

## Securities Exclusion May Not Negate Duty to Defend Where ERISA Action Alleges Conduct Outside Exclusion's Scope

---

March 2014

The United States District Court for the District of Nevada, applying Nevada law, granted in part and denied in part an insurer's motion to dismiss, finding that a company adequately pled that claimants in an underlying ERISA action alleged conduct outside the scope of a Securities Exclusion. *Int'l Game Tech., Inc. v. Fed. Ins. Co.*, 2014 WL 580876 (D. Nev. Feb. 13, 2014).

Participants in the insured company's retirement plan brought an ERISA action against the technology company and its directors for breach of their fiduciary duties alleging various failures with respect to the plan's investments in the company's own stock. The company sought coverage under an Executive Protection Portfolio insurance policy, which contained a Fiduciary Liability Coverage Section that imposed a duty to defend. The insurer disclaimed coverage under the policy's Securities Exclusion, which precluded coverage for Loss arising from "[a]ny offering, issuance, distribution, sale or purchase of securities" and "[a]ny Organization's past, present, or future financial or operational performance, condition, or prospects."

The court rejected the insurer's argument that the ERISA action fell "squarely and entirely within the Securities Exclusion." Instead, it found that the insurer, in disclaiming its duty to defend, "merely assumed" that none of the claims gave rise to a duty to defend or indemnify. Applying Nevada pleading standards and construing the Securities Exclusion narrowly, the court found that the company had "adequately pled that the ERISA Plaintiffs alleged conduct outside the scope of the Securities Exclusion." Specifically, the ERISA plaintiffs' allegation of a failure "to adequately review the performance" of the retirement plan's other fiduciaries did not clearly fall within the exclusion. As a result, the court found that the company stated a "plausible claim for breach of the duty to defend."

The court then dismissed with prejudice the company's claim that the insurer was estopped from raising any defenses to coverage due to its refusal to defend without conducting a reasonable coverage analysis. The court found this claim "false and obviously misleading" because the insurer's coverage letter, which was incorporated by reference into the complaint, reflected the insurer's careful coverage analysis and reservation of rights.