

ALERT

## D&O Policy Does Not Cover Lawsuit by Insured Person against the Company

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A magistrate judge for the United States District Court for the Middle District of Tennessee has issued a report and recommendation that a directors and officers liability policy does not cover a lawsuit filed by an insured former director and officer against the company. *Am. Sec. Bank & Trust Co. v. Progressive Cas. Ins. Co.*, 2011 WL 2531311 (M.D. Tenn. June 24, 2011). Specifically, the judge opined that there was no claim against an insured person under the policy, and further that the insured v. insured exclusion applied to bar coverage.

The claimant, a shareholder and former director and officer of a bank, filed suit against the bank alleging violations of law and fiduciary duty stemming from an alleged breach of the bank's bylaws and the right to inspect the bank's books and records. The complaint did not name any other defendants. The bank sought reimbursement for defense costs in connection with the action pursuant to a directors and officers liability policy. The policy provided coverage for loss resulting from claims first made against insured persons for wrongful acts, defining "Insured Person" as "any past, present or future directors, member of the board of trustees, officer, [or] Employee . . . of the Company[.]" The insurer denied coverage for the action because no directors or officers were named in the complaint. The bank argued that the complaint was impliedly against members of the board of directors as insured persons, and further that the complaint was a derivative action exempted from the policy's "Insured vs. Insured Exclusion." The bank filed suit against the insurer, which removed to federal court and moved to dismiss.

The magistrate judge recommended that the complaint be dismissed for either of two independently sufficient reasons. First, the judge opined that there was no claim under the policy because no director

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or officer had been named as a defendant in the complaint. The judge explained that to find that the complaint was a claim “instituted against” directors and officers as required by the policy, the court would need to find the words “instituted against” to be ambiguous. The judge determined instead that the words had a usual, natural and ordinary meaning. The judge concluded this result furthered the intent of directors and officers liability policies, which is to protect corporate directors and officers from personal liability, not to protect the corporation by which they are employed.

Second, the judge opined that even if there were a claim under the policy, coverage for the action was barred under the Insured v. Insured Exclusion. The Exclusion provided, subject to certain exceptions, that the “*Insurer* shall not be liable to make payment for *Loss* in connection with any *Claim* by, on behalf of, or at the behest of the *Company* . . . or any *Insured Person* in any capacity[.]” The judge explained that the exclusion barred coverage because the claimant was a former director and officer and thus an insured person. Although the Exclusion contained a derivative action exception “where such *Claim* is brought and maintained . . . by a security holder of the *Company* as a derivative action on behalf of the *Company*,” the exception only applied where “such *Claim* is brought independently of, and totally without the solicitation, assistance, participation, or intervention of any *Insured*[.]” Because the action was brought by an insured person, and not independently of any insured, the judge concluded that the exception did not apply.