

# California Court of Appeal Holds That I v. I Exclusion Bars Coverage

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An intermediate California appellate court has held that an I v. I exclusion barred coverage for a claim brought by a former executive of a former subsidiary of a corporation against the former subsidiary. *Ascent Media Grp., LLC v. Those Interested Underwriters at Lloyd's*, 2008 WL 2600728 (Cal. App. July 2, 2008). The court also held that exclusions that barred coverage for wrongful acts prior to the inception of the policy and subsequent to the time that the former subsidiary ceased being a subsidiary, respectively, applied to preclude coverage.

In June 2000, the subsidiary of the corporation purchased a cable transmission and broadcasting company, agreed to pay the owner of the acquired company in cash and stock and promised to make him the head of a post-merger subsidiary. Some of the stock compensation was held back as part of an incentive program and as a guarantee for representations in the merger agreement.

On July 9, 2001, the insurer issued to the purchaser a run-off policy for the period July 9, 2001 to July 9, 2007. On August 10, 2001, the purchaser ceased to be a subsidiary of the corporate insured. On August 28, 2001, the purchaser (now a former subsidiary) terminated the former owner's employment and refused to return shares held back in connection with the merger. Litigation and arbitration proceedings between the former owner and the former subsidiary ensued. After the former owner prevailed in the underlying proceedings, the former subsidiary initiated a coverage action against the insurer.

The insurer denied coverage based on three exclusions. First, the insurer asserted that the I v. I exclusion precluded coverage because both the underlying plaintiff and the defendants were insureds under the policy. Second, the insurer asserted that coverage was barred under an exclusion that barred coverage for any Wrongful Act committed after the date on which the purchaser ceased being a subsidiary of the insured. Third, the insurer asserted that coverage was barred under an exclusion that precluded coverage for claims arising out of Wrongful Acts committed after July 9, 2001 (the date of the policy's inception).

On appeal, the purchaser argued that: (1) a wrongful termination carve-back precluded application of the I v. I exclusion; and (2) the other exclusions did not apply because the plaintiff alleged an interrelated series of Wrongful Acts that commenced prior to the inception of the policy and at a time when the purchaser was a

subsidiary. The appellate court rejected those arguments. After reviewing the underlying complaint and the underlying arbitration award, the court concluded that the plaintiff did not assert a claim for wrongful termination. Rather, the court held that the underlying plaintiff's claim was premised upon the purchaser's failure to pay the full merger consideration. As such, the court affirmed the trial court's determination that the wrongful termination carve-back did not apply.

The court also concluded that the other two exclusions relied on by the insurer provided alternative and independent bases to deny coverage. The court noted that the relevant exclusions applied to claims "based upon, arising out of, directly or indirectly resulting from or in consequence of or in any way involving any Wrongful Act" occurring "subsequent to the date such entity ceased being a Subsidiary" and "actually or allegedly committed on or after [July 9, 2001]," respectively. The court stressed that the exclusions' use of the word "any" meant that if "any one wrongful act occurred after" the July 9, 2001 inception date or after the date the purchaser ceased to be a subsidiary, then the policy afforded no coverage. The court concluded that even if one were to adopt the purchaser's argument that the plaintiff alleged a wrongful termination, that termination did not occur until August 28, 2001. Because that "one wrongful act" occurred after July 9, 2001 and August 10, 2001, the court concluded that the policy afforded no coverage. In so holding, the court rejected the purchaser's argument that the exclusions did not apply because the plaintiff had alleged an interrelated series of Wrongful Acts that commenced prior to the inception of the policy and while the purchaser was still a subsidiary.