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ALERT

Application of Insured v. Insured Exclusion Turns on Whether Plaintiff Was in Fact Duly Elected or Appointed as a Director

December 14, 2012

Applying New York law, the United States District Court for the Eastern District of New York denied an insurer's motion for summary judgment, finding that there existed a material issue as to whether the claimant had been "duly elected or appointed" to the board of directors of the insured entity such that he was an insured and therefore the "insured v. insured" exclusion applied to bar coverage. *Intelligent Digital Sys., LLC v. Beazley Ins. Co., Inc.*, 2012 WL 5995550 (E.D.N.Y. Nov. 27, 2012).

The insured entity entered into a sales transaction with another company and its owner, whereby the company sold its assets to the insured entity and the owner of the purchased company was to become a member of the insured entity's board of directors. Shortly after the sale closed and the owner took a seat on the board, the insured entity failed to fulfill its payment obligations under the purchase agreement. The former owner subsequently resigned from the board of directors and, together with the purchased company, brought suit against the insured entity.

The insured entity reported the claim to its directors and officers liability insurer in an email that described the claimant as a former director of the company. The insurer denied coverage for the suit based on the policy's insured v. insured exclusion, which barred coverage for claims "by, on behalf of, or at the direction of any of the Insureds." The policy defined "Insureds" to include "Directors and Officers," which, in turn, included "all persons who were, now are, or shall be duly elected or appointed directors."

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Insurance

In the coverage litigation that followed, the parties disputed whether the former owner of the purchased company actually had been "duly elected or appointed" to the board of directors of the insured entity. In this regard, the owner, as the assignee of the insured entity's rights under the policy following a settlement of the underlying suit, put forth evidence that he had been only "nominated" to the board and that the requirements for election or appointment set forth in the bylaws had not been met. Based on the record before it, the court determined that a genuine issue of fact precluded the entry of summary judgment for the insurer. Nonetheless, the court found as a matter of law that a showing of collusion between the claimant and the insured was not required for the exclusion to apply. According to the court, regardless of what the original rationale for insured v. insured exclusions may have been, the plain language of the policy here did not set forth such a requirement.

The opinion is available here.