

Court Requires Allocation Where I v. I Exclusion Applies to Some But Not All Claimants

August 2012

A federal appellate court has held that, under Illinois law, an insured versus insured exclusion does not bar coverage when some plaintiffs in a lawsuit are insureds but other plaintiffs are non-insureds. *Miller v. St. Paul Mercury Ins. Co.*, 2012 WL 2479552 (7th Cir. June 29, 2012).

The underlying lawsuit named two of the insured's directors and was brought by five plaintiffs, two of whom were former directors of the insured and thus insureds under the policy. A third plaintiff was acting on behalf of a trust and was also a former director of the insured and thus also was determined to be an insured. The two remaining plaintiffs had no prior affiliation with the insured and did not qualify as insureds under the policy. The named insured was a bank, and its D&O policy excluded coverage for "Loss on account of any Claim made against any Insured: . . . brought or maintained by or on behalf of any Insured or Company in any capacity . . ." The policy also included an allocation provision for when a claim includes both covered and uncovered matters.

In finding that the insured versus insured exclusion did not bar coverage in its entirety, the court reviewed the decision in *Level 3 Communications, Inc. v. Federal Insurance Co.*, 168 F.3d 956 (7th Cir. 1999), where the court held that a lawsuit brought by both insured and non-insured plaintiffs required an allocation of indemnity and defense costs under a similar D&O policy. The court rejected the insurer's efforts to distinguish *Level 3* and determined that the insurer has a duty to defend and to indemnify the claims brought on behalf of the non-insureds while those claims brought by the insureds are excluded from coverage. According to the court, even though the "primary suitor" was an insured plaintiff whose claim was excluded, courts are able to enforce the insured versus insured exclusion by allocating defense costs or a judgment or settlement to the insured's part of the underlying lawsuit.