

Execs Covered For Sears Bankruptcy Claims, Del. Judge Says

By **Emily Enfinger**

Law360 (January 19, 2023, 8:21 PM EST) -- Two excess directors and officers insurers must defend a real estate investment trust and its executives from underlying bankruptcy litigation accusing them of siphoning billions of dollars from Sears, a Delaware Superior Court judge said in a decision unsealed this month.



A Delaware judge found that two excess D&O insurers are on the hook to defend a real estate investment trust and its executives in an underlying action alleging that they siphoned billions from Sears. (AP Photo/Charlie Riedel)

Judge Mary M. Johnston **said** Dec. 19 that, in a coverage dispute with Endurance American Insurance Co. and Allianz Global Risks U.S. Insurance Co., Seritage Growth Properties sufficiently demonstrated an alternative claim for coverage for an adversary proceeding as a "non-securities claim" and found that coverage can't be denied because the proceeding is related to a previous action.

Seritage Growth Properties, referred to as New Seritage, was formed in 2015 by Robert Riecker, the president of a real estate investment trust created by Sears in 2014 called Seritage Growth Properties and later renamed to Old Seritage Growth Properties. He also held leadership positions within Sears.

According to the opinion, Riecker authorized a rights offering of Old Seritage stock to raise funds in March 2015. A few months later, New Seritage purchased the partnership interests of Seritage Growth Properties LP from Old Seritage. New Seritage then issued the rights offering that funded the purchase of more than

260 properties from Sears in a sale-and-leaseback transaction, future unsecured creditors of Sears would allege.

Edward Lampert, then-CEO and chair of Sears, became chair of the board of trustees of New Seritage on July 7, 2015. That same day, Old Seritage folded into New Seritage, and New Seritage purchased the properties to lease back to the department store chain.

Sears shareholders later filed a consolidated complaint against New Seritage, Lampert and other Sears directors, among others. The suit settled in 2017.

Sears filed for bankruptcy in October 2018. The following April, Sears' unsecured creditors committee filed an adversary proceeding. An amended complaint named Seritage, Lampert, Riecker and more than 50 others as defendants, accusing them of transactions that caused billions of dollars to be siphoned from the department store chain.

According to the judge's opinion, New Seritage held a QBE Insurance Corp. D&O insurance policy that was effective from June 2018 to June 2019. Endurance, Allianz and Continental Casualty Co. issued excess policies that followed the terms and conditions of the QBE policy.

QBE initially denied coverage because the adversary proceeding and the 2015 action were related claims, but later settled the action with the plaintiffs. Continental took a similar stance but also settled, according to the opinion.

The plaintiffs then filed the current action against Endurance and Allianz, seeking a declaration that they are obligated to cover all losses arising from the adversary proceeding, subject to their respective limits of liability.

Representatives of the parties did not immediately respond to requests for comment.

Seritage Growth Properties is represented by Jennifer C. Wasson and Carla M. Jones of Potter Anderson & Corroon LLP and Matthew J. Schlesinger, Ralph M. Muoio, Colin P. Watson, Timothy D. Greszler and Maura A. Sokol of Covington & Burling LLP.

Endurance American Insurance Co. is represented by Thaddeus J. Weaver of Dilworth Paxson LLP and Michael L. Zigelman and Catherine S. Lyster of Kaufman Dolowich & Voluck LLP.

Allianz Global Risks U.S. Insurance Co. is represented by Thaddeus J. Weaver of Dilworth Paxson LLP and Erica J. Kerstein and Dmitriy Gelfand of Robinson & Cole LLP.

The case is Seritage Growth Properties LP et al. v. Endurance American Insurance Co. et al., case number N21C-03-015, in the Superior Court for the State of Delaware.

--Editing by Emma Brauer.