

Eighth Circuit Holds Criminal Claim Need Not Allege Loss for Policyholder To Have Defense Coverage; Factual Adjudication Needed on Personal Gain, Dishonesty Exclusions

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The Eighth Circuit, applying Arkansas law, has held that the insuring agreement of a directors and officers liability policy did not require that a "claim" be for "loss" in order for the insured to be entitled to coverage for defense expenses. *Wintermute v. Kan. Bankers Sur. Co.*, 2011 WL 31531 (8th Cir. Jan. 6, 2011). The court further held that two exclusions, for personal profit and dishonesty, each required a factual determination that the insured had committed the actions barred by the exclusion before the exclusion could apply.

The insured bank director had been convicted of two criminal counts for filing false statements in connection with the purchase of the bank, but acquitted of four other counts for bank fraud related to subsequent loan transactions. The director sought coverage for defense expenses for the counts on which she was acquitted. In coverage litigation, the district court granted summary judgment to the insurer.

The Eighth Circuit reversed. The court rejected the insurer's argument that the policy only provided coverage for a "claim for loss," and that the criminal charges did not seek loss. The insuring agreement provided that the insurer would "indemnify" each director for "Loss which the director . . . is legally obligated to pay by reason of any Wrongful Act solely in their capacities of Directors." The policy defined Loss as any amount which the director is "legally obligated to pay . . . for a claim . . . made against the Directors . . . for Wrongful Acts, and shall include but not be limited to damages, judgments, . . . and defense of legal claims." The insurer argued that the policy required a "claim for Loss," and the criminal proceedings did not constitute such a claim because the indictment did not demand money, and thus was not a claim for an amount that the director would be legally obligated to pay. The court held that the insuring agreement did not require a claim for loss to trigger indemnification, but only a claim for a wrongful act. Because the indictment indisputably alleged wrongful acts and the director was legally obligated to pay defense expenses, the policy applied.

The court rejected a similar argument by the policyholder with respect to policy exclusions. The policy's exclusion lead-in language provided that the insurer was not liable "to make any payment or provide any defense in connection with any claim for Loss made against" the insureds. The director argued that the exclusions could only apply to "claims for Loss," and the criminal claims were not claims for loss. The court held that substituting the definition of loss into the quoted phrase showed an intention for the prefatory language to mirror the coverage provision.

Turning to the exclusions at issue, the court held that each exclusion required a factual adjudication. The personal profit exclusion was grounded on a director "gaining in fact" profit to which she was not entitled. The court held that the pleadings in the underlying matter could not control application of the exclusion, and that a factual determination in the coverage action was required. The court rejected the insurer's argument that its holding created a "final adjudication" requirement, noting that such provisions are read more narrowly than "in fact" provisions because an "in fact" finding could be made in either the underlying case or a separate coverage action. The court likewise held that language in a dishonesty exclusion, providing that it did not apply to any director "who was not involved in the dishonest acts," "serve[d] the same purpose as the 'in fact' language contained in the personal profit exclusion" and required a factual determination based on evidence beyond the underlying allegations in order to be applied.

Accordingly, the court reversed the district court's grant of summary judgment and remanded for further proceedings.