

Applicability of Insured v. Insured Exclusion Subject to Allocation Provision; Officer's Alleged Misrepresentations Not Employment Practices Wrongful Act

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The United States District Court for the Central District of California has held that an insurer must provide a defense to an insured officer for cross claims asserted against her by a corporate shareholder, but not for cross claims brought by the insured company. *Hardin v. Greenwich Ins. Co.*, 2012 WL 3217704 (C.D. Cal. Aug. 3, 2012). In so holding, the court declined to decide whether the action constituted one or multiple "Claims" for purposes of the policy's insured v. insured exclusion, stating that the policy's allocation provision made it unnecessary to answer that question. The court additionally held that the alleged misrepresentations and fraudulent acts of the officer did not constitute a "Wrongful Act" as defined in the policy's EPL coverage part.

The underlying action was initiated by the insured officer in 2009, when she brought suit against her former employer—an insured subsidiary—alleging that it failed to pay her deferred compensation as agreed. Cross complaints against the officer subsequently were filed by the subsidiary (alleging that the officer had breached an agreement with and fiduciary duties to the subsidiary) and by a corporate shareholder of the subsidiary (alleging that she caused the subsidiary to submit fraudulent billing claims to the state, breached her fiduciary duties, fraudulently induced the shareholder to enter into certain agreements and engaged in promissory fraud). The officer tendered her defense of both cross complaints to the insurer under a private company reimbursement policy, which included a D&O coverage part and an EPL coverage part. The insurer denied coverage and coverage litigation followed.

Ruling on cross motions for summary judgment, the court held that the insurer was obligated to provide the officer with a defense under the D&O coverage part, but only with respect to the shareholder's cross complaint. The insured v. insured exclusion, the court held, while precluding coverage for the subsidiary's cross-complaint, did not extend to bar coverage for the shareholder's cross complaint. First, the court rejected the insurer's argument that the entire action was a single "Claim" barred by this exclusion. The court opined that the policy's allocation provision "contemplates that a single Claim may contain both covered and uncovered matters" and thus stated that "regardless of whether the [shareholder's cross complaint] is a separate Claim, or a separate matter under one Claim, it is brought by uninsured Plaintiffs and triggers the

duty to defend as to that portion of the action." Next, the court found that the fact that the subsidiary and the shareholder had common board members was insufficient to show that the shareholder's cross-complaint was brought "by, on behalf of, or at the direction of" the insureds.

The court additionally held that neither cross complaint was covered under the EPL coverage part because they did not allege a "Wrongful Act" as defined in that part. Examining the relevant portion of the definition in the context of the surrounding provisions, the court held that the term "employment related misrepresentation" was not so broad as to encompass the officer's alleged misrepresentations related to agreements with the subsidiary and the shareholder or the submission of false billing claims to the state. Rejecting the officer's contention that the term should be read broadly, the court stated that "construction of the term as encompassing any misrepresentation made by an insured in the scope of his or her employment is completely divorced from the definition of Wrongful Act under the EPL Coverage and ignores the maxim that a policy's terms are construed in context."