

Allegations Giving Rise To the Possibility of Coverage Sufficient To Invoke the Duty To Defend

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The United States Court of Appeals for the Ninth Circuit, applying California law, has held that a complaint alleging facts that gave rise to the possibility of coverage is sufficient to trigger an insurer's duty to defend. *Goerner v. AXIS Reins. Co.*, 2010 WL 4117093 (9th Cir. Oct. 20, 2010).

The insurer issued a D&O policy requiring it to defend and indemnify the insured company's officers for "any actual or alleged error" committed while acting in their official capacity. A third party brought suit against the company's former CEO for actions allegedly taken on behalf of two other companies in the same industry. In the ensuing coverage litigation, the district court held on summary judgment that because the underlying complaint did not specifically allege that the former CEO acted in his official capacity, the insurer did not owe a duty to defend the suit.

Citing the California rule that an insured can establish a duty to defend by proving the existence of the potential for coverage, the court rejected the insurer's argument on appeal that it was not obligated to undertake the defense because the underlying complaint failed to allege that the former CEO committed some wrongdoing while acting in his official capacity. According to the court, the underlying complaint alleged sufficient facts giving rise to the possibility of coverage because: (1) the former CEO demonstrated that the insured company had potential or actual business dealings with all of the persons and companies named in the complaint, and (2) the complaint included allegations that the insured company's board of directors authorized and paid for the former CEO to travel to and meet with two of those entities. Accordingly, the court reversed the grant of summary judgment on behalf of the insurer and instructed the district court to grant summary judgment for the insured on the duty to defend.