

October 19, 2022

Warranty Letter Bars Coverage for Claim Against Chief Legal Officer Arising From CEO's Alleged Fraud

Ashley Criss

Wiley Rein LLP

+ Follow

Contact

The United States District Court for the District of Nevada, applying Nevada law, has held that a warranty letter executed by the insured's CEO prior to the issuance of an excess D&O policy barred coverage for a claim made against the insured's chief counsel. *See Ironshore Indem. Inc. v. Kay*, 2022 WL 4329790 (D. Nev. Sept. 16, 2022).

The insured, a now-bankrupt cybersecurity company, and its CEO were the subject of an investigation by the SEC alleging that the CEO defrauded investors by using forged documents to entice them to purchase securities. The insured later filed for bankruptcy, and its Chief Legal Officer (CLO) received a demand letter alleging that he had breached his fiduciary duties because he knew of "material irregularities and alarming discrepancies" in the company's finances but failed to report those to the board.

The CLO sought coverage for the demand letter under an excess D&O policy but the insurer denied coverage under a warranty executed by the CEO on behalf of himself and "all insureds" representing that "no insured has knowledge or information of any act, error[,] or omission [that] might give rise to a claim(s) . . . under [the Excess Limits]" and that, "if such claim(s) . . . knowledge[,] or information exists, then such claim(s) . . . and any claim(s) . . . arising therefrom or arising from such knowledge or information is excluded from coverage under the Excess Limits." The insurer asserted that the SEC alleged fraud by the CEO beginning *before* the execution of the warranty, thus the warranty barred coverage for the claim against the CLO.

In subsequent coverage litigation, the court agreed that the warranty barred coverage. First, the court held that the claim against the CLO fell within the terms of the warranty because it "arose from" the CEO's fraudulent conduct. Second, the court held that the D&O insurer need not show that the CEO had "actual knowledge or information" about his fraudulent conduct, citing to authority holding that "it does not matter what the insureds believed, only what the SEC's [claim] alleged [that] they knew." Although the CEO had pleaded guilty, the court did not consider that fact "because the SEC allegations against him [were] sufficient" and distinguished the warranty exclusion from the final adjudication requirements in the policy's conduct exclusions. Third, the court held that the policy's non-imputation provisions did not apply to the warranty exclusions.

Because the warranty was signed on behalf of “*all* insureds,” represented that “*no* insured” had knowledge, and barred coverage for “*any* claim” arising therefrom, the CEO’s knowledge triggered the exclusion without resort to any imputation.

[View source.]

 Send

 Print

 Report

RELATED POSTS

- **“Theft of Funds” Exclusion Precludes Coverage Where All Underlying Claims “Arose Out of” Theft**
- **Professional Services and Contract Exclusions Do Not Bar Coverage for Settlement of False Claims Act Investigation**
- **Excess Insurer Cannot Challenge Payments by Underlying Carriers**

LATEST POSTS

- **[Webinar] 2022 National Security Series - An Update on Sanctions and Export Controls: Russia, Belarus, and Ukraine - November 17th, 1:00 pm - 2:00 pm EST**
- **With 2023 Compliance Deadlines Looming for Several New State Privacy Laws, California and Colorado Release Draft Privacy Rules**

[See more »](#)

DISCLAIMER: Because of the generality of this update, the information provided herein may not be applicable in all situations and should not be acted upon without specific legal advice based on particular situations.

© Wiley Rein LLP 2022 | Attorney Advertising

WRITTEN BY:

wiley

Wiley Rein LLP

Contact

[+ Follow](#)



Ashley Criss

PUBLISHED IN:

Breach of Duty

+ Follow

CEOs

+ Follow

Chief Legal Officers

+ Follow

D&O Insurance

+ Follow

Failure to Report

+ Follow

Fiduciary Duty

+ Follow

Forgery

+ Follow

Insurance Industry

+ Follow

Intent to Defraud

+ Follow

Policy Exclusions

+ Follow

SEC

+ Follow

Warrantv Insurance

+ Follow

more ▼

WILEY REIN LLP ON:

