

Oregon District Court Imposes Collusion Requirement on I v. I Exclusion

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The U.S. District Court for the District of Oregon, applying Oregon law, has held that a lawsuit filed by minority shareholders against a company insured under a D&O policy that alleged that the plaintiffs had been squeezed out of the company was not "collusive," and that, as a result, the policy's I v. I exclusion did not apply, even though some of the minority shareholders were former directors and officers of the company. *MegAvail Inc. v. Illinois Union Ins. Co.*, 2006 WL 3063487 (D. Or. Oct. 26, 2006).

In the underlying dispute, six shareholders of the insured company, two of whom were former directors and officers, sued the organization and some of its current directors and officers. The company tendered defense of the suit to its insurer. The insurer refused to defend the company in the dispute, relying on the policy's I v. I exclusion. The company subsequently filed suit against the insurer. Previously in the case, the court had held that the I v. I exclusion did not bar coverage absent a showing that the suit was collusive. That decision was summarized in the September 2006 issue of *The Executive Summary*.

On cross-motions for summary judgment, the court considered the insurer's argument that the underlying suit was collusive because the plaintiffs asked the corporation "to pay for the consequences of allegedly poor business decisions by... then management and directors." The court rejected the argument, reasoning that the corporation was not suing its own officers or directors to recoup its losses. Rather, minority shareholders, along with two former directors, claimed that the plaintiffs "effectively squeezed them out of the corporation." The court reasoned that the insurer's offered definition of "collusive" could bar all shareholder actions and would thereby defeat the I v. I exclusion's exemption for independent derivative shareholder claims. The court concluded that the underlying allegations, such as breach of fiduciary duties, fell within the scope of the assumed risks of the policy and therefore that the insurer had a duty to defend.