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Executive, shareholder or both: the consequences for D&O coverage

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You are the CEO of a business, sit on the board of directors and own shares. The business is sold, but the buyer later files suit, claiming that the seller (your former business) made a series of misrepresentations. The buyer and seller settle that suit, but don't wrap you into the settlement. The buyer then comes after you, with a new case, alleging that you were personally responsible for the misrepresentations. You seek coverage under your former employer's insurance policy, which includes directors and officers liability (D&O) language. The carrier denies coverage, asserting that the claims brought against you are in your capacity as a shareholder, not as an officer. Not one to take no for an answer, you fight back.

Such were the basic facts in *Grigg v. Aarrowcast*, *Inc.*, No. 2016AP1521, 2018 WL 1092062 (Wis. Ct. App. Feb. 27, 2018) (publication recommended), a recent decision out of the Wisconsin Court of Appeals. The decision contains several helpful reminders for insurance practitioners.

The procedural background was complicated, involving three lawsuits: one in New York federal court, one in New York state court and one in Wisconsin state court (involving insurance coverage). What mattered most for purposes of the coverage question, however, were the allegations in the New York state court case, where the buyer, IOP, sued Grigg, the CEO and shareholder, for misrepresentation. When Grigg tendered to Hudson Specialty under a policy it had issued to Grigg's former business (Aarrowcast), Hudson Specialty turned him down. Why?

From Hudson Specialty's perspective, IOP's claims in the New York state court suit were directed at Grigg's conduct as an individual shareholder and seller of his own Aarrowcast stock, not as a company executive. Hudson Specialty pointed specifically to a paragraph in the complaint where IOP explicitly attempted to limit its claims to those against Grigg "in his capacity as a shareholder but not as an officer and director."

Yet, the court did not put much stock in that allegation because other parts of the complaint made clear that, as a factual matter, IOP was also taking aim at Grigg's actions as a company officer and director. For example, the complaint alleged that "[a]s Chief Executive Officer of the Company, it was incumbent upon Grigg to immediately make known to [IOP] the material information regarding the foreseen pending declines in Company performance."

Thus, the court determined that this was a “concurrent capacity” situation, where IOP had made allegations involving some covered acts or omissions (director and officer capacity) and some uncovered acts or omissions (shareholder capacity). Because the acts or omissions in Grigg’s capacity as a director and officer were covered, that meant there was a duty to defend.

The decision is a stark reminder that in determining the scope of a carrier’s duty to defend, the entire complaint matters. Just because the plaintiff includes a sentence in the complaint that may have been designed to preclude coverage, that is not the end of the inquiry. All the factual allegations in the complaint must be reviewed, and it is the facts pled rather than the particular legal theories asserted that control.

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