered judgment in favor of the insured.