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## Insured v. Insured Exclusion in D&O Policy Explored by Ninth Circuit

By Ronald J. Clark

The United States Court of Appeals for the Ninth Circuit recently addressed the "insured versus insured" exclusion in a Directors and Officers (D&O) liability policy, enforcing the exclusion as written. See attached link for the full text of the opinion:
http://caselaw.lp.findlaw.com/data2/circs/9th/0616417p.pdf

Visitalk, an Arizona corporation, bought D&O insurance to indemnify its directors and officers against claims made against them due to their work for the company. The policy excluded from coverage claims brought by Visitalk itself against its own officers and directors. Later, Visitalk filed a Chapter 11 bankruptcy petition, and as "debtor and debtor in possession" sued some of its recently terminated officers and directors for breaching their fiduciary duties. The D&O insurer refused to cover the claim. Biltmore, as trustee for Visitalk's creditors, then stepped into Visitalk's shoes for purposes of prosecuting the lawsuit against the D&O carrier.

The court found the policy clearly stated that coverage is excluded if Visitalk sues its own directors and officers regardless of whether any resulting money award would benefit creditors rather than Visitalk shareholders. Second, Biltmore had no claim under the insurance policy because it was not a named insured. Finally, Biltmore, as trustee for Visitalk's creditors, was barred by the insured versus insured exclusion, just as Visitalk's claim would be barred. The court noted "bankruptcy does not erect the bar to recovery -- the insurance policy does."

The court held a D&O policy cannot be transformed into "an available pot for the corporation's creditors" by disregarding the policy's clear language, which in this case included an exclusion directly on point.

The court noted that to decide otherwise in this case would "create a perverse incentive for the principals of a failing business to bet the dwindling treasury on a lawsuit against themselves and a coverage action against their insurers, bailing the company out with the money from the D&O policy if they win and giving themselves covenants not to execute if they lose."

**Result:**

The Ninth Circuit Court of Appeals' favorable reading of the insured versus insured exclusion applies whether or not a company is in bankruptcy. Moreover, struggling companies and trustees in bankruptcy should not look to D&O insurance policies as a means of recovery for malfeasance on the part of directors and officers. If companies are worried about such conduct by their directors and officers, they should look to casualty insurance or fidelity bonds for possible application.