

Other Decisions of Note

October 2004

Receiver Must Obtain D&O Coverage

In an unpublished decision, the Delaware Chancery Court has held that the claims of former directors and officers for indemnification under a defunct reinsurance company's articles of incorporation are present contingent contractual claims under Delaware law and that a D&O policy obtained by the receiver of the defunct entity does not provide sufficient coverage to satisfy statutory requirements to make reasonable provisions for such claims. *In re Delta Holdings, Inc.*, 2004 WL 1752857 (Del. Ch. July 26, 2004). The directors and officers objected to the D&O policy obtained by the receiver as part of the proposed plan of distribution in connection with the liquidation of the defunct reinsurer, which had been going on for 19 years. Under Delaware law, the receiver must provide "reasonable provision" for present contingent contractual claims. The court held that the directors' and officers' claims were such claims and that the D&O policy, which provided \$1 million in coverage for six years, was insufficient to insulate them from liability for toxic tort-related coverage that could stretch into the distant future. Accordingly, the court held that the receiver was obligated to "procure a suitable D&O Policy, which would account for the necessity to defend against such suits for a number of years," but that "[t]he coverage limit of such policy need not reach the potential value" of the outstanding claims.

Insurer Must Reimburse Defense Costs

The U.S. District Court for the Northern District of Texas has granted summary judgment in favor of an insured, holding that the insurer had to reimburse defense costs incurred by the insured in defending an underlying suit when the insured selected and utilized its own defense counsel rather than the counsel selected by the insurer, which had reserved its rights to decline coverage under the policy. *Housing Authority of the City of Dallas v. Northland Ins. Co.*, 2004 WL 1877783 (N.D. Tex. Aug. 23, 2004). The insured was the defendant in a suit for alleged wrongful employment practices for which it sought coverage under a Nonprofit Organization Liability Policy. The insurer offered a defense subject to a reservation of rights. The insured refused to accept defense counsel appointed by its insurer, and, after successfully defending the claim with counsel of its choice, demanded reimbursement of defense costs. The court held that the reservation of rights created a potential conflict of interest between the carrier and its insured. Citing *Rhodes v. Chicago Ins. Co.*, 719 F.2d 116 (5th Cir. 1983), the court concluded that the potential conflict meant that the insured could reject the tendered defense in favor of reimbursement of defense costs of its chosen counsel.

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