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ALERT

Actions Based on Same Course of Conduct Are Related Claims; Application of I v. I Exclusion Unclear Where Claims Brought by Trustee on Behalf of Debtor and Subsidiaries

September 19, 2011

The United States Bankruptcy Court for the District of Delaware, applying federal law, has held that certain lawsuits brought by a bankruptcy trustee were related claims, even though they alleged unique causes of action, because they were based upon the same course of conduct. The court also found that the trustee was pursuing claims both on behalf of the policyholder-debtor and its subsidiaries, and therefore the application of the insured versus insured exclusion was "unclear." Nonetheless, the court found that the individual insureds were entitled to 100% of their defense costs under the policy's allocation provision. *Federal Ins. Co. v. DBSI, Inc.*, 2011 WL 3022177 (Bankr. D. Del. July 22, 2011).

The insurer issued a claims-made directors and officers liability policy to the policyholder, a corporation with numerous subsidiaries. Several months later, the policyholder and its subsidiaries filed for Chapter 11 bankruptcy protection and a liquidation trustee was appointed. After the policy period ended, the trustee filed two lawsuits against certain of the policyholder's former directors, officers or employees, one alleging violations of the Racketeer Influenced and Corrupt Organizations (RICO) Act (the RICO Action) and the second seeking to avoid transfers made to or on behalf of the policyholder's alleged "insiders" (the Avoidance Action). Each of these defendants was an insured under the policy. The trustee then filed two additional avoidance actions (the Separate Actions) naming only two of the insureds. The insurer filed an interpleader action in the bankruptcy court and tendered the policy's limit into the court registry.

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The individual insureds moved for partial summary judgment that the policy covered their defense costs in the actions brought by the trustee. The trustee argued that the individuals were not entitled to defense costs because the claims were made after the policy period expired. The individual insureds argued that the actions were covered because they were related to claims made during the policy period (the Covered Actions).

The court granted the individual insureds' motion for partial summary judgment with respect to the RICO Action and the Avoidance Action. The court explained that "claims are 'related' if there is a logical or causal connection between them," and that "claims may be related even if they allege different causes of action and arise from different actions." According to the court, "the relevant inquiry is whether there is a 'single course of conduct' that serves as the basis for the various causes of action." The court identified six courses of conduct alleged in the RICO Action and the Avoidance Action that also had been alleged in the Covered Actions, and therefore concluded that these matters were related claims as defined in the policy. However, the court denied the motion for partial summary judgment as to the Separate Actions because, while they asserted the same types of *legal* claims as the Avoidance Action, they did not allege the same course of conduct.

The trustee also argued that the insured versus insured exclusion barred coverage for the RICO and avoidance actions. The exclusion barred coverage for any claim brought "by or on behalf of any Insured in any capacity," but expressly did not apply to any claim brought by a bankruptcy trustee appointed to liquidate the "Parent Corporation." The policy defined "Parent Corporation" only as the named insured, but the trustee's complaints alleged that the RICO Action and Avoidance Action were brought on behalf of the named insured *and* several of its debtor-subsidiaries. Since the carveout applied only to the extent the trustee acted as liquidator of the Parent Corporation, the court held that it was "unclear" how the exclusion and its carveout would apply to claims the trustee brought both as liquidator of the Parent Company and on behalf of its subsidiaries. The court found no need to resolve the issue, however, because the policy's allocation provision entitled the individuals to 100% of their defense expenses even if the claims were deemed to consist of both covered and non-covered matters.