

District Court Overseeing Receivership of Investment Entity, Over Opposition By Receiver and SEC, Permits Insurer to Advance Defense Costs to Accused Individual

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The United States District Court for the Eastern District of Missouri has held that an insurer may advance defense costs on behalf of an individual accused of fraud by the Securities and Exchange Commission (SEC), notwithstanding the opposition of the court-appointed receiver and of the SEC to the depletion of the proceeds of the applicable D&O policy. *SEC v. Morriss*, 2012 WL 1605225 (E.D. Mo. May 8, 2012).

The SEC filed suit against four investment entities and their principal officer, alleging that the individual had misappropriated investor funds. In response to the SEC's ex parte motion, the court entered orders freezing the assets of the entities and appointing a receiver.

The investment entities' D&O policy provided both individual A-side coverage and specified entity coverage. The policy also contained a priority of payment provision that required the insurer to first pay claims arising under the A-side coverage. The insurer indicated its willingness to advance defense costs on behalf of the individual, but the SEC and receiver objected, claiming that the insurer should not do so. The individual accordingly sought an order from the court confirming that its receivership and asset freeze orders did not bar the insurer from advancing defense costs under the insurance policy.

The Receiver argued that she should have access to the policy proceeds to reimburse investors. The court pointed out that the Receiver had not sought coverage under the insurance policy for the SEC's claim, and that any other claims against the entities for which the policy might provide coverage were speculative. The court also found that the plain language of the policy required the insurer to advance defense costs to the individual without regard for the Receiver's speculative interest in the policy. Accordingly, the court concluded that the policy proceeds were not property of the receivership estate, and that its asset freeze orders did not prevent the insurer from advancing defense costs.