

Ninth Circuit Holds I v. I Exclusion Does Not Bar Coverage; Declines to Determine Exact Meaning of "Assistance"

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The United States Court of Appeals for the Ninth Circuit, applying California law in an unpublished opinion, has held that a D&O insurer could not deny coverage based on an I v. I exclusion, even though two officers of the company provided information to an underlying plaintiff. *Harris v. Gulf Ins. Co.*, 2007 WL 4385775 (9th Cir. Dec. 14, 2007). However, the court expressly declined to adopt the lower court's narrow construction of the I v. I exclusion as applying only when a director or officer aids the prosecution of a securities fraud claim in order to obtain economic benefit.

The insured company and a number of its directors and officers were named as defendants in class action securities lawsuits. Representatives of the underlying plaintiffs made telephone calls to two officers of the company, and the officers provided information that allowed the consolidated, amended complaint to survive a motion to dismiss. After the insurer discovered that the officers had provided information to the underlying plaintiffs, it stopped advancing defense expenses based on the I v. I exclusion. Two individual defendants in the securities litigation then filed a declaratory judgment action challenging the applicability of the I v. I exclusion. The I v. I exclusion barred coverage for actions "brought or maintained by or on behalf of . . . any security holder of the Insured Company whether directly or derivatively except . . . a Claim that is brought and maintained by security holders who are acting totally independently of, and totally without the solicitation, assistance, participation, or intervention of any Director or Officer of the Insured Company."

The district court had held that the I v. I "exclusion bars coverage for securities fraud claims only if a director or officer actively and voluntarily provided substantial aid or help to a securities fraud plaintiff with the intent to aid the prosecution of the lawsuit in order to obtain economic benefit." Applying this standard, the court held that there was no evidence that the officers who provided information to the securities plaintiffs had acted to obtain an economic benefit. The district court's opinion was reported in the January 2004 edition of the *Executive Summary*.

On appeal, the Ninth Circuit held that "assistance" could not be interpreted as encompassing the two officers' actions. The court acknowledged that California courts have not clearly defined the scope of "assistance" as

used in I v. I exclusions but held that the term "cannot be interpreted as broadly as [the insurer] claims because it would be inconsistent with the surrounding words, 'solicitation,' 'participation,' and 'intervention,' which connote voluntary and active conduct." However, the court expressly declined to adopt the definition enunciated by the district court, explaining that it could resolve the appeal without determining the exact meaning of "assistance" as used in the I v. I context.