

I v. I Exclusion Does Not Apply to Bankruptcy Trustee Listed As Insured on D&O Policy

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A Florida intermediate appellate court has found that the I v. I exclusion in a D&O policy does not apply to a suit filed by a bankruptcy trustee in his capacity as trustee against the president of the company, even though the trustee was added to the policy as an additional insured. *Rigby v. Underwriters at Lloyd's, London*, 2005 WL 1226123 (Fla. Dist. Ct. App. May 25, 2005).

The insurer issued a D&O policy to a company that operated landfills and provided petroleum soil decontamination and trucking services. Subsequently, the company filed for bankruptcy under chapter 7. The insurer renewed the policy while the company was in bankruptcy and, at the request of the permanent trustee, added the trustee as an insured. The trustee subsequently filed suit against the president of the company for negligence and breach of fiduciary duty. The insurer denied coverage, relying on the I v. I exclusion.

The I v. I exclusion in the policy barred coverage for any claim "by, on behalf of, or at the direction of any of the Assureds, except and to the extent such Claim is brought derivatively by a security holder of the Company who, when such Claim is first made, is acting independently of all of the Assureds." The policy defined "assureds" to include directors and officers of the company. When the insurer added the trustee as an additional insured, the policy was amended to define directors and officers as "(1) Directors or Officers of the Company, or (2) [the bankruptcy trustee.]"

In finding that the exclusion did not apply, the court explained that the trustee "as trustee had filed suit against [the president] on behalf of the [company's] creditors, based upon his statutory duty as trustee." Without citing any case law, the court concluded that the trustee "did not bring the adversary action acting as an officer and director" and the exclusion did not apply.

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