

Insurer Must Defend and Indemnify Directors Because of Exception to I v. I Exclusion

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In an unpublished decision, the federal district court for the Northern District of Illinois has held that an insured versus insured exclusion in a directors and officers liability policy does not apply to a claim brought by a former director and officer for wrongful termination against his former company's directors based on an exception to the exclusion for claims "brought or maintained by an executive for the actual or alleged wrongful termination of such executive." *Walz v. Federal Insurance Co.*, 2004 WL 2452713 (N.D. Ill. Oct. 29, 2004).

In this case, a former president and CEO of the insured company brought suit against several current directors relating to his termination. One director tendered the claim to the insurer, which initially recognized its duty to defend the claim and accepted coverage subject to certain reservations of rights. The CEO then filed two amended complaints including counts for "Tortious Interference with a Contract of Employment" and "Tortious Interference with Reasonable Expectation of Continued Employment." After the amended complaints were filed, the insurer withdrew its defense and informed the director that it was declining coverage under the policy based on its insured versus insured exclusion. The director filed a declaratory judgment action seeking coverage under the policy and monetary relief for the insurer's failure to pay the claim.

In granting summary judgment in favor of the insured director, the court rejected the insurer's argument that the exception to the insured versus insured exclusion was inapplicable to the facts. In reaching this conclusion, the court indicated that the insurer incorrectly focused on the particular legal theories asserted by the CEO in his amended complaints rather than "the alleged conduct on which the lawsuit was based." The court determined that the CEO's complaint alleged that he was wrongfully removed from his position of employment, which, although styled as a tortious interference claim, essentially asserted a claim for wrongful termination. The court accordingly concluded that the exception to the exclusion applied and held that the insurer was required to defend and indemnify the insured, subject only to the policy's total monetary limit.

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