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Insurance Coverage Update

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Condo Association's D&O Coverage Suit Defeated By the Policy's Insured v. Insured Exclusion

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The presence of a former condominium association's president as a plaintiff in a lawsuit against the association for installing non-compliant hurricane impact windows prevented the association from obtaining a defense and indemnification from its D&O insurer. The recent case of *The Marbella Condo. Ass'n v. RSUI Indem. Co.*, No. 16-CV-80987, 2017 WL 395301 (S.D. Fla. Jan. 30, 2017) provides an illustrative example of a court applying the language of an IvI exclusion to foreclose coverage for all claims in a suit, even those of non-Insured plaintiffs. (For another recent example, CLICK HERE).

After the defective windows were discovered, two condo owners, Jack Leone and Franklyn Field, sued the Marbella Condominium Association ("the Association") and its current president, Norman Sloane. While Field was never an officer of the Association, Leone previously served as the Association's president. The Association submitted the claim to its D&O insurer, which denied coverage in reliance on a number of policy exclusions, including the policy's IvI exclusion.

The policy defined "Insured" to include "any Insured Organization and/or any Insured Person." The definition of "Insured Person" included "any past, present or future director, officer, trustee, Employee, or any committee member of a duly constituted committee of the Insured Organization." The policy's IvI exclusion provided that the insurer would not be liable to make any payment for Loss in connection with any Claim made against any Insured brought by or on behalf of any Insured. The IvI exclusion also included an exception for any claim brought by a former director, officer, trustee, etc. if that person had not served in that capacity for the past three years. While not explicitly stated in the court's opinion, it appears that Leone had served as president of the Association within the past three years since the exception to the exclusion did not apply.

Central to the exclusion's application, the court noted, is whether Field or Leone were Insureds under the policy's terms. There was no dispute that Field was not an Insured. The Association did not dispute that Leone was an Insured as defined in the policy, and the parties did not argue that the IvI exclusion was ambiguous or unclear.

Instead, the Association argued that Field's presence as an underlying plaintiff prevented the IvI exclusion from applying. And the Association further argued that the differences between the damages alleged by Field and Leone in the underlying suit made their claims individual and distinct, therefore triggering the Policy's allocation clause. The insurer, on the other hand, argued that because an Insured (Leone) made a claim against another Insured (the Association and Sloane) in the underlying suit, the IvI exclusion barred coverage for the entire action.

After considering the relevant legal precedent cited by both parties, the operative pleading in the

underlying action, and the plain language of the policy, the court rejected the Association's arguments and sided with the insurer.

The court rejected the Association's attempt to distinguish the claimants' claims on the basis that they sought distinct damages. While the measure of damages may have been different by virtue of Field and Leone owning separate units, the claims asserted were brought on behalf of both together, and stemmed from the same installation of non-compliant glass. And the court found the policy's allocation provision did not apply since the duty to defend was not triggered. Therefore, the IvI exclusion operated to bar coverage for the entire underlying suit.

Comment

This is another decision recognizing that a claim is barred by the IvI exclusion, and does not trigger an insurer's duty to defend when an insured is one of the plaintiffs, even if other plaintiffs are non-insureds. Since D&O policies generally define "claim" to include a civil proceeding or lawsuit, this seems to be the most straightforward read of the IvI exclusion. The policy language must be read closely, however, as an alternative definition of "claim," or a differently worded allocation provision, could cause a court to rule in favor of partial coverage for these kinds of claims.

If you have any questions about this Update, please contact the author listed below or the Aronberg Goldgehn attorney with whom you normally consult:

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