

ALERT

Insurer Has Duty to Defend Where It Cannot Demonstrate That Insured "In Fact" Committed Fraudulent or Dishonest Acts

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The United States District Court for the Southern District of Mississippi, applying Mississippi law, has denied an insurer's partial motion for summary judgment after concluding that the insurer failed to demonstrate that there was no potential for coverage for the underlying action. *United States Liability Ins. Co. v. Goldin Metals, Inc.*, No. 1:10cv175-LG-RHW, 2011 WL 6002975 (S.D. Miss. Nov. 30, 2011). The court stated that the insurer based its argument that it owed no duty to defend on two exclusions that required "in fact" determinations yet offered no argument or authority to support its position that the allegations in the underlying complaint were a sufficient basis for applying those exclusions.

The insurer issued a D&O policy to an insured, a steel coil manufacturer. The manufacturer and certain other insureds were named as defendants in a lawsuit in which the plaintiff alleged that the insureds participated in and profited from a fraudulent scheme that harmed the plaintiff. The plaintiff, which treated steel coils from the manufacturer, alleged that the manufacturer's employees paid kick-backs to an employee of the plaintiff in return for below-market prices and other concessions. The underlying complaint against the insureds contained causes of action for fraud, conversion, tortious interference with contractual or business relations, negligence, violations of the Racketeer Influenced and Corrupt Organizations (RICO) Act and the Georgia state equivalent of RICO.

The D&O policy stated that the insurer had a right and duty to defend "even if the allegations of the Claim are groundless, false or fraudulent[.]" The insurer agreed to provide a defense under a

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reservation of rights but filed a declaratory judgment action for a determination that it had not duty to defend or indemnify the insureds in the underlying action. The insurer then moved for partial summary judgment and argued it had no duty to defend based on exclusions that barred coverage for Loss in connection with any Claim "brought about or contributed to **in fact** by any dishonest, fraudulent or criminal Wrongful Act or by any Wrongful Act committed with intent to cause damage" or arising out of or involving "any of the Insureds gaining **in fact** any profit, benefit, remuneration or advantage to which such Insured was not legally entitled" (emphasis in case). The insurer argued that "all of the factual allegations made in the [complaint] describe[d] illegal and intentional conduct on the part of the insured and therefore the exclusions bar[red] coverage."

The court stated that it must construe the exclusions strictly and examined dictionary definitions of "in fact" and "fact." The court noted that the insurer did not provide any cases that analyzed the exclusions at issue and did not provide any argument on whether the "in fact" language of the exclusions required a determination that an insured actually committed fraudulent or dishonest acts, a determination that the insured actually acted with intent to cause harm, or a determination that the insured actually received a benefit to which it was not entitled. In addition, the court stated that it was "unclear whether a final adjudication" would be required for the exclusions to apply and that no final adjudication had been made in the underlying action. The court therefore determined that the insurer had not demonstrated that there was "no potential basis for coverage under the policy as a matter of law" and denied the partial motion for summary judgment.