In High-Stakes Business Litigation, All-or-Nothing Approach in Complaint Leaves Directors with Nothing

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In a complex business dispute between four different corporations, involving multiple lawsuits and arbitrations, top level directors of a corporation are left without coverage under their D&O insurance policy after personally being made defendants. A recent opinion by the U.S. Court of Appeals for the Eighth Circuit explained why decisions about litigation strategy early on in the case led to a situation where the directors were left with no choice but to pursue an all-or-nothing approach. Without being able to consider alternative approaches, the Eighth Circuit opted to award nothing to the directors.

The Court spent several pages cataloguing the labyrinthine history of the dispute, which involved a fight over wind turbines manufactured by a South Korean company. The directors got personally dragged into the fray based on allegations that a financing agreement had been breached. There were motions to compel arbitration granted and denied, appeals to the Eighth Circuit taken, arbitrations held, a counterclaim filed, and more litigation commenced.

In the most recent chapter of this corporate saga, the directors were suing their D&O insurance company claiming entitlement to coverage for the mounting expenses with all of the above. The Eighth Circuit explained that in their complaint, the directors strictly pursued an all-or-nothing approach to seeking coverage. It wasn't until filing a reply in support of their motion for summary judgment that the directors raised alternative theories to going-for-broke, proposing for the first time that instead of 100% coverage under the D&O policy they should be allocated 82% or 40% coverage. The Eighth Circuit explained how the directors had failed to conform the complaint to the facts, and pointed out that they had not filed a Rule 15(b) motion in district court.

A cautionary tale, this case is quite instructive. Although there is nothing like the benefit of hindsight, there are many steps that litigators can take early on to insulate against being boxed into an all-or-nothing situation. For example, a thoroughly pled complaint can prove to be a broad launching pad from which to mount a successful case. By starting off too narrow, a litigant may foreclose alternative theories that could have later turned out to be partial wins. A partial win is no one's first choice, but leaving the door open to such a possibility looks attractive when the first plan of attack doesn't work out. Whether by strict adherence to the law, or through a desire to find an equitable solution for all, sometimes a judge can be persuaded to compromise and take the middle ground. In complex litigation, leaving that option open can be a prudent litigation move.

Case Reference: Brand, et al., v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA, No. 18-1372 (8th Cir. Aug. 16, 2019).