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NEWSLETTER

Acts by Directors and Officers Committed outside Insured Capacity

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An Ohio intermediate appellate court has held that claims by shareholders against individual directors and officers of a corporation arising out of alleged insider trading were not covered by a directors and officers liability policy because the wrongful acts were not committed by the individuals in their insured capacities. *Cincinnati Ins. Co. v. Irwin Co.*, Nos. C-000107, C-000120, 2000 Ohio App. LEXIS 6045 (Ohio Ct. App., 1st Dist. Dec. 22, 2000).

The Irwin Company was a closely-held corporation engaged in making power tool accessories. Because its stock was not publicly traded, the company had an informal buy-back policy. In late 1992, two groups of shareholders sold their shares to the company treasury for $28 dollars per share. Subsequently, several individual directors and officers, allegedly acting on non-public information regarding a possible merger with American Tool Company, began to purchase the available treasury stock at $28 dollars per share. At trial, the facilitating director stated that he did not seek approval from the full board of directors before offering the stock to select officers and directors. Irwin and American Tool merged in August 1993, and American Tool acquired Irwin's shares at $131.54 per share. The two buy-back shareholder groups then brought suit against the individual directors and officers. The case ultimately settled for over $1 million.

The directors and officers sought coverage for defense costs and the settlement under a directors and officers liability policy, which provided coverage to them for claims for "wrongful acts in their respective capacities of directors and officers of the company." The carrier denied the claim on the grounds that the individuals were acting in a personal, uninsured capacity when they bought the shares. The insureds filed suit.

The court held that none of the shareholder claims was covered under the D&O policy because the repurchase of the shareholders' stock was not an authorized corporate act, and was thus not a wrongful act committed by the directors and officers in their insured capacity. The court reasoned that credible evidence existed in the record to support the conclusion that the settlements reached in the underlying shareholder litigation were for unauthorized acts performed by the directors and officers in their personal capacities, and that the settlement amounts were allocated based upon the number of Irwin shares owned by the directors and officers, rather than their relative liabilities for actions taken as directors and officers.