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NEWSLETTER

I v. I Exclusion Bars Coverage for Former Directors' Suit

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A federal district court in Florida, applying Florida law, has held that an insured v. insured exclusion in a D&O policy precluded coverage for a lawsuit brought against the corporation by two of its former directors. *See Powersports, Inc. v. Royal & SunAlliance Ins. Co.*, 2004 WL 415269 (S.D. Fla. Feb. 25, 2004).

An insurer issued a D&O policy to a company that contained an I v. I exclusion precluding coverage for "Loss resulting from any Claim made against any Insured Person, or with respect to Insuring Clause C, the Company...brought or maintained by or on behalf of the Company or any Insured Person in any capacity." The policy also contained an allocation clause that required the insurer and corporation to "fairly and reasonably allocate such amount between covered Loss and non-covered Loss" when the two are "jointly incurred."

Two former directors of the company, as well as a corporation they controlled, sued the corporation and its directors and officers, alleging tortious interference with a contract that the former directors had entered into with a third party to purchase stock of the company. The insurer denied coverage based on the I v. I exclusion, and coverage litigation ensued.

The court held that the I v. I exclusion barred coverage for the lawsuit. The court first noted that the parties agreed that the former directors were "Insured Persons" under the policy. The court then rejected the corporation's argument that because the former directors and the corporation they controlled asserted distinct claims, coverage was available as to the claim by the corporation controlled by the former directors. The court reasoned that "every single allegation of fact in the underlying pleadings and each count asserted in both Complaints" jointly referred to the former directors and their corporation and did not distinguish between their claims.

The court also rejected the corporation's argument that the allocation clause required the insurer to provide coverage for the claims by the company controlled by the former directors. The court reasoned that if it were to read the allocation clause as a grant of coverage for the corporation's claims, "it would read the I v. I clause out of the policy." Finally, the court rejected the corporation's argument that the I v. I exclusion was ambiguous, concluding that "[t]he plain language of the clause states that claims brought by insured persons are not covered."

For more information, please contact us at 202.719.7130.