

Embezzlement Is Not Act in Capacity as President; Other Exclusions Also Bar Coverage

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In an unpublished decision, a California appellate court has held that the former president of a company was not entitled to coverage under a D&O policy in connection with a lawsuit alleging that he embezzled money because the embezzlement was not an act in his "capacity as an officer or director" of the company.

Kronemyer v. Philadelphia Indemn. Ins. Co., 2003 WL 21213243 (Cal. Ct. App. May 27, 2003). The court also held that the exclusion for employment-related acts and the I v. I exclusion barred coverage for allegations that the former president was negligent in performing his duties.

The insurer issued a D&O policy to a film company. The policy provided coverage for claims seeking relief for "wrongful acts." The policy defined "wrongful acts" as any "actual or alleged error, misstatement, misleading statement, act, omission, neglect, or breach of duty committed by an Insured...in [his] capacity as a director or officer." The policy contained an employment practices exclusion barring coverage for "[l]oss in connection with any Claim arising out of, based upon or attributable to any actual or alleged breach of a written or oral employment contract or employment-related defamation." The policy also contained an I v. I exclusion that barred coverage for any claim "brought or maintained by or on behalf of the Company or an Insured in any capacity." The I v. I exclusion contained an exception for "a Claim in the form of a cross claim, third party claim or other claim for contribution or indemnity by an Insured which is part of or directly results from a Claim which is not otherwise excluded by the terms of the Policy."

A former president of the company filed a lawsuit against the company, which then filed a cross complaint alleging that the former president had embezzled money, converted other company assets, and negligently performed his duties. The insurer denied coverage, and litigation ensued.

The appellate court held that no coverage was available for the allegations of embezzlement and conversion because those allegations did not involve "Wrongful Acts." The court explained that "[a]n officer does not act in his capacity as such when he engages in misconduct for his individual benefit to the injury of his employer."

The appellate court held, without elaboration, that the allegations of negligent performance of duties were excluded under the employment practices exclusion. It also held that the I v. I exclusion barred coverage for these allegations. The court rejected the president's arguments that the exception in the I v. I exclusion for contribution or indemnity claims applied, reasoning that the corporation did not seek relief for indemnity or

contribution, did not allege that the president was responsible for a liability the corporation satisfied, and did not plead that the president was responsible or mandated to satisfy such a liability.

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