

No Coverage for Trustees of Non-Profit Who Could Not Be Personally Liable

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A Wisconsin appellate court has held that an insurer that issued a D&O policy to a synagogue did not have a duty to defend two trustees of the synagogue because the underlying complaint did not seek to hold the officers personally liable for damages. *Green v. Heritage Mut. Ins. Co.*, No. 01-2778, 2002 WL 31455720 (Wis. Ct. App. Nov. 5, 2002).

The underlying action had been filed against a synagogue, its board and two of the trustees in connection with the sale of property. The synagogue notified its insurer of the action and requested that it provide a defense, but the insurer refused. After the action was dismissed as to all defendants, the trustees sued the insurer, seeking recovery of their defense costs.

The insurer argued that it was not required to provide a defense because the underlying complaint did not allege a claim as to which the trustees could suffer a "loss." The policy defined "loss" as "any amount which an insured person is legally obligated to pay or which the named insured may be required or permitted by law to pay as indemnity to an insured person for a claim or claims made against an insured person for wrongful acts."

The appellate court agreed with the insurer. It reasoned that "not all claims made against a trustee fall within the policy definition of 'loss.' Only those claims which result in the trustees' personally being held liable are insured." Under the facts alleged in the complaint, the court concluded that while the synagogue could have been found liable, the trustees could not have been found liable for any loss. To begin with, the allegations against the trustees were based on the trustees' acting as agents for the synagogue, and under Wisconsin law, an agent generally cannot be held personally liable for the actions of a disclosed principal. Furthermore, the complaint sought only injunctive relief from the synagogue and did not seek any damages from the trustees personally. Accordingly, the court concluded that since there was not an alleged "loss," there was no coverage or duty to defend.

For more information, please contact one of WRF's Professional Liability Attorneys at 202.719.7130