

**UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT**

No. 08-2525

MEDICAL MUTUAL INSURANCE COMPANY OF MAINE
Plaintiff – Appellant

v.

INDIAN HARBOR INSURANCE COMPANY

Defendant – Appellee

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF MAINE

BRIEF OF THE APPELLEE

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CORPORATE DISCLOSURE STATEMENT

Indian Harbor Insurance Company is incorporated in North Dakota with its principal place of business in Stamford, Connecticut and is a wholly owned subsidiary of XL Specialty Insurance Company. XL Specialty Insurance Company, a Delaware corporation, is a wholly owned subsidiary of Intercargo Corporation. Intercargo Corporation, a Delaware corporation, is a wholly-owned subsidiary of XL Reinsurance America, Inc. XL Reinsurance America, Inc., a New York corporation (formerly known as NAC Re Corporation), is an indirect wholly-owned subsidiary of XL America, Inc.

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MISCELLANEOUS

Knepper & Bailey, *Liability of Corporate Directors and Officers*, §23.02 at
23-3 - 23.4, 7th ed., 200718

STATEMENT OF THE ISSUES FOR REVIEW

1. Whether the District Court correctly concluded that a claimant's administrative proceedings and lawsuit which sought relief against only the company did not constitute a covered claim against the company's directors and officers under a directors' and officers' ("D&O") liability insurance policy, even if the proceedings premised the company's liability on allegations of wrongdoing by certain directors and officers?

2. Alternatively, even assuming *arguendo* a "Claim" had been made against an insured individual, whether the appellant Medical Mutual Insurance Company ("MMIC") failed to show covered "Loss" in excess of the \$250,000 retention, where its employment practices liability ("EPL") insurer paid its defense costs and \$225,000 of the settlement amount, and the additional \$325,000 paid by MMIC in settlement was allocated to its uncovered contractual obligation to pay severance and benefits to the claimant?

STATEMENT OF FACTS

This insurance coverage litigation was spawned by an employment dispute between MMIC and its former CEO, Dr. Patrick Dowling.

A. MMIC's Dispute with Dr. Patrick Dowling

In 2002, MMIC and Dr. Dowling entered an Employment Agreement, pursuant to which Dr. Dowling was employed as the CEO through October 2005

and potentially until 2009. The Agreement provided that if Dr. Dowling's employment was terminated due to disability, Dr. Dowling would *not* receive severance or other compensation. However, if his employment was terminated without cause during his third year of employment, Dr. Dowling was entitled to a benefit equal to his then monthly base salary for twenty-four months, plus a lump sum payment for medical insurance premiums. *See* IHSMF ¶¶ 3-4 (App. 134);¹ Employment Agreement ¶¶ 8, 9 (App. 455-459).

In April 2005, Dr. Dowling had a stroke. Over the next six months, MMIC and Dr. Dowling disputed whether Dr. Dowling was disabled. *See* IHSMF ¶5 (App. 135); *Dowling v. Medical Mutual Ins. Co.*, Case No. 2:06-CV-126-DBH (D. Me.) ("the *Dowling* Action"), Complaint at ¶¶ 21-54 (App. 543-550); Restuccia Dep. 9-10 (App. 376).²

By letter dated October 13, 2005, Dr. Dowling demanded that MMIC pay him the compensation and benefits due under his Employment Agreement, including salary and bonuses through May 6, 2009, and his attorneys' fees. *See* IHSMF ¶8 (App. 135-136); App. 600-601; Restuccia Dep. 21-24 (App. 379).

¹ Indian Harbor's Statement of Material Fact ("IHSMF") submitted to the District Court may be found at pp. 133-157 of the Appendix ("App. __"). Indian Harbor's Opposition to MMIC's Statement of Material Facts ("IHOPSMF"), may be found at pp. 218-251 of the Appendix.

² Dominic Restuccia was MMIC's Rule 30(b)(6) representative. Restuccia Dep. 5 (App. 375).

On October 26, 2005, Dr. Dowling filed a Notice of Charge of Discrimination against MMIC with the Maine Human Rights Commission (“MHRC”). App. 462-466. No director or officer of MMIC was named a respondent. The Charge alleged that MMIC discriminated against Dr. Dowling by reason of disability and retaliated against him in violation of the Americans With Disabilities Act (“ADA”) and the Maine Human Rights Act (“MHRA”). As the Charge summarized the claim:

In summary, MMIC discriminated against me on the basis of my disability by terminating my employment and insisting that I renegotiate my employment agreement and accept a new position with substantially diminished responsibilities at a substantially diminished salary. In addition, MMIC retaliated against me because I insisted on my rights under the ADA and the MHRA. Further, MMIC failed and refused to provide me reasonable accommodation to perform my job as CEO and President, including the reasonable accommodations outlined by Dr. Attfield and Dr. Grube in their reports.

App. 466. On October 31, 2005, Dr. Dowling filed the same Charge of Discrimination against MMIC with the Equal Employment Opportunity Commission (“EEOC”), and again named no director or officer as a respondent.

App. 461-466. In May 2006, the MHRC and the EEOC issued Notices of Right to Sue and terminated their proceedings. App. 529, 531; Restuccia Dep. 28-30 (App. 380-381). *See also* IHSMF ¶¶9-13 (App. 136-137).

On July 25, 2006, Dr. Dowling filed the *Dowling* Action against MMIC. App. 533-538, 540-555. The complaint alleged that MMIC discriminated against Dr. Dowling on the basis of disability and breached his Employment Agreement by terminating him without cause and refusing to pay severance and other benefits. The complaint included causes of action for violations of the ADA and the MHRA, breach of the Employment Agreement, and infliction of emotional distress. App. 540-555. *See also* IHSMF ¶¶14-15 (App. 137).

Throughout the time the *Dowling* Action was pending, MMIC was the only defendant. No director, officer or other individual was named a defendant. No individual ever retained an attorney to represent him or to enter an appearance on his behalf. All filings by MMIC were solely on its own behalf. *See* IHSMF ¶¶17-18 (App. 137-138). *See also* App. 533-538, 540-555, 557-567; Restuccia Dep. 119 (App. 403).

B. The Carolina Casualty EPL Policy

MMIC gave notice of the MHRC/EEOC proceedings and the *Dowling* Action pursuant to an Employment Practices Liability (“EPL”) policy issued by Carolina Casualty Insurance Company (the “Carolina EPL Policy”). App. 359-372. That policy provided coverage to MMIC and its directors, officers and employees for employment practices claims. IHSMF ¶¶19-25 (App. 138-140). By letter dated October 24, 2005, Monitor Liability Managers (“Monitor”), the claims

manager for the Carolina EPL Policy, acknowledged coverage for the Dowling matter and appointed counsel to represent MMIC, pursuant to the policy provision requiring Carolina Casualty to defend claims against its insureds. App. 606-608. The only aspect of the Dowling dispute *not* covered by the Carolina EPL Policy was breach of contract, due to the breach of contract exclusion. *See* Carolina EPL Policy Section IV(C) (App. 368); IHSMF ¶¶27-28 (App. 140-141).

An internal email confirms MMIC's understanding that the Carolina EPL Policy did not cover Dr. Dowling's claim for breach of his Employment Agreement:

Dom and I had a conference call this morning with a claim rep from Monitor in which we discussed Dr. Dowling's demand letter.

As you know, our policy with Carolina Casualty excludes any breach of any oral or written contract that may apply in this particular situation. Therefore, we would presumably seek coverage under our D&O and E&O policy. I just wanted to be assured that Indian Harbor had been put on notice in this regard.

App. 604. MMIC never disputed Monitor's position that the Carolina EPL Policy did not cover MMIC's contractual liability. IHSMF ¶¶29-32 (App. 141); Restuccia Dep. 46, 75-76 (App. 385, 392).

Between October 2005 and August 2007, when the *Dowling* Action ultimately was dismissed after settlement, MMIC incurred \$226,298.64 in defense costs, all of which were paid by Carolina Casualty except for \$10,000 paid by

MMIC as its retention obligation under the Carolina EPL Policy. IHSMF ¶¶ 65-66 (App. 152); App. 658-760; Restuccia Dep. 46-49, 52-53 (App. 385-387).

C. Settlement of the Dowling Action

In May 2007, Dr. Dowling and MMIC settled the *Dowling* Action for \$550,000. IHSMF ¶¶56-64 (App. 149-151), Restuccia Dep. 84 (App. 394). Dr. Dowling and MMIC executed a Release and Confidentiality Agreement. No director or officer was a party to the agreement. App. 1136-1141. Monitor refused to pay the entire settlement amount because MMIC's alleged breach of the Employment Agreement was not covered by the Carolina EPL Policy. App. 626-627, 633, 635. MMIC and Monitor therefore agreed that Carolina Casualty's share of the settlement was \$225,000, and MMIC's share was \$325,000. The \$500,000 limit of liability provided by the Carolina EPL Policy was not exhausted. App. 624-627, 631-633; Restuccia Dep. 84-86, 90-91 (App. 394-396).

D. The Indian Harbor D&O Policy

Indian Harbor issued Management Liability and Company Reimbursement Insurance Policy No. ELU 087874-04 ("Indian Harbor D&O Policy") to MMIC. IHSMF ¶¶33-46 (App. 142-146), App. 329-355. The policy contains three insuring agreements. Insuring Agreements I(A) and I(B) provide coverage for **Loss** resulting from **Claims** made against the **Insured Persons** – *i.e.*, MMIC's directors and officers – for **Wrongful Acts** or **Employment Practices Wrongful**

Act.³ Insuring Agreement I(C) provides coverage for **Loss** resulting from **Securities Claims** made against MMIC for a **Company Wrongful Act**. A **Securities Claim** means a **Claim** alleging violations of the securities laws or a shareholder derivative suit. **Securities Claim** does not include employment disputes. Indian Harbor D&O Policy at Sections I, II(E), II(G), II(J), II(M), II(Q) (as amended by Endorsement No. 5), II(S) (App. 329-355).

MMIC provided notice of the Dowling proceedings to Indian Harbor's claims manager, Executive Liability Underwriters (n/k/a XL Insurance). IHSMF ¶¶47-49 (App. 146), App. 762-839. Indian Harbor advised that coverage under its policy was not triggered under Insuring Agreements I(A) or I(B) because no **Claim** had been made against any **Insured Person** by Dr. Dowling. Moreover, insofar as Dr. Dowling had made a claim against MMIC, that claim was not covered because it was not a **Securities Claim** under Insuring Agreement I(C). Indian Harbor stated that it would treat the submission in accordance with the potential claim reporting provision at policy Section VI(A)(2), and requested that MMIC immediately notify it if a **Claim** was made against an **Insured Person**. IHSMF ¶¶50-51 (App. 146-148), App. 841-846.

MMIC asked its insurance broker why the Indian Harbor D&O Policy did not cover Dr. Dowling's breach of contract count:

³ Words appearing in bold are defined terms under the Indian Harbor D&O Policy.

We understand XL's coverage position on the Dowling claim, however, could you or Roger clarify why coverage is not triggered under the D&O policy on Count V (Breach of Contract) which I believe directly relates to his employment agreement.

App. 848-849. In response, the broker explained why Indian Harbor was correct:

The D&O policy covers insured persons (ie: directors and officers) and covers the company with respect to securities matters.

At this time, the only defendant is the company, Medical Mutual Insurance Company of Maine, Inc., therefore there is no claim against a director or officer. Which means an "insured person" is not named. Since it is not a securities claim, there is no trigger for "the company." A very basic answer to your inquiry is that the complaint must either name a director or officer or it must involve a securities matter in order to trigger coverage under the D&O policy.

App. 851. *See also* IHSMF ¶¶52-54 (App. 148-149).

On February 14, 2008, MMIC filed this suit against Indian Harbor seeking coverage for the \$325,000 it paid to settle the *Dowling* Action. *See* Docket No. 1 (App. 2). On June 9, 2008, MMIC filed a First Amended Complaint, purporting to seek \$776,298.64, representing all of the defense costs and the entire \$550,000 settlement amount, notwithstanding that Carolina Casualty had paid the defense costs and \$225,000 of the settlement. App. 6-15. However, MMIC later admitted that it will not repay to Carolina Casualty any of the defense costs or settlement paid by that company on MMIC's behalf. MMIC also admitted that its damages

were limited to \$325,000 and its claim for attorneys' fees in this coverage action.

IHSMF ¶80 (App. 156), Restuccia Dep. 91-96 (App. 396-397).

E. The District Court's Summary Judgment Decision

On November 19, 2008, the District Court (Judge D. Brock Hornby) granted summary judgment for Indian Harbor. After reviewing the undisputed facts, Judge Hornby framed the issue: "The only question . . . is whether MMIC paid funds as a result of a Claim . . . made against [an] Insured Person []." Slip Op. at 5. The District Court held it did not:

I conclude that no extended discussion is necessary. The CEO may have accused individual MMIC officers and directors of wrongful conduct, but never did he make a claim against any officer or director for relief. His administrative claims with the MHRC and EEOC listed only MMIC; his detailed statement of charge was focused on MMIC; his federal lawsuit sued only MMIC. The fact that his prayer for relief sought injunctive relief against "MMIC, its agents, employees, and successors" does not alter that conclusion. That is boilerplate language always used in an injunction against a corporation. Likewise, the fact that the settlement included not only MMIC, but also "its officers, agents, employees, attorneys, and members of the Board of Directors, successors, affiliates, subsidiaries and insurers, and any and all other persons, firms and corporations employed by or acting as agents of MMIC" is no more than boilerplate settlement language. It is customary to try to extend the reach of a settlement as far as possible. The effort, when successful as here, does not alter the fact that the CEO never made a claim against any officers and directors.

Id.

SUMMARY OF ARGUMENT

The issue in this case is whether MMIC can recover the defense costs and settlement incurred to resolve Dr. Dowling's claim against MMIC under the Indian Harbor D&O Policy. As the name reflects, Indian Harbor's "management liability" policy only insures the directors and officers (*i.e.*, a company's "management") against personal liability, and not the corporation for its own liability (except for securities claims). As a result, coverage under a D&O Policy is triggered by claims made against the directors and officers, rather than claims made against the company. The Indian Harbor D&O Policy does not insure MMIC for an employment practices liability claim against it, which is why MMIC maintained a separate EPL policy. As one court put it, rejecting an argument similar to MMIC's position here:

The position urged upon us . . . would, by providing coverage where the insured officers and directors are not legally obligated to pay, transform a D&O policy into a corporate liability policy. Such an interpretation would be contrary to the purpose of D&O policies which . . . exist to shield directors and officers – not their employer/principal – from personal liability.

In re Liquidation of WMBIC Indemnity Corp., 175 Wis. 2d 398, 409, 499 N.W. 2d 257, 262 (Wisc. Ct. App. 1993).

Based on the undisputed facts, the District Court correctly concluded that the Indian Harbor D&O Policy did not cover the Dowling proceedings. Insuring Agreement I(B) of the policy states that Indian Harbor –

shall pay on behalf of [MMIC] Loss which [MMIC] is required or permitted to pay as indemnification to any of the **Insured Persons** resulting from a **Claim** first made against the **Insured Persons** during the **Policy Period . . .** for a **Wrongful Act** or **Employment Practices Wrongful Act**.

App. 331. Here, no **Claim** was made against an **Insured Person** of MMIC and no **Loss** resulted from a **Claim** made against an **Insured Person**. Simply put, no director or officer was named a defendant in any proceeding, and no individual ever had any legal obligation to pay anything as a result of a **Claim** made against him personally. Rather, Dr. Dowling sued only MMIC, and he sought to impose liability solely on MMIC. Although Dr. Dowling alleged that MMIC was liable based on the conduct of its executives and others, because a corporation's liability necessarily is predicated on the actions of its directors and officers, it is the making of a **Claim** against an **Insured Person** – and not simply allegations of misconduct – that triggers coverage under the policy. Without a **Claim** against an **Insured Person**, there was no **Loss** that an **Insured Person** was legally obligated to pay.

The plain language of the Indian Harbor D&O Policy and the undisputed facts confirm the correctness of the District Court's decision. MMIC's effort to shift all of its own liability for Dr. Dowling's employment discrimination and

breach of contract claim would impermissibly rewrite the policy so as to provide EPL coverage to the corporation. It also flies in the face of the factual record, which confirms that Dr. Dowling made no **Claim** against an individual and that the loss was solely the legal obligation of MMIC to pay based on its own liability.

ARGUMENT

“In essence and at its core, a D&O policy remains a safeguard of officer and director interests and not a vehicle for corporate protection.” *In re First Central Financial Corp.*, 238 B.R. 9, 16 (Bankr. E.D.N.Y. 1999). MMIC’s effort to transform the Indian Harbor D&O Policy into a corporate liability policy that provides protection for an employment claim made only against MMIC fails for two independent reasons.

First, MMIC cannot prove that the Dowling proceedings were a **Claim** made against any individual **Insured Person** or that any covered **Loss** was incurred as a result of such a **Claim** against an individual, both of which are expressly required by the Policy’s Insuring Agreements.

Second, even assuming the Dowling proceedings were within the scope of the Insuring Agreements (which they were not), MMIC cannot prove that it incurred covered loss in excess of the \$250,000 retention under the Indian Harbor D&O Policy, as opposed to uncovered loss allocable to the breach of contract count asserted against MMIC.

A. Summary Judgment Standard, Burden of Proof and Maine Law on the Interpretation of Insurance Policies

Summary judgment is appropriate where there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Narragansett Jewelry Co. v. St. Paul Fire & Marine Ins. Co.*, 555 F.3d 38, 41 (1st Cir. 2009). “Summary judgment permits a court to pierce the boilerplate of the pleadings and assay the parties’ proof in order to determine whether trial is actually required.” *Bird v. Centennial Ins. Co.*, 11 F.3d 228, 231 (1st Cir. 1993) (internal quotations and citations omitted). “[S]ummary judgment cannot be defeated by relying on improbable inferences, conclusory allegations, or rank speculation.” *Ingram v. Brink’s, Inc.*, 414 F.3d 222, 229 (1st Cir. 2005).

MMIC has the burden to prove that its claim for coverage is within the scope of the Insuring Agreements of the policy. *See, e.g., Barrett Paving Materials, Inc. v. Cont’l Ins. Co.*, 488 F.3d 59, 67 (1st Cir. 2007) (applying Maine law); *Pelkey v. GE Capital Assur. Co.*, 2002 ME 142, P10, 804 A.2d 385, 387 (Me. 2002) (“It is [the insured’s] burden . . . to show that his injury falls within the scope of the [insurance] contract”). Although the insurer usually bears the burden of proving the applicability of any exclusions, here, no exclusion is at issue. Therefore, the burden of proof remains solely with MMIC.

Maine’s rules for interpretation of insurance policies similarly are well established:

A contract of insurance, like any other contract, is to be construed in accordance with the intention of the parties, which is to be ascertained from an examination of the whole instrument. All parts and clauses must be considered together that it may be seen if and how one clause is explained, modified, limited or controlled by the others.

American Protection Ins. Co. v. Acadia Ins. Co., 2003 ME 6, P11, 814 A.2d 989, 993 (Me. 2003) (internal quotations omitted). “Language in a contract should be given its plain meaning.” *Id.* “The function of the court is not to make a new contract for the parties by enlarging or diminishing its terms, but is to ascertain the meaning and intention of [the contract] actually made.” *Apgar v. Commercial Union Ins. Co.*, 683 A.2d 497, 500 (Me. 1996). “The rule of construction that a policy should be construed more strongly in favor of coverage is a rule of last resort, which must not be permitted to frustrate the intention the parties have expressed, if that can otherwise be ascertained.” *Id.* at 500-501. *See also Patrons Oxford Mut. Ins. Co. v. Marois*, 573 A.2d 16, 19 (Me. 1990) (“There are many words, phrases or paragraphs in a standard insurance contract that a first time reader does not understand. That circumstance does not justify excising such provisions from the contract. Only when they are ambiguous is their interpretation affected, and the insured given the benefit of the doubt.”) (internal citation omitted). Whether ambiguity exists and the meaning of an insurance contract are

questions of law. *See Foremost Ins. Co. v. Levesque*, 2005 ME 34, P7, 868 A.2d 244, 246 (Me. 2005).

Accordingly, under Maine law, the Indian Harbor D&O Policy must be enforced according to its plain meaning. The policy cannot be rewritten to create coverage where none exists. In the absence of ambiguity, the policy may not be construed in favor of the insured.

B. The Dowling Proceedings Are Not Within the Scope of Insuring Agreement I(B)

MMIC cannot prove that the Dowling proceedings are within the scope of Insuring Agreement I(B).⁴ As Insuring Agreement I(B) provides:

The Insurer shall pay on behalf of [MMIC] *Loss* which [MMIC] is required or permitted to pay as indemnification to any of the **Insured Persons** *resulting from a Claim first made against the Insured Persons during the Policy Period . . . for a Wrongful Act or Employment Practices Wrongful Act.*

App. 331 (emphasis added). MMIC cannot establish either that (1) Dr. Dowling made a **Claim** against any individual in the MHRC/EEOC proceedings or the

⁴ As it did before the District Court, MMIC argues that only Insuring Agreement I(B) applies, thereby conceding that Insuring Agreement I(A) or I(C) are inapplicable. *See, e.g.*, MMIC Brief at 17-18. Insuring Agreement I(A) provides coverage for *non-indemnifiable Claims* against the **Insured Persons**. Insuring Agreement I(C) provides coverage for claims against MMIC, but only to the extent such claims are **Securities Claims**. App. 331. MMIC does not contend that the Dowling proceedings are **Securities Claims**.

Dowling Action; or (2) covered **Loss** resulted from such **Claim** made against an individual. The failure to establish both conditions is fatal to its position.

1. **No Claim is Made Against An Individual If That Person Is Not Named a Defendant**

Courts uniformly hold that no claim is made against an individual if that person is not a respondent in a proceeding. In *National Bank of Arizona v. St. Paul Fire and Marine Ins. Co.*, 193 Ariz. 581, 975 P.2d 711 (Ariz. Ct. App. 1999), suit was filed against the corporation but not against any director or officer. The insured nevertheless sought coverage under a D&O policy, on the theory that the claim against the company was based solely on wrongful acts committed by its directors and officers, and the company could not be held liable independent of the actions of the directors and officers. The court rejected this argument, noting that a “prerequisite” for coverage is the director’s or officer’s legal obligation to pay for a claim made against him or her:

“[A] D&O policy would be transformed into a corporate liability policy if coverage were provided where the insured officers and directors were not legally obligated to pay. . . . Such an interpretation would be contrary to the purpose of D&O policies which . . . exist to shield directors and officers – not the employer/principal – from personal liability.”

Id. at 585, 975 P.2d at 715 (quoting *In re Liquidation of WMBIC Indemnity Corp.*, 175 Wis.2d 398 at 409, 499 N.W.2d at 262). The court held that the D&O policy

did not provide coverage where “[i]t is undisputed that no director or officer was ever in jeopardy of paying any money damages. . .” *Id.* at 585, 975 P.2d at 715.

In *Olympic Club v. Underwriters at Lloyd’s London*, 991 F.2d 497 (9th Cir 1993), the Ninth Circuit reached the same conclusion. In *Olympic Club*, the insured Club sought coverage under a D&O policy for a discrimination suit filed against it and unidentified “John Does.” In affirming summary judgment for the insurer, the court rejected the argument that coverage was triggered because its directors and officers committed wrongful acts for which the Club was liable:

If this interpretation governed, the Club’s directors, officers and employees would be liable for every corporate act undertaken by the Club and Lloyd’s would be obligated to pay defense costs for every suit against the Club. This argument defies any reasonable interpretation of Endorsement #2 and the unmistakable purpose of a directors and officers liability insurance policy. It also turns on its head California’s rule that directors are the agents of their corporation.

991 F.2d at 501. The Ninth Circuit further dismissed the contention that the inclusion of the Doe defendants triggered coverage: “even assuming the Doe defendants are directors, officers or employees of the Club, the City’s complaints

do not allege that the Doe defendants are liable for any discriminatory act or omission.” *Id.*⁵

2. Dr. Dowling Did Not Make A Claim Against An Insured Person

Here, Dr. Dowling did not make a **Claim** against an **Insured Person** within the scope of Insuring Agreement I(B). The Indian Harbor D&O Policy defines

Claim to mean:

- (1) a written demand for monetary or non-monetary relief;
- (2) any civil proceeding in a court or law or equity, or arbitration;
- (3) any criminal proceeding which is commenced by the return of an indictment; and

⁵ See also *Clark v. General Accident Ins. Co.*, 951 F. Supp. 559, 562 (D.V.I. 1997) (D&O policy does not cover corporation for claims against it: “the fact that [the corporation] only acts through the actions of its board members does not render [the corporation] and the officers and directors one and the same for purposes of insurance coverage”); *Bank of Carbondale v. Kansas Bankers Surety Co.*, 324 Ill. App.3d 537, 755 N.E.2d 543 (Ill. App. Ct. 2001) (no coverage under D&O policy where the counterclaim named no director or officer); *85-10 34th Avenue Apartment Corp. v. Nationwide Mut. Ins. Co.*, 283 A.D.2d 604, 725 N.Y.S.2d 98 (N.Y. App. Div. 2001) (no coverage under D&O policy where no director or officer named as defendant); *Buckingham Apartments, Ltd. v. Liberty Mut. Ins. Co.*, 124 A.D.2d 774, 508 N.Y.S.2d 493 (N.Y. App. Div. 1986) (no coverage under D&O policy for suit against insured entity where no director or officer was named a defendant, even though suit sought injunctive relief against the entity and unnamed directors, officers, agents and employees); *Edinburg Consolidated Independent School Dist. v. St. Paul Ins. Co.*, 783 S.W.2d 610 (Tex. App. 1989) (no coverage for lawsuit against insured school district after individual trustees were dropped as defendants); Knepper & Bailey, *Liability of Corporate Directors and Officers*, §23.02 at 23-3 – 23.4, 7th ed., 2007 (“Unless specifically provided . . . [D&O] policies do not insure the corporation itself against its own liabilities”).

(4) a formal civil, criminal, administrative or regulatory proceeding or formal investigation of an **Insured Person** or the **Company** (but with respect to the **Company** only for a **Company Wrongful Act**) which is commenced by the filing or issuance of a notice of charges, formal investigative order or similar document *identifying in writing such Insured Person or the Company as a person or entity against whom a proceeding as described in (C)(2) or (3) above may be commenced*, including any proceeding before the Equal Employment Opportunity Commission or any similar federal state or local governmental body having jurisdiction over any **Employment Practices Wrongful Act**.

Indian Harbor D&O Policy Section II(C) (emphasis added) (App. 331-332). As the District Court correctly held, Dr. Dowling never made a **Claim** against any directors or officers.

a. The MHRC/EEOC Proceedings

The MHRC/EEOC proceedings are not a **Claim** against an **Insured Person** under any of the subsections of the **Claim** definition in Section II(C). The administrative proceedings plainly are not a civil proceeding in a court under Section II(C)(2), nor a criminal proceeding under Section II(C)(3). Although the MHRC/EEOC proceedings are an administrative proceeding under Section II(C)(4), nowhere does the Notice of Charge or Dr. Dowling's Statement of Claim "identify[] in writing such **Insured Person** . . . as a person or entity against whom a proceeding as described in (C)(2) ([a civil proceeding] or (C)(3) [a criminal

proceeding] may be commenced.” Dr. Dowling’s Notice of Charge identified only MMIC as the respondent. App. 461-466. While Section II(C)(4) expressly requires that the notice of charge “identify in writing” the **Insured Person**, here, no director or officer was named as a respondent, and no individual was identified anywhere in the Statement. The MHRC/EEOC proceedings therefore are not a **Claim** against an **Insured Person** under Section II(C)(4).

Dr. Dowling further made no written demand for relief against an **Insured Person** in the MHRC/EEOC proceedings under Section II(C)(1). Indeed, the Notice of Charge and the Statement of Claim contain no demand of any kind, for either monetary or non-monetary relief, even as against MMIC. App. 461-466. The absence of any demand is unsurprising, because neither the MHRC or the EEOC has the authority to award relief in such a proceeding. Instead, those agencies investigate and act as conciliators. On their face, the documents contain no demand for relief against any MMIC director or officer.

b. The Dowling Action

The *Dowling* Action also is not a **Claim** made against any **Insured Person**. First, insofar as the suit is a “civil proceeding” under Section II(C)(2), it does not satisfy Insuring Agreement I(B)’s requirement that the civil proceeding be “made against” an **Insured Person**. MMIC’s contention that Section II(C)(2) does not require that the **Insured Person** be “listed in the caption of the complaint” misses

the point that Insuring Agreement I(B) expressly requires that the civil proceeding be “*made against*” an individual. The only way a civil proceeding is “made against” a person in federal court, where the *Dowling* Action was filed, is through the service of a complaint and issuance of a summons to the defendants.⁶ See Fed. R. Civ. P. 3, 4. The summons and complaint serve the necessary purpose of identifying the parties to the lawsuit for the courts and others. Here, the summons and complaint were served only on MMIC. No director or officer was named a defendant in the *Dowling* Action, and indeed, the complaint did not even include any unidentified “John Doe” defendants. No director or officer ever participated in as a party in his personal capacity or ever filed a pleading. App. 533-555. As such, the *Dowling* Action was not a civil proceeding made against any **Insured Person**.

Second, Dr. Dowling made no written demand for monetary or non-monetary relief against any director or officer under Section II(C)(1). MMIC has not, and cannot, point to any written demand for monetary relief made against any individual in the record. All five counts of the complaint sought monetary relief only from MMIC. Indeed, the 16 page complaint never identifies any director or officer by name. App. 540-555.

⁶ MMIC states that “made against” is not defined by the Indian Harbor D&O Policy, apparently to imply that the term is ambiguous (MMIC Brief at 23), but without explaining why. There is no need to define “made against” where its meaning is simple, straightforward and unambiguous.

The complaint in the *Dowling* Action further makes no written demand for non-monetary relief from a director or officer. In this regard, MMIC's reliance on the complaint's request that the District Court "enjoin MMIC, its agents, employees, and successors, from continuing to violate Plaintiff's rights" (App. 555) is misplaced. Notably, this request omitted any reference to "board members" or "directors and officers," which is a significant omission given that the complaint elsewhere uses the term "members of its Board of Directors." *See, e.g.,* App. 553. Moreover, such a request directed generally to MMIC and its "agents, employees, and successors" – without identifying any director or officer or even referencing the directors or officers as a group – is far too ambiguous and attenuated to show that Dr. Dowling was seeking relief from an individual **Insured Person**. Any injunctive relief issued by the District Court in the *Dowling* Action would have been directed to and enforceable only against MMIC, rather than any non-parties to the litigation. *See Buckingham Apartments, Ltd.*, 124 A.D. 2d at 775, 508 N.Y.S. 2d at 495 (no coverage for suit where no director or officer named, even though complaint sought injunction against the entity and its "directors, officers, agents, members and employees"). In any event, MMIC cannot show that any **Loss** resulted from Dr. Dowling's request for injunctive relief, whomever it may have been directed against, because no director or officer incurred defense

costs and no injunctive relief was issued by the District Court. App. 533-538, Restuccia Dep. 117-119 (App. 403).

Third, MMIC's contention that the Release and Confidentiality Agreement confirms the existence of a **Claim** against an **Insured Person** also misses the mark. MMIC relies on the language from the Agreement whereby Dr. Dowling released all claims "known and unknown, suspected or unsuspected, matured or unmatured, now existing or arising in the future" that he may have had against "MMIC and its officers, agents, employees, attorneys, members of the Board of Directors, successors, affiliates, subsidiaries and insurers, and any and all other persons, firms and corporations employed by or acting as agents of MMIC (the 'MMIC Parties')." App. 1136-1137. The reference to MMIC's directors and officers is but one in a string of references to groups of persons and entities related to MMIC in some fashion that routinely are included as releasees in settlement agreements. It is not evidence that a **Claim** previously had been made against the broad group of persons and entities within the definition of "MMIC Parties" and included as releasees.

In any event, a settlement agreement and release cannot logically constitute a **Claim** made against a person being released. In *Richardson Electronics, Ltd. v. Federal Ins. Co.*, 120 F. Supp. 2d 698 (N.D. Ill. 2000), the court rejected the same argument made here by MMIC, noting:

Richardson does not explain how a release of potential liability against its executives translates into an actual claim against them that generated losses for which they were liable. The insurance policy here . . . kicks in only if there is a claim against an insured person . . . and the civil settlement did not generate such a claim. . . Rather, the civil settlement forestalled any actual claim from arising against an insured person.

120 F. Supp. 2d at 704. Here too, the release given by Dr. Dowling collectively to the “MMIC Parties” forestalled any future claim that might have been made. But the Indian Harbor D&O Policy does not cover *future* claims that have not been made; it covers only **Loss** resulting from **Claims** against **Insured Persons** that actually have been made. *See FDIC v. Booth*, 82 F.3d 670, 677 (5th Cir. 1996) (“The mere ‘threat’ of liability will not necessarily develop into an actual demand for compensation”); *Winkler v. National Union Fire Ins. Co.*, 930 F.2d 1364, 1366-1367 & n.4 (9th Cir. 1991) (threatened legal action was not a claim against any director or officer under a D&O policy). That the Release and Confidentiality Agreement had the collateral effect of forestalling possible future but unasserted claims against MMIC’s directors and officers does not prove that a **Claim** previously had been made against them.

3. **No Loss Resulted From A Claim Made Against Any Insured Person**

MMIC cannot prove that any **Loss** *resulted* from a **Claim** made against an **Insured Person**, as required by Insuring Agreement I(B). The Indian Harbor

D&O Policy defines **Loss** to mean “damages, judgments, settlements or other amounts . . . and **Defense Expenses** in excess of the Retention *that the Insured is legally obligated to pay.*” Indian Harbor D&O Policy Section II(M), as amended by Endorsement No. 3 (emphasis added) (App. 346). Here, no **Insured Person** had any legal obligation to pay MMIC’s defense costs or the settlement of the *Dowling* Action. MMIC therefore cannot prove that a **Loss** resulted from a **Claim** made against an **Insured Person**, as required by Insuring Agreement I(B).

This language, which is common in D&O policies, means what it says; that is, if the **Insured Person** is not legally obligated to pay a settlement or defense costs, such amount is not **Loss** covered by the policy. For example, in *Telxon Corp. v. Federal Ins. Co.*, 309 F.3d 386 (6th Cir. 2002), the Sixth Circuit rejected a corporation’s claim for coverage under a D&O policy for defense costs incurred by its own counsel who did not represent the directors and officers. The court held that the D&O policy only covered loss that the directors and officers were legally obligated to pay. Based on its findings that the directors and officers had no express or implied contract with the corporation’s counsel for the provision of legal services, and further that the corporation’s counsel entered its appearance and made filings solely on behalf of the company, the court held the directors and officers had no legal obligation to pay such counsel’s fees. As such, there was no coverage under the D&O policy for the corporation’s legal bills. *See also*

Richardson Electronics, 120 F. Supp. at 703-704 (civil settlement that the corporation was directly liable to pay, and for which the individuals had no obligation to pay, was not covered loss under D&O policy).

Here, no **Insured Person** was legally obligated to pay any amount for defense costs or the settlement with Dr. Dowling. First, to the extent that MMIC seeks recovery of the \$226,298.64 in fees charged by its defense counsel, those fees never were the legal obligation of any director or officer to pay. Defense counsel entered its appearance and represented *only* MMIC in the Dowling proceedings. App. 533-538, 557-567; Restuccia Dep. 118 (App. 403). In the MHRC/EEOC proceedings, MMIC's position statement was filed solely on its own behalf. App. 496-515. Similarly, all pleadings in the *Dowling* Action were filed solely on MMIC's behalf, and not on behalf of any individual. App. 533-555. As MMIC admitted, no director or officer ever retained counsel in connection with the Dowling proceedings. Restuccia Dep. 117-119 (App. 403). Indeed, it would be irrational for MMIC's directors and officers to take the position that they were personally liable to pay the defense fees charged by MMIC's lawyers to represent MMIC in the Dowling proceedings.

Second, no **Insured Person** had a legal obligation to pay the settlement with Dr. Dowling. In this regard, no **Insured Person** was a defendant in the *Dowling* Action. App. 540-555. No **Insured Person** was a party to the Release and

Confidentiality Agreement between MMIC and Dr. Dowling, and no **Insured Person** had a legal obligation under that agreement to pay any portion of the settlement amount. App. 1136-1141.

In the absence of any **Loss** that an **Insured Person** was legally obligated to pay as a result of the Dowling proceedings, there was no need for any indemnification from MMIC to the directors and officers. As the District Court noted, there is no evidence that MMIC in fact indemnified any individual for any amount. Slip Op. at 4 n.2. Under Insuring Agreement I(B), MMIC would be permitted or obligated to indemnify an **Insured Person** only if that individual had a personal legal obligation to pay in the first instance. Here, no individual had any legal obligation to pay any amount.

Despite the clear language of the policy, MMIC attempts to shift to Indian Harbor the entirety of the costs charged by *its* lawyers for representing *it*, and the full amount of the settlement to resolve *its* liability to Dr. Dowling. To this end, MMIC argued to the District Court that because the definition of **Loss** includes settlements and **Defense Expenses** that the “**Insured**” is obligated to pay, rather than solely what an “**Insured Person**” is obligated to pay, all of its own attorneys’ fees and the settlement are covered. However, that argument ignores that Insuring Agreement I(B) requires that the **Loss** *result* from a **Claim** made against an **Insured Person**. MMIC’s defense costs and the settlement did not result from a

Claim against an individual; rather, such amounts resulted from Dr. Dowling's claim against MMIC. Moreover, by admitting that Insuring Agreement I(B) is the only potentially applicable insuring agreement, MMIC concedes that the policy does not provide coverage for Dr. Dowling's claim made against MMIC, because such claim was not a **Securities Claim** under Insuring Agreement I(C).

4. **Alleged Wrongful Acts Are Insufficient To Establish That Dr. Dowling Made A Claim Against Any Insured Person**

While MMIC concedes that no director or officer was named a defendant or respondent in any proceeding, it nevertheless contends that because Dr. Dowling alleged misconduct by the directors and officers, such allegations are evidence of a **Claim** against them. However, under Insuring Agreement I(B), it is not enough for MMIC to point to allegations of wrongdoing. A claimant's contention that the corporation is liable based on the conduct of its directors and officers is not the same as the making of a **Claim** against those directors and officers which results in **Loss**. The policy requires the latter.

The Indian Harbor D&O Policy clearly distinguishes between the terms **Claim** and **Wrongful Act**. As noted above, **Claim** means: (1) a written demand for monetary or non-monetary relief (Section II(C)(1)); (2) a civil proceeding in a court (Section II(C)(2)); (3) a criminal proceeding (Section II(C)(3)); or (4) an administrative proceeding (Section II(C)(4)). App. 331-332. By contrast, **Wrongful Acts** and **Employment Practices Wrongful Acts** generally mean

actual or alleged acts, errors or omissions by **Insured Persons**. Indian Harbor D&O Policy Sections II(G), II(S) (App. 332, 334). To trigger potential coverage, Insuring Agreement I(B) requires both a **Claim** made against an **Insured Person** and a **Wrongful Act/Employment Practices Wrongful Act**. One, without the other, is insufficient.

The same argument made by MMIC – that allegations of **Wrongful Acts** by the directors and officers constitute a **Claim** – was rejected by the Sixth Circuit in *MGIC Indemnity Corp. v. Home State Savings Ass’n*, 797 F.2d 285 (6th Cir. 1986). In *MGIC v. Home State*, a bank sought coverage under a D&O policy for a criminal proceeding filed against it, but no director or officer was charged. In the plea agreement, to which only the bank was a party, the bank agreed to pay restitution to settle the charges. While the government threatened to pursue the officers, it entered into separate letter agreements in which it agreed not to file criminal charges against them. 797 F.2d at 287. The bank sued its D&O insurer, MGIC, seeking coverage for the settlement payment. The Sixth Circuit affirmed summary judgment for MGIC, and held that no claim was made against any individual, even though the government had alleged wrongdoing by them:

MGIC concedes that the letter identifying the individual officers as targets of the grand jury investigation constituted a ‘claim’ of “Wrongful Acts” on the part of the officials within the meaning of the policy. That is not the end of our inquiry, however; *a claim that a wrongful act has occurred is not the same thing as a claim for*

payment on account of a wrongful act. The insuring agreement, as we read it, requires a claim of the latter type.

. . . The existence of claims “of” wrongful acts does not of itself mean that claims were made against officials “for” wrongful acts. . . .

. . . Although “claim” often means “contention,” that is not the use to which it has been put in the insuring agreement. If claims were made in the newspapers that directors and officers of Home State engaged in wrongful acts, those would obviously not be the kind of “claims” that could make MGIC liable under the insuring agreement. *The agreement, as we read it, is speaking not of a claim that wrongdoing occurred, but a claim for some discrete amount of money owed to the claimant on account of the alleged wrongdoing. In context, it seems to us, the only kind of “claim or claims” that could trigger the insurer’s obligation to pay would be a demand for payment of some amount of money. Thus it is that the policy defines “loss” in terms of an “amount” – i.e., an amount of money – which amount the officials are legally obligated to pay or for which amount they have been indemnified or are required to be indemnified.*

797 F.2d at 287-288 (emphasis added). *See also Windham Solid Waste*

Management Dist. v. National Cas. Co., 146 F.3d 131, 134 (2d Cir. 1998) (“an accusation that wrongdoing occurred is not by itself a claim, . . . nor is a naked threat of a future lawsuit A claim requires, in short, a specific demand for relief”) (citations omitted); *FDIC v. Booth*, 82 F.3d at 675 (the mere “threat” of liability is not sufficient to qualify as a “claim” under a D&O policy: “when the terms ‘claim’ and ‘loss’ are intimately connected in a policy, then a ‘claim’ is a demand which if sustained necessarily results in a loss”) (internal quotation and

citation omitted). Bare allegations of wrongful acts by directors and officers therefore are insufficient to trigger coverage.

Here, MMIC's lengthy recitations from Dr. Dowling's Charge of Discrimination, his complaint, and interrogatory responses of allegations of wrongdoing by MMIC's directors and officers are beside the point. Insuring Agreement I(B) does not provide coverage in the absence of an actual **Claim** against an individual, regardless of whether Dr. Dowling premised MMIC's liability on misconduct by its executives. MMIC's arguments impermissibly ignore the policy's distinction between **Claim** and **Wrongful Act**. *See Pelkey*, 2002 ME 142 at P15, 804 A.2d at 388 ("Where possible, we construe a contract to give force and effect to all of its provisions, and we avoid an interpretation that renders meaningless any particular provision of the contract"). Dr. Dowling no more made a **Claim** against MMIC's directors or officers than he made a **Claim** against MMIC's outside counsel at Verrill & Dana, whose alleged misconduct also was the basis of the relief sought solely from MMIC. *See IHOPSMF* ¶ 29 (App. 231); App. 524 (alleges that MMIC's attorneys altered Dr. Dowling's job description to prevent his return to work).

While the case law overwhelmingly supports the District Court's conclusion that the Dowling proceedings are not covered under the Indian Harbor D&O Policy, MMIC conspicuously fails to cite a single decision in support of its

arguments.⁷ While MMIC has sought to excuse the absence of support by arguing that the terms of D&O policies are *sui generis*, a review of the decisions reveals that the insuring agreements and the definitions of “claim,” “wrongful act” and “loss” in D&O policies are substantively the same, if not identical. *See, e.g., MGIC v. Home*, 797 F.2d at 286-287. Moreover, in those cases where the policies do not define “claim,” courts apply its plain and ordinary meaning, which is a “demand for relief.” *See, e.g., Windham Solid Waste*, 146 F.3d at 133-134; *National Bank of Arizona*, 193 Ariz. 581 at 584-585, 975 P.2d at 714-715. That definition, of course, is the same as the definition in the Indian Harbor D&O Policy. Accordingly, although the District Court did not find it necessary to reference case law to explain its conclusion, its decision finds unanimous support.

⁷ MMIC cited two cases to the District Court (Docket No. 25 at pp. 13, 18), for the proposition that a claim is made against individuals even though none were named as defendants: *Mt. Hawley Ins. Co. v. Federal Savings & Loan Ins. Corp.*, 695 F. Supp. 469 (C.D. Cal. 1987), and *MGIC Indemnity Corp. v. Central Bank of Monroe, La.*, 838 F.2d 1382 (5th Cir. 1988). However, to the extent that *Mt. Hawley* so held, the decision has no precedential value following the Ninth Circuit’s express disapproval of its reasoning in *California Union Ins. Co. v. American Diversified Savings Bank*, 914 F.2d 1271, 1276-1277 (9th Cir. 1990). The Fifth Circuit’s decision in *MGIC v. Central Bank of Monroe* also provides no support to MMIC. The issue in that case was whether the insured had provided timely notice under its policy. The court did *not* hold that a suit against the bank, to which no director or officer was a defendant, was a covered claim under a D&O policy. *See* 838 F.2d at 1388.

5. **The Record Confirms that Dr. Dowling Made A Claim Only Against MMIC**

MMIC's contends that the District Court improperly rewrote the Indian Harbor D&O Policy by concluding that there no coverage simply because no director or officer was "listed in the caption of the civil complaint" (MMIC Brief at 23). Contrary to MMIC's argument, the District Court correctly framed the issue under Insuring Agreement I(B): "The only question . . . is whether MMIC paid funds as a result of a '**Claim . . . made against [an] Insured Person.**'" Slip op. at 5. That no director or officer was named a defendant is but one of many facts in the record that demonstrate, individually and collectively, that MMIC did not pay funds as a result of a **Claim** against an **Insured Person**:

1. No MMIC director or officer was identified in the Notice of Charge or Statement of Claim filed in the MHRC/EEOC proceedings, much less named a respondent. App. 461-466. Had Dr. Dowling intended to make a **Claim** against an individual, such individual should have been named a respondent in order to exhaust administrative remedies before filing suit. That was not done.

2. No MMIC director or officer filed a position statement with the MHRC in response to the Notice of Charge. Restuccia Dep. 118 (App. 403). Moreover, MMIC's own 20 page position statement makes no mention of any "claim" purportedly made against an individual, notwithstanding the obvious legal defenses such individual would have had to allegations of discrimination under the

ADA and MHRA, and for breach of the employment agreement. App. 496-515. In this regard, the prevailing law in Maine during the pendency of the Dowling proceedings is that there is no individual liability under the ADA or the MHRA. *See Gough v. Eastern Maine Dev. Corp.*, 172 F. Supp. 2d 221, 224-225 (D. Me. 2001); *Quiron v. L.N. Violette Co.*, 897 F. Supp. 18, 21 (D. Me. 1995); *Davis v. Emery Worldwide Corp.*, No. Civ. A. CV-02-265, 2002 WL 31546159, at *2 (Me. Super. Oct. 22, 2002); *Lerman v. Mt. Sinai Cemetery Ass'n*, No. Civ. A. 99-613, 2001 WL 1711516, at *9 (Me. Super. Feb. 28, 2001). MMIC's position statement further failed to address that the directors and officers, as non-parties to Dr. Dowling's Employment Agreement, had no personal liability for MMIC's contractual obligation to pay severance and benefits. The document's silence on these defenses relevant to the individuals evidences the understanding of MMIC and its defense counsel that Dr. Dowling had made no **Claim** against any individual.

3. At no time did any director or officer retain an attorney, take any action or file any document in any proceeding in response to a purported "claim" made against him by Dr. Dowling. No director or officer was liable to pay any legal fees or any portion of the settlement. *See App. 533-538, 1136-1141; Restuccia Dep. 117-119 (App. 403).*

4. There is no evidence that MMIC indemnified any director or officer for any amount in connection with the Dowling proceedings. Moreover, MMIC's conclusory assertion, that "it paid defense costs and a settlement *on behalf of* its directors and officers" (MMIC Brief at 27, emphasis added), lacks any evidentiary basis. Rather, MMIC settled the case based on its concern about *the company's* exposure and liability. App. 624, Restuccia Dep. 80-82 (App. 393-394).

5. In a March 15, 2007 letter to Monitor, MMIC's defense counsel provided a detailed analysis of the *Dowling* Action for purposes of evaluating a settlement. Although the letter addresses factors that arguably "would make liability *against MMIC* more likely" (App. 621), the letter nowhere analyzes the potential liability of any director or officer. Like MMIC's position statement to the MHRC/EEOC, the letter is silent on the dispositive legal defenses such individuals would have had under the ADA and MHRA and for breach of the Employment Agreement. App. 617-622. Such omission would be inexplicable if a "claim" actually had been made against an individual.

6. At no time did MMIC inform its EPL insurer, Carolina Casualty, that a "claim" had been made against a director or officer, even though the Carolina EPL Policy would have provided full coverage to the individuals for such a "claim." IHSMF ¶76 (App. 154-155), App. 359-372, 629-654, Restuccia Dep. 119 (App. 403).

7. Although MMIC made disclosure in regulatory filings and financial statements that Dr. Dowling had made a claim *against MMIC*, it did not disclose that a “claim” had been made against any director or officer. IHSMF ¶¶77 (App. 155), App. 887, 904, 950, 982.

8. There is no mention in MMIC’s contemporaneous emails about seeking coverage under the Indian Harbor D&O Policy on the theory that a **Claim** had been made against a director or officer. Instead, MMIC’s rationale and motive for seeking coverage from Indian Harbor was to find coverage for its alleged breach of the Employment Agreement, which it knew was not covered by the Carolina EPL Policy. App. 604, 848-849.

In sum, the record conclusively shows that MMIC did not pay **Loss** that resulted from a **Claim** made against an **Insured Person**. At no time did MMIC, its directors or officers, or its defense counsel act in a manner consistent with MMIC’s assertion in this litigation that a **Claim** was made against an **Insured Person**.

C. **MMIC Cannot Prove that Any Loss Covered By the Indian Harbor D&O Policy Exceeded the \$250,000 Retention**

Even assuming *arguendo* that a **Claim** had been made against an **Insured Person** (which it was not), the District Court’s judgment may be affirmed on the alternative ground that MMIC cannot prove that it incurred covered **Loss** under the

Indian Harbor D&O Policy in excess of the \$250,000 retention.⁸ *See Cox v. Hainey*, 391 F.3d 25, 29 (1st Cir. 2004) (“A decision to affirm a summary judgment order may be grounded on any rationale revealed by the record, whether or not the lower court employed that rationale”).

1. **MMIC’s Actual Damages Cannot Exceed Its Out of Pocket Payments**

MMIC’s damages cannot exceed its out of pocket payments in connection with the Dowling proceedings. MMIC paid \$325,000 for the settlement and \$10,000 toward its defense counsel’s fees, which was its retention obligation under the Carolina EPL Policy. Carolina Casualty paid everything else. MMIC therefore cannot recover more than \$325,000 from Indian Harbor and receive a windfall.

It is axiomatic that a party may not recover as actual damages more than to which it is entitled in order to fully compensate for its loss. *See Caron v. Otonka, Inc.*, 344 F. Supp. 2d 765, 766 (D. Me. 2004) (“the law is clear that a plaintiff may not enjoy a double recovery”) (citations omitted). Moreover, the Indian Harbor D&O Policy’s Other Insurance clause states that any coverage provided thereunder is “specifically excess of and will not contribute with any other insurance, including but not limited to any insurance under which there is a duty to defend.” Indian Harbor D&O Policy Section VI(C) (App. 337). The Other Insurance clause

⁸ Indian Harbor briefed this alternative ground to the District Court. *See* Docket No. 27 at 17-20, Docket No. 34 at 18-20.

thereby precludes such a windfall. *See State Farm Mutual Auto. Ins. Co. v. Lefebvre*, No. CV-83-295, 1985 Me. Super. LEXIS 321, at *11 (Me. Super Ct. Nov. 7, 1985) (“Other insurance clauses were designed to prevent double recovery in cases of concurrent coverage, a goal the court would not differ with”).

MMIC’s compensatory damages therefore cannot exceed the \$325,000 it paid to settle the *Dowling* Action. MMIC admitted that its actual out of pocket payments were limited to \$325,000 for the settlement and \$10,000 for defense costs, paid as its retention obligation under the Carolina EPL Policy, and that Carolina Casualty paid everything else. App. 631-633; Restuccia Dep. 47-49, 84-86 (App. 385-386, 394-395). MMIC denied any obligation to pay back any amount to Carolina Casualty, and stated that it would not do so. Restuccia Dep. 91-96 (App. 396-397). MMIC is bound by this testimony.

2. The \$325,000 Settlement Payment By MMIC Is Not Covered Loss Under the Indian Harbor D&O Policy

Carolina Casualty accepted coverage for all aspects of the *Dowling* proceedings, but refused to pay for the severance and benefits owed under Dr. *Dowling*’s Employment Agreement. Carolina Casualty therefore paid \$225,000 toward the \$550,000 settlement. App. 606-608, Restuccia Dep. 47-49 (App. 385-386).

The record demonstrates that the remaining \$325,000 paid by MMIC was the amount that MMIC and Carolina Casualty allocated to the uncovered breach of

contract count. During the course of MMIC's dispute with Dr. Dowling, MMIC repeatedly offered payment of up to \$300,000 from its own funds (and not insurance funds) to resolve the matter, thereby reflecting its understanding that its contractual liability to Dr. Dowling was not insured. *See* IHSMF ¶¶56-58 (App. 149-150); Restuccia Dep. 54-64 (App. 387-389). App. 649-650. In connection the mediation in the *Dowling* Action, MMIC and Monitor negotiated the amount of their respective contributions to the settlement in view of the uncovered contractual liability. MMIC reiterated its willingness to pay \$300,000 from its own funds, based on its belief that "*the company was very exposed*" and "*it was to the company's benefit to settle this thing.*" Restuccia Dep. 80-82 (App. 393-394) (emphasis added); App. 624. Monitor's April 3, 2007 letter to MMIC confirms that MMIC's \$300,000 payment was for the uncovered contract count:

Monitor does not evaluate this matter as having a value of \$650,000. However, with the Insured's consent, Monitor would consent to making an offer of judgment to Claimant in the amount of \$500,000, *with the Insured's previously agreed contribution of \$300,000 for the Claimant's breach of contract/severance claim*, in a continuing effort to resolve this matter.

App. 626 (emphasis added). Similarly, Monitor's internal claim note for May 14, 2007, reporting on the progress of the negotiations, states:

Spoke to d/c [defense counsel] – he received a call from opc [opposing counsel] who wanted to continue to negotiate and stated claimant was willing to move off of his previous \$650k demand (the last offer from the Insd

& MLM [Monitor] was \$450k combined) – d/c wanted to confirm that MLM was willing to pay \$200k to settle this matter (with the Insd paying \$300k for the contractual/severance matters for a total settlement authority of \$500k) without an offer of judgment being made on behalf of the Insd. I concurred. . . .

App. 633 (emphasis added). Monitor’s notes then reflect the final allocation for the \$550,000 deal reached later that day:

Spoke to d/c – opc’s “bottom line” was \$550k – the Insd is willing to contribute \$25k more if MLM will do the same (\$225k from MLM, \$325k from the Insd) – I agreed. . . .

App. 632. MMIC and Monitor thereby agreed that MMIC’s share was \$325,000.

See also Restuccia Dep. 84 (App. 394).

The \$325,000 contract payment by MMIC also is not covered by the Indian Harbor D&O Policy. Under Insuring Agreement I(C), coverage for claims made directly against MMIC specifically is limited to **Securities Claims**. Indian Harbor D&O Policy Section I(C) (App. 331). Dr. Dowling’s count alleging breach of his Employment Agreement is not a **Securities Claim**, and therefore is not covered. Moreover, as discussed above, no director or officer was a party to the Employment Agreement and therefore no individual had personal liability to pay Dr. Dowling’s severance and benefits. MMIC’s \$325,000 contract payment is not covered by the Indian Harbor D&O Policy.

Accordingly, even assuming that Dr. Dowling had made a **Claim** against an **Insured Person** (which he did not), MMIC bears the burden to prove that some portion of the \$325,000 paid by it is allocable to covered **Loss** under the Indian Harbor D&O Policy. This it cannot do. In this regard, Section V(D) would require a fair and appropriate allocation as between covered loss and uncovered loss based on the “relative legal and financial exposures.” Indian Harbor D&O Policy Section V(D) (App. 336-337). As the policyholder with the burden to prove covered loss within the scope of the insuring agreement, MMIC also has the burden to prove the amount allocable to covered matters. *See Continental Casualty Co. v. Canadian Universal Ins. Co.*, 924 F.2d 370, 376 (1st Cir. 1991). Here, the amount allocated to the uncovered breach of contract loss was \$325,000. The remaining \$225,000 paid by Carolina Casualty was allocated to the remaining counts alleged by Dr. Dowling (including the ADA and MHRA violations, for which the directors and officers could not have been held personally liable).

3. The “Larger Settlement” Rule Does Not Apply

In its briefs to the District Court, MMIC argued that none of the defense costs or settlement were allocable to its own liability and that all of such amounts should be shifted to the Indian Harbor D&O Policy, on the basis of the so-called “larger settlement” rule. Assuming MMIC makes this argument again, it cannot

provide any evidentiary support for the position, and the policy's allocation provision and the case law refute it.

First, the "larger settlement" rule has no application here. Courts developed this rule in the 1990's to address disputes involving D&O policies over how much of the total loss was insured in situations where there were covered claims against the directors and officers but uncovered claims against the corporation in the same lawsuit. Because many D&O policies at that time did not have a provision specifying the method of allocation as between covered and uncovered loss, the larger settlement rule was devised by the courts as a default rule. However, courts recognized that where the policy specifies a different method of allocation, the language of the policy governs. *See, e.g., Nordstrom, Inc. v. Chubb & Son, Inc.*, 54 F.3d 1424, 1432 (9th Cir. 1995) ("We do not decide whether any given rule is generally applicable to all settlement agreements under D&O insurance policies. Rather, we consider the particular policy in question to determine which rule best effectuates the reasonable expectations and intentions of the parties under the insurance contract") (emphasis added); *Safeway Stores, Inc. v. National Union Fire Ins. Co.*, 64 F.3d 1282, 1287 (9th Cir. 1995) (same). Here, Section V(D) of the Indian Harbor D&O Policy requires that covered and uncovered loss be allocated on a relative exposure basis. Because the policy specifies the method of allocation, that language controls and the larger settlement rule does not apply.

Second, the larger settlement rule by its own terms is inapplicable because MMIC's liability in the Dowling proceedings was direct, and not derivative of any individual's liability. *See Safeway Stores*, 64 F.3d at 1287 ("Under the larger settlement rule, a corporation is entitled to reimbursement of all settlement costs where the corporation's liability is purely derivative of the liability of the insured directors and officers"). *See also Richardson*, 120 F. Supp. at 704 (rejecting application of the larger settlement rule where the corporation's liability was not purely derivative). In this case, MMIC was the only defendant in the *Dowling* Action. It had direct liability for discrimination under the ADA and MHRA and for breach of Dr. Dowling's Employment Agreement. Moreover, because there is no individual liability under the ADA and MHRA and the individuals were not personally liable for MMIC's contractual obligations under the Employment Agreement, MMIC's exposure far exceeded the potential exposure of any individual. MMIC's conclusory assertion, that all of the defense costs and the settlement were paid for the "benefit" of the directors and officers, lacks any evidentiary or legal basis. In truth, MMIC settled because it believed that "the company" was "very exposed." *Restuccia* Dep. 81-82 (App. 394).

In sum, MMIC cannot prove that any **Loss** allocable to a purported **Claim** against a director or officer exceeded the \$250,000 retention under the Indian Harbor D&O Policy.

CONCLUSION

For the foregoing reasons, Indian Harbor respectfully requests that the Court affirm the District Court's judgment.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B), as it contains 9,984 words, excluding the parts of the brief exempted by Fed. R. App. 32(a)(7)(B)(iii).

Dated: April 13, 2009

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CERTIFICATE OF SERVICE

I, Leslie S. Ahari, hereby certify that on April 13, 2009, I served two copies of Brief of Defendant-Appellant Indian Harbor Insurance Company on the Plaintiff-Appellant by way of overnight mail:

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