

# Single Limit Applies, Claims Are Related and Insurer May Advance under Mutual Fund Policy Despite Receivership Order

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A federal district court in Texas, applying Texas law, has granted a motion for summary judgment filed by an insurer immediately after the insurer initiated a suit seeking a declaratory judgment as to a number of coverage issues. *Exec. Risk Indem., Inc. v. Integral Equity, L.P., et al.*, 2004 WL 438936 (N.D. Tex. Mar. 10, 2004). The court held, *inter alia*, that the insureds and underlying claimants were not entitled to discovery on the coverage issues under Rule 56(f) because:

- the policy was unambiguous,
- the claims made against insureds were "related" such that only one \$5 million limit of liability per "claim" applied,
- the advancement of defense expenses depletes the limit of liability and
- the insurer was authorized to advance defense costs to the insureds notwithstanding that some of them were in receivership under Texas law.

Wiley Rein & Fielding LLP represented the insurer in the case.

The insurer issued an insurance policy that provided specified coverage to mutual funds and one of its officers. The policy contained a \$5 million per claim limit and a \$25 million aggregate limit. The policy defined "claim" as "any civil proceeding in a court of law or equity." It defined "related claims" as "all Claims for Wrongful Acts based on, arising out of, directly or indirectly resulting from, in consequence of, or in any way involving the same or related facts, circumstances, situations, transactions or events," and provided that related claims would be treated as a single claim. The policy stated that "the Underwriter will, upon written request, pay on a current basis Defense Expenses for which this Policy provides coverage," and that "Defense Expenses will be part of and not in addition to the Underwriter's limit of liability, and payment of Defense Expenses by the Underwriter will reduce and may exhaust its limit of liability."

A lawsuit was filed in Texas state court against the insureds alleging mismanagement in connection with money that the underlying plaintiff had invested in the mutual funds. Subsequently, some of the defendant's mutual funds were placed into receivership under Texas law. The insurer then filed the instant declaratory

judgment action against the insureds, the receiver and the underlying plaintiff seeking court approval to advance defense expenses to the insureds and seeking a ruling concerning certain other coverage issues that were in dispute. Immediately thereafter, the insurer filed a motion for summary judgment as to all issues in its complaint.

The receiver and the underlying plaintiff argued that the motion for summary judgment was premature because they should be given an opportunity to take discovery first concerning negotiation of the policy. The court rejected this argument, noting that "[t]he only contested issues in this case relate to the interpretation of certain provisions in the Policy." The court explained that, under Texas law, discovery is permitted only if the policy is ambiguous, which is a matter of law, and that "parol evidence is not admissible for the purpose of creating an ambiguity." The court then addressed each of the disputed issues and held that the policy language unambiguously supported the insurer's position.

The court agreed with the insurer that a single \$5 million limit was applicable to the underlying litigation and rejected the receiver's and underlying plaintiff's argument that multiple limits were available because the underlying litigation alleged multiple causes of action and named multiple insureds as defendants. As an initial matter, the court held that multiple causes of action in a single lawsuit could constitute multiple claims. However, the court agreed with the insurer that all of the causes of action should be treated as a single claim "under the broad definition of Related Claims given in the Policy." The court explained that all of the causes of action were based on the same inducement to the same underlying plaintiff to invest in the same funds or on continuing misrepresentations concerning those funds.

The court next held that the advancement of defense expenses would deplete the limits of liability in the policy. The court rejected the underlying plaintiff's argument to the contrary based on the unambiguous language in the policy.

Finally, the court held that the insurer could advance defense expenses notwithstanding the fact that two of the insured funds were in receivership. The court reasoned that the mutual funds in receivership "have no cognizable interest, in and of themselves, in the proceeds" of the policy. Instead, "any proceeds from the Policy—whether they are first paid to the Insured or not—are owed not to the Insured but to successful third-party claimants against the Insured, as well as to the Insured's attorneys defending against those claims."

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