

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. JACQUELINE W. SILBERMANN
Administrative Judge *Justice*

~~PART~~

Executive Risk Indemnity Inc.

INDEX NO. 601976/2004

- v -

William J. Remley, et al.

MOTION DATE _____

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

Administrative Order
Interim Order

The following papers, numbered 1 to _____ were read on this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

~~Upon the foregoing papers, it is ordered that this motion~~

This is an application, pursuant to Paragraph F of the *Guidelines for Assignment of Cases to the Commercial Division*, for the transfer of this case to the Commercial Division (Hon. Bernard Fried, J.). Counsel for plaintiff has submitted a letter in which, it represents, all parties join.

This is a declaratory judgment action in which plaintiff insurer contends that it need not provide Directors and Officers coverage to defendants, directors and officers of a now-bankrupt Delaware corporation. The coverage has to do with a claim by the trustee in bankruptcy asserting that some of the directors and officers breached their fiduciary duty to the corporation by engaging in self-dealing in connection with their activities as officers or directors of a certain holding corporation and its holding company. The trustee first issued a letter demanding that the directors reimburse the bankrupt and thereafter instituted a civil action seeking such relief in North Carolina state court.

Dated: _____

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

The insurer seeks a declaration that it has no obligation to pay because of an exclusion having to do with service as an officer or director of any entity other than the insured and because of an insured-against-insured exclusion, which involves claims made by or on behalf of the insured corporation. The argument is that the alleged wrongdoing by the officers and directors arises out of the service of some of them as officers and directors of another entity. The other claim is that the trustee in seeking reimbursement is acting on behalf of the insured corporation, thus bringing this matter within the reach of the second exclusion.

This action does not demand an award of monetary damages other than the plaintiff's costs and disbursements. Although the current *Guidelines for Assignment of Cases to the Commercial Division* generally contemplate acceptance of actions involving monetary damages, it is clear from the *Guidelines* that some declaratory judgment actions may be pursued in the Division.

The *Guidelines* provide that cases seeking a declaratory judgment as to insurance coverage for a personal injury or property damage action are presumptively to be transferred out of the Division. In the same category are first-party insurance claims and actions by insurers to collect premiums or rescind policies. Actions that are presumptively to be retained include those involving complicated environmental insurance coverage litigation.

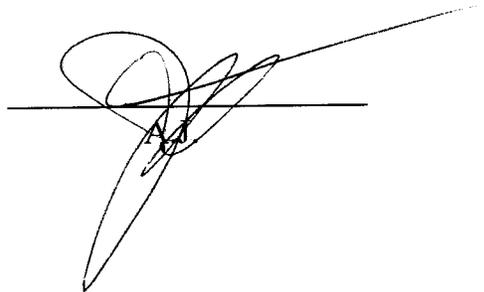
These categories do not precisely address the kind of case at issue here, one involving Directors and Officers liability coverage. The declaratory judgment exclusion cited above (Par. A (2)) is addressed in large part to actions seeking declarations as to underlying actions for personal injury or physical damage to property caused by alleged negligence. The *Guidelines* as currently framed speak of presumptions. The objective of the *Guidelines* is to bring within the Division "complex commercial and business disputes." This does appear to be a relatively complicated case, a matter of sufficient complexity as to be appropriate for processing in the Division. The Justice assigned will presumably be faced with summary judgment motions (and some are pending) that will involve such things as whether a trustee in bankruptcy should be considered to be acting on behalf of the insured for the purposes of D&O insurance coverage. There may also be issues as to whether the claims arise out of service as directors and officers for the holding corporation, Mentmore. At the heart of this action is a dispute about commercial liability coverage for the acts of corporate directors and officers while serving as such. This seems to me a sufficiently commercial matter, in contrast with actions concerning coverage for, say, an action involving personal injury in a

workplace accident. Instructive in this regard, though of course not controlling, is the fact that a DJ action with regard to Directors and Officers coverage is defined as a Division matter in the new draft *Guidelines*, which have been circulated to Bar groups for comment.

This case is now reassigned to Justice James. She has decided a motion and scheduled the case for a conference. However, the motion was a pro hac vice application and the conference is set for January 21. Thus, it appears that Justice James has had little involvement with the substance of this case so that there is no reason why the matter cannot be transferred to the Division.

Accordingly, the application is granted. The Motion Support Office is directed to reassign this matter to Mr. Justice Fried.¹

Dated: January // , 2005

A handwritten signature in black ink, written over a horizontal line. The signature is stylized and appears to be 'J. Fried'.

¹ I note that the RJI in this case and the caption in the court's computer system that resulted from it identify the first named plaintiff by a different middle initial from the one used in the complaint.