

# I v. I Exclusion Does Not Bar Coverage for ERISA Breach of Fiduciary Duty Suit Where Fund Trustee Was Plaintiff in Underlying Action

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In an unpublished summary order, the United States Court of Appeals for the Second Circuit, applying New York law, has held that the insured v. insured exclusion in a trustee and fiduciary liability policy did not apply to bar coverage for a suit brought by the chairman of the board of trustees and two plan participants. *Burke v. Ulico Casualty Co.*, 2006 WL 266609 (2d Cir. Feb. 3, 2006). The district court opinion was summarized in the November 2004 issue of *The Executive Summary*.

An insurer issued a trustee and fiduciary liability policy to a union pension fund. The policy contained an I v. I exclusion that "specifically excludes any claim or allegation which, directly or indirectly, in whole or in part, arises out of any assertions, allegations, causes of action or demands whatsoever by or on behalf of an Insured or Insureds under this certificate against another Insured or Insureds hereunder."

Prior to the expiration of the policy period, an official of the pension fund notified the insurer that an investigation had revealed that a claim would likely be made under the policy based on the fund's declining financial viability. Subsequently, the chairman of the board of trustees of the plan and two fund participants brought an ERISA action seeking equitable relief and damages based on alleged breaches of fiduciary duties by eight current and former trustees of the pension fund. The complaint also made allegations against the pension fund's former actuarial firm. The allegations against the actuarial firm were settled, and the chairman withdrew as a plaintiff. When the pension fund tendered the underlying action to the insurer, the insurer denied coverage based on, *inter alia*, the insured v. insured exclusion in the policy. The insurer argued that the participation of the chairman as a plaintiff triggered application of this exclusion. The district court rejected the insurer's summary judgment motion, holding that adopting the interpretation of the I v. I exclusion urged by the insurer would render superfluous the bargained-for provision of coverage for claims such as the one in the underlying action.

On appeal, the Second Circuit affirmed the district court's conclusion that the I v. I exclusion did not apply to preclude coverage. The appellate court reasoned that the I v. I exclusion did not unambiguously exclude

coverage for the litigation brought by the two non-insured plaintiffs because "[t]he clause does not exclude covered claims that happen to be 'joined with' uncovered claims" but only excludes coverage for claims that arise out of allegations by one insured against another. Relying on its prior decision in *Coregis Insurance Co. v. American Health Foundation*, 241 F.3d 123 (2d Cir. 2001), the court noted that New York law interprets the phrase "arise out of" to mean originating from a specific source and requiring a causal connection. Here, the court concluded that all of the claims originate "if at all, in the allegedly deficient performance of the fund" and that there was no causal connection between the non-covered claim and those brought by the two plan participants. The appellate court also rejected the insurer's contention that the policy at issue defined the term "claim" in such a manner as to aggregate the three claims at issue even if they were legally distinct and independent.

The Second Circuit also upheld the district court's decision to strike all affirmative defenses related to the insurer's obligation to advance defense expenses. Relying heavily on *Federal Insurance Company v. Kozlowski*, 792 N.Y.S.2d 397 (N.Y. App. Div. 2005), the court reasoned that the complaint contained allegations that might result in coverage and that the insurer was therefore obligated to reimburse the defendants' defense expenses. In contrast, the Second Circuit reversed the district court's decision striking those affirmative defenses regarding the insurer's indemnity obligations. The appellate court ruled that summary judgment on indemnity issues was premature because the duty to indemnify is based on actual facts adduced in the course of litigation, and the insurer had not had an opportunity to gather potentially dispositive facts.