

ALERT

Court Finds Company Has No Standing to Seek Declaratory Judgment under Side A Policies; Coverage under Other Policies Too Remote Because Retention Is Unsatisfied

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The United States District Court for the Central District of California has granted motions by several Side A and traditional directors and officers insurers to dismiss a declaratory judgment action brought by a subsidiary of the named insured organization because the subsidiary lacked standing to pursue the litigation. *IndyMac MBS, Inc. v. Ace American Ins. Co. (In re IndyMac Bancorp, Inc.)*, No. 11-cv-2950, 11-cv-2998 (C.D. Cal. Aug. 24, 2011). In doing so, the court determined that any potential for coverage that might be available for the subsidiary under those policies providing entity coverage was too speculative to support standing given the relevant order of payments provision and the subsidiary's failure to satisfy the applicable retention. Wiley Rein LLP represents an excess insurer and the primary Side A insurer in the litigation.

The plaintiff was a subsidiary of the named insured, an insolvent bank holding company, with its assets—including the plaintiff—held in receivership. Certain directors and officers liability insurers issued policies that afforded specified coverage to the bank holding company, its subsidiaries and its directors and officers. Under those policies' order of payments provision, where loss was incurred contemporaneously by the individuals insureds and an insured entity, loss incurred by the individuals must be paid first. Other insurers issued Side A only policies, which afforded specified coverage only to the directors and officers. The subsidiary filed coverage litigation against all the insurers, seeking determinations as to coverage for actions against the subsidiary, as well as numerous other actions that

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named only former directors and officers and no insured entities. The plaintiff contended that, in order for it to obtain relief as to the entity coverage it demanded, it was necessary to adjudicate coverage for all claims noticed under the policies so the proceeds available to it could be ascertained. Both sets of insurers moved to dismiss.

The traditional directors and officers insurers argued that any dispute as to entity coverage that might be available to the plaintiff was not ripe because the plaintiff had not exhausted the applicable retention, or even alleged that such exhaustion was imminent. The court ruled that the plaintiff's request for declaratory relief was too remote to constitute a case or controversy under Article III of the United States Constitution. Any coverage for the entity under the traditional directors and officers policies could only be determined, the court found, "after the underlying actions involving the [individual insureds] [were] concluded." Because those actions remained pending, the court determined that the plaintiff did "not yet have an adequate injury that would make this case justiciable." The court also held that the plaintiff lacked standing because it had not satisfied the applicable retention. Accordingly, the court granted the traditional directors and officers insurers' motions.

The Side A insurers argued that the entity had no standing to sue under the Side A policies because it was not an insured under their policies. The court agreed, finding that "Plaintiff has not and cannot adequately allege that it has a legal interest in the Side-A Policies." For this reason, the court likewise granted the Side A insurers' motion to dismiss.