

## Court Denies Insurer Summary Judgment on Capacity, Loss and Public Policy

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The United States District Court for the Northern District of California, applying California law, has denied a professional liability insurer's motion for summary judgment based on the insurer's arguments that the claimant was not acting in an insured capacity in connection with the underlying events, that the underlying lawsuit did not seek recovery for "loss" as defined by the policy and that California Insurance Code Section 533 precluded coverage for the underlying lawsuit. *Daily v. Fed-Ins. Co.*, 2005 WL 1108978 (N. D. Cal. Apr. 5, 2005).

The underlying litigation involved allegations that a former director or officer of the policyholder company, while acting in that capacity, had breached an oral contract with the underlying plaintiff by misusing the plaintiff's confidential and proprietary information regarding the credit card processing industry. The complaint also alleged that the insured had defrauded the plaintiff by doing so, had interfered with plaintiff's contract with a third party and had interfered with plaintiff's prospective economic advantage by interfering with his relationship with that same third party.

The insurer issued an executive liability and indemnification policy to the company under which the claimant asserted he was insured pursuant to his position as "an officer or director" of the company. The insurer denied coverage for the claim, and the claimant subsequently filed a declaratory judgment action to establish coverage. The insurer subsequently sought summary judgment on three separate grounds, each of which the court rejected.

First, the insurer contended that the claimant was not acting as a director or officer of the policyholder in connection with his transactions with the underlying plaintiff. In doing so, the insured relied on "admissions" of the claimant and other alleged evidence, all of which the court rejected as unpersuasive. In doing so, the court noted that the alleged evidence was not properly before the court, not properly authenticated or merely a recitation of legal positions that did not constitute evidence.

Second, the insurer argued that the underlying plaintiff did not seek recovery for "loss" as defined by the policy because the plaintiff sought restitution or disgorgement rather than damages. The court determined that this position was without merit because the operative complaint "made clear that [the plaintiff was] seeking damages" and also because the underlying plaintiff had designated an expert to testify as to

damages.

Third, the insurer argued that California Insurance Code Section 533, which provides that "[a]n insurer is not liable for a loss caused by the willful act of the insured," precluded coverage because all of the underlying causes of action alleged intentional acts. In considering this argument, the court first noted that Section 533 precludes only indemnification of willful conduct, and not the defense of an action in which such conduct is alleged, citing *Gray v. Zurich Ins. Co.*, 419 P.2d 168 (Cal. 1966). The court then observed that, while the duty to pay defense fees is distinct from the duty to defend, the insurer had "failed to establish that [the claimant] did not reasonably expect the policy to cover his defense expenses." The insurer's argument that Section 533 precluded indemnification for willful acts was accordingly insufficient to support summary judgment in the court's view.

Accordingly, as the court found no merit with respect to any of the insurer's grounds for summary judgment, the court denied its motion in full.

For more information, please contact us at 202.719.7130.