

Eleventh Circuit Affirms Summary Judgment for Insurer Based on 'Other Capacity' Exclusion

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On June 22, the Eleventh Circuit affirmed the grant of summary judgment in favor of National Union Insurance Company of Pittsburgh, Pa., in an action where the insured sought \$10 million in coverage under a D&O policy. The court found that the claim was excluded under a provision barring coverage for claims “arising out of” alleged misconduct in a capacity other than as a corporate officer and director, and that, accordingly, there was no bad faith as a matter of law. The insured was seeking the \$10 million policy limit for costs it had incurred in defending litigation filed by some of its former shareholders. The underlying lawsuits arose out of two transactions in which certain shares of the insured company owned by a family trust were redeemed by the company. The trust beneficiaries sued both the company and two of its officers who also served as trustees of the trust. The underlying plaintiffs argued, among other things, that the officers, acting both as trustees of the trust and as officers of the company, misrepresented the terms of the trust agreement and concealed the true value of the trust’s shares. In affirming the district court’s grant of summary judgment to National Union, the Eleventh Circuit focused on the exclusion for claims arising out of acts of insureds serving in a

capacity other than as an executive or employee of the company. The court held that the genesis of the underlying plaintiffs' claims involved the acts of the trustees; the allegations of wrongdoing against the company and its officers would not have occurred "but for" the breaches of fiduciary duty of the trustees. The court also found that because all of the causes of action asserted were "so inextricably entwined with . . . alleged misconduct as trustees," the duty to advance defense costs was not triggered, even as to the causes of action specifically directed to conduct as a D&O. Finally, because the district court properly found no coverage under the D&O policy, the Eleventh Circuit affirmed the grant of summary judgment dismissing the bad faith claim. See: [The Langdale Company v. National Union Fire Insurance Company of Pittsburgh, Pa., No. 14-12723 \(11th Cir. June 22, 2015\)](#).

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