First Circuit finds for insurer on scope of D&O policy

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What you need to know:
In order to obtain traditional D&O coverage, the claim must be made directly against the insured company's officers and directors. It is not enough for a claim to be made solely against the company.

What you need to do:
D&O insurance providers should consider seeking dismissal of a suit premised on an underlying claim in which the only defendant is the company, and not its officers or directors.

Last week, the US Court of Appeals for the First Circuit ruled in *Medical Mutual Ins. Co. of Maine v. Indian Harbor Ins. Co.* that a D&O policy does not provide coverage for lawsuits in which the only defendant is the company, even if the suits allege misconduct by the company's officers and directors. The Court further concluded that seeking injunctive relief against a company and its agents in their corporate capacity does not transform an otherwise uncovered claim into a covered claim.

Background

Medical Mutual fired its CEO after he had a stroke. Shortly thereafter, the former CEO filed administrative complaints against Medical Mutual alleging disability discrimination. He then filed a complaint in court, naming Medical Mutual as the sole defendant. The civil complaint alleged wrongful conduct by Medical Mutual's officers and directors, but did not name them as defendants. The complaint sought both monetary damages and injunctive relief against the company and its agents to prevent further discriminatory conduct. Medical Mutual settled the CEO's claim in exchange for a release that extended to its officers and directors, and then sought D&O coverage for the settlement payment. Indian Harbor, the D&O insurer, denied coverage, and in the coverage litigation that followed, the District Court granted summary judgment in Indian Harbor's favor.

The First Circuit's Ruling

The First Circuit, implying that Medical Mutual's arguments were an exercise in shape-shifting and "alchemy," ruled under Maine law that traditional D&O coverage applies only to cases in which officers and directors are themselves "the actual targets of the claims made." Permitting coverage in cases where the company is the only defendant would improperly transform D&O policies into "comprehensive corporate liability policies," the Court found. The Court concluded that the administrative complaints were not covered "claims" because they did not mention any officers or directors. The key coverage question as to the civil complaint was whether a complaint alleging misconduct by the officers and directors, but naming only the company as a defendant, constituted a "claim" "made against" the officers and directors. The Court, finding those terms unambiguous, concluded that a judicial complaint is only "made against" a person when it is "filed in court" and "identif[ies] the person as a defendant in the action." Seeking broader injunctive relief against non-defendant officers and directors in their capacity as corporate representatives, or settling litigation by obtaining a broader release of potential claims against officers and directors, does not create coverage where none otherwise exists.

Conclusion

The Court held that a judicial claim must be expressly filed against officers and directors in order for a traditional D&O policy to provide coverage for that claim. Coverage does not exist simply as a result of allegations of wrongful conduct by insured persons when there is no attempt to hold them personally responsible for their alleged misdeeds.

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