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ALERT

Court Enforces Anti-Assignment Clause and Holds Parent of Named Corporation Not Insured

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A federal district court has held that a parent company was not insured under a D&O policy where the parent company had been replaced by one of its alleged subsidiaries as Named Corporation, and the policy covered subsidiaries of the Named Corporation but did not provide coverage to parent companies. The court also held that the policy's anti-assignment clause barred breach of contract and bad faith claims brought by an assignee where the insurer had not consented to the assignment of claims. *Sandburg Financial Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 2011 WL 3104406 (S.D. Tex. July 25, 2011).

A director and officer of a company personally guaranteed any damages incurred or any judgment obtained by the plaintiff arising from the purchase of commercial real estate. When the real estate was wrongfully sold to another buyer, the plaintiff sued the seller of the property and obtained a judgment in excess of $7 million. Relying on the guarantee, the plaintiff demanded that the company and director and officer pay the $7 million judgment. In turn, the director and officer notified the company's D&O insurer of plaintiff's demand, but the insurer refused to provide a defense or indemnification. Thereafter, the plaintiff filed a lawsuit and obtained a separate judgment against the company for its failure to pay the $7 million judgment. In exchange for agreeing not to execute this judgment, the plaintiff was assigned all the claims the company had against the insurer. Years later, the plaintiff filed a separate lawsuit against the director and officer for wrongful acts committed as an officer and director of the company. The D&O insurer was notified of this lawsuit,

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but the insurer again declined to provide coverage. The lawsuit against the director and officer, who had since filed for bankruptcy, resulted in a default judgment. In light of these events, the plaintiff, as a judgment creditor and assignee, ultimately sued the D&O insurer for breach of contract and bad faith.

Dismissing the plaintiff's claim for breach of contract as judgment creditor, the court reasoned that the policy claim arose from plaintiff's initial demand that the company's officers and directors pay the $7 million judgment pursuant to the guarantee. Noting that plaintiff's demand was made in 1996, the court explained that an endorsement to the 1996 D&O policy had deleted the company as Named Corporation and named instead one of the company's alleged subsidiaries as Named Corporation. Because the 1996 D&O policy only covered subsidiaries of the Named Corporation (and not a parent company), the court dismissed plaintiff's claim for breach of contract as judgment creditor. In so doing, the court noted that the complaint only contained allegations of wrongful acts by the directors and officers of the company, and not the subsidiary.

The court also dismissed plaintiff's bad faith and breach of contract claims as an assignee. In so doing, the court explained that the 1996 D&O policy had an anti-assignment clause forbidding the assignment of claims without the consent of the insurer. Because there was no allegation that the insurer consented to the assignment, the court dismissed the assigned claims.