

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA**

In re:)	
)	Chapter 7 Case
)	BKY Case No. 02-40284 to 02-40286
SRC Holding Corp.)	Jointly Administered
f/k/a Miller & Schroeder, Inc.)	
and its subsidiaries,)	
)	
Debtor.)	
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Brian F. Leonard, Trustee,)	
)	
Plaintiff,)	
)	
vs.)	ADV Case No. 03-4284
)	
Executive Risk Indemnity, Inc.,)	
)	
Defendant.)	
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The Marshall Group, Inc., Jerome A.)	
Tabolich, James E. Iverson, Edward J.)	
Hentges, Kenneth R. Larsen, Steven W.)	
Erickson, Paul R. Ekholm, and Mary Jo)	
Brenden,)	
)	
and)	
)	
John M. Clarey, Kenneth E. Dawkins, and)	COMPLAINT IN INTERVENTION
Joseph K. Halloran,)	OF JOHN M. CLAREY,
)	KENNETH E. DAWKINS AND
)	JOSEPH K. HALLORAN
Intervenors.)	
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COMES NOW, John M. Clarey, Kenneth E. Dawkins and Joseph K. Halloran (collectively referred to hereinafter as “Intervenors”), and as and for their Complaint in the adversary proceeding between Plaintiff Brian F. Leonard, Trustee and Defendant Executive Risk Indemnity, Inc., hereby

state and allege as follows:

PARTIES

1. Miller & Schroeder, Inc. (“Miller & Schroeder”), is and at all relevant times was a Minnesota corporation with its principal place of business in Minneapolis, Minnesota. Miller & Schroeder Financial, Inc., (“Miller & Schroeder Financial”) is a subsidiary of Miller & Schroeder, located principally in Minneapolis, Minnesota. Miller & Schroeder and Miller & Schroeder Financial at times relevant were in the business of securities underwriting and securities broker/dealer services.

2. Upon information and belief, Intervenor Jerome A. Tabolich (“Tabolich”) is a Minnesota citizen residing at 14 Meadowlark Lane, St. Paul, Minnesota 55127.

3. Upon information and belief, Intervenor James E. Iverson (“Iverson”) is a California citizen residing at 31300 Lobo Canyon Road, Agoura Hills, California 91301.

4. Upon information and belief, Intervenor Edward J. Hentges (“Hentges”) is Minnesota citizen residing at 3399 Kings Point Road, Excelsior, Minnesota 55331.

5. Upon information and belief, Intervenor Kenneth R. Larsen (“Larsen”) is a Minnesota citizen residing at 539 Linden Lane, Lino Lakes, Minnesota 55014.

6. Upon information and belief, Intervenor Steven W. Erickson (“Erickson”) is a Minnesota citizen residing at 9 Copeland Road, Maple Plain, Minnesota 55359.

7. Upon information and belief, Intervenor Paul R. Ekholm (“Ekholm”) is a Minnesota citizen residing at 2606 West Lafayette Road, Orono, Minnesota 55331.

8. Upon information and belief, Intervenor Mary Jo Brenden (“Brenden”) is a Minnesota citizen residing at 1331 Crestridge Lane, Eagan, Minnesota 55123.

9. Intervenor John M. Clarey (“Clarey”) is and at all times mentioned herein was a resident of the State of Minnesota. Clarey served as the Chief Operating Officer of Miller & Schroeder from November 14, 1997 to January 14, 2000. Clarey served as the Chief Operating Officer of Miller & Schroeder Financial, a subsidiary of Miller & Schroeder, from August 1, 1997 to March 16, 2000. Clarey served as the Executive Vice President of Miller & Schroeder and Miller & Schroeder Financial from January 14, 2000 to May 31, 2001, and August 1, 1997 to May 31, 2001, respectively. Clarey served as director of Miller & Schroeder and Miller & Schroeder Financial at times relevant hereto.

10. Intervenor Kenneth E. Dawkins (“Dawkins”) is and at all times mentioned herein was a resident of the State of Minnesota. Dawkins served as an Executive Vice President of Miller & Schroeder and Miller & Schroeder Financial from July 31, 1997 to December 30, 2000. Dawkins served as a director of Miller & Schroeder and Miller & Schroeder Financial from July 31, 1997 to December 30, 2000.

11. Intervenor Joseph K. “Ken” Halloran (“Halloran”) is and at all times mentioned herein was a resident of the State of Minnesota. Halloran joined Miller & Schroeder Financial as Senior Vice President in February, 1998. In addition to serving as Senior Vice President, Halloran managed and supervised the Retail Division of Miller & Schroeder Financial’s Minneapolis office.

12. Plaintiff Brian F. Leonard is the duly appointed, qualified and acting Trustee of the above-captioned bankruptcy cases.

13. Defendant Executive Risk Indemnity, Inc. (“Executive Risk”) is a Delaware corporation with its principal place of business at 82 Hopmeadow Street, Simsbury, Connecticut 06070-7683.

JURISDICTION

14. The Debtors commenced their bankruptcy cases under Chapter 7 of the United States Bankruptcy Code on January 22, 2002.

15. As this case does not arise under Title 11 of the United States Code or fit within one of the categories listed in 28 U.S.C. §157(b)(2), this is a non-core proceeding over which this Court has jurisdiction under 28 U.S.C. §157(c)(1).

16. Intervenors do not consent to the entry of final orders or judgment by the bankruptcy court.

PROCEDURAL POSTURE

17. The Intervenors have moved to intervene in this adversary proceeding pursuant to Fed.R.Bankr.P. 7024 and Fed.R.Civ.P. 24(a) and 24(b).

18. The Intervenors have intervened in the declaratory judgment lawsuit commenced against Defendant Executive Risk by the above-named intervenors, The Marshall Group, Inc., Jerome A. Tabolich, James E. Iverson, Edward J. Hentges, Kenneth R. Larsen, Steven W. Erickson, Paul R. Ekholm and Mary Jo Brenden, which is pending in the United States District Court for the District of Minnesota, Case No. 03-6339, the Honorable Judge James R. Rosenbaum, presiding.

19. In the district court lawsuit pending before the Honorable Judge Rosenbaum, the Intervenors have requested an order from the district court declaring, among other things, that Executive Risk is obligated to defend, indemnify and pay benefits to the Intervenors for claims asserted in connection with the Underlying Actions, as set forth below, under the Directors and Officers Liability Policy (8166-6027) issued to Miller & Schroeder for the policy period July 31, 2000 to July 31, 2003 (the "Insurance Policy"). The Insurance Policy at issue in the district court

lawsuit pending before the Honorable Judge Rosenbaum is the same policy at issue in this adversary proceeding. The Intervenors are covered persons/entities under the policy and, therefore, are entitled to benefits.

20. The Honorable Judge Rosenbaum has informed the parties that it is staying the Intervenors' action in United States District Court pending resolution of this adversary proceeding. Accordingly, the Intervenors have now intervened in this proceeding for purposes of preserving their rights under the Insurance Policy.

THE INSURANCE POLICY

21. On or about July 31, 1997, Executive Risk, in consideration for a premium in excess of \$100,000 paid by Miller & Schroeder, issued a Directors and Officers Liability Insurance Policy to Miller & Schroeder for the period of July 31, 1997 to July 31, 2000.

22. On or about July 31, 2000, Executive Risk, in consideration for a premium of \$80,000 paid by Miller & Schroeder, renewed the Insurance Policy for the three year period of July 31, 2000 to July 31, 2003.

23. The Insurance Policy provides coverage on a claims-made basis and insures "any past, present or future director or officer" of Miller & Schroeder and certain of its affiliated or subsidiary entities, which includes the Intervenors.

THE UNDERLYING LITIGATION

24. While the Insurance Policy was in full force and effect, Intervenors, and each of them, were sued as defendants in a series of lawsuits, including, but not limited to, the case entitled *In re Heritage Bond Litigation*, venued in the United States District Court for the Central District of California, Court File No.: 02-ML-1475D, and/or named as respondents in a series of National

Association of Securities Dealers, Inc. (“NASD”) arbitration proceedings arising out of the underwriting and brokering of certain alleged securities, commonly known as Heritage Bonds. Said lawsuits and NASD arbitration proceedings are collectively referred to herein as “the Underlying Actions”.

25. Intervenors were not personally or directly involved in the underwriting or brokering of Heritage Bonds. Rather, they were sued and compelled to arbitrate solely by reason of their status as Officers and/or Directors of Miller & Schroeder and Miller & Schroeder Financial on theories of vicarious liability, including, but not limited to, the alleged failure to adequately manage and/or supervise the division/branch office from which the Heritage Bonds were allegedly underwritten and/or brokered.

26. The Underlying Actions, and each of them, constitute covered “Claims” within the meaning of the Insurance Policy.

27. Shortly after the commencement of the Underlying Actions, Intervenors notified Executive Risk and requested that Executive Risk accept the tender of defense and indemnify them as required by the Insurance Policy.

28. In a series of letters dating from 2001 to August 21, 2003, Executive Risk denied coverage to Intervenors for the claims asserted against them in the Underlying Actions on the basis of a policy endorsement, entitled “Securities Exclusion”.

29. Due to Executive Risk’s wrongful refusal to pay defense costs to Intervenors, they have been forced to pay their own costs of defense and, in some instances, amounts to settle certain of the actions.

30. Due to Executive Risk's wrongful refusal to indemnify Intervenors, they face exposure to damages in the Underlying Actions.

31. An actual controversy exists between the Intervenors and Executive Risk concerning their rights and duties under the Insurance Policy described herein.

32. Intervenors Jerome A. Tabolich, James E. Iverson, Edward J. Hentges, Kenneth R. Larsen, Steven W. Erickson, Paul R. Ekholm and Mary Jo Brenden are former Officers and/or Directors of Miller & Schroeder and Miller & Schroeder Financial and commenced the action against Executive Risk in the United States District Court for the District of Minnesota, pursuant to 28 U.S.C. §2201, seeking a determination that the Insurance Policy obligates Executive Risk to defend and indemnify them with respect to the Underlying Actions.

33. Intervenors John M. Clarey, Kenneth E. Dawkins and Joseph K. Halloran have an interest relating to the Insurance Policy which is the subject matter of the action against Executive Risk, as more fully described above, and Intervenors are so situated that the disposition of the action may as a practical matter impair or impede their ability to protect their interests.

COUNT I
(Declaratory Judgment)

34. Intervenors re-allege Paragraphs 1 through 33 above as if set forth in full herein.

35. An actual controversy exists between Intervenors, and each of them, and Executive Risk concerning their respective rights and duties under the Insurance Policy. Intervenors, and each of them, contend that under the Insurance Policy they are entitled to a defense and indemnity in each of the Underlying Actions.

36. Intervenor, and each of them, desire a judicial determination of their rights and duties under the Insurance Policy, and a declaration that Executive Risk is obligated to defend and indemnify them in the Underlying Actions.

37. Accordingly, Intervenor seek a determination, pursuant to 28 U.S.C. §2201 of the parties' rights and duties under the Insurance Policy described herein.

**COUNT II
(Breach of Contract)**

38. Intervenor re-allege Paragraphs 1 through 37 above as if set forth in full herein.

39. Executive Risk has a contractual duty to pay the defense costs of Intervenor and indemnify them against the claims asserted in the Underlying Actions. This contractual duty includes a duty of good faith and fair dealing.

40. Intervenor have performed all conditions of the Insurance Policy to be performed on their part, including payment of premiums and timely notice of the Claims.

41. Executive Risk breached its contractual obligation to Plaintiffs by failing to defend and indemnify them in the Underlying Actions.

42. As a direct and proximate result of Executive Risk's breach of contract, Intervenor have been damaged in an amount in excess of \$75,000.00, exclusive of interest and costs, plus pre and post judgment interest, and will continue to suffer and sustain additional damages and costs in an amount to be proven at trial.

**COUNT III
(For Illusory Coverage/Estoppel)**

43. Intervenor re-allege Paragraphs 1 through 42 above as if set forth in full herein.

44. At the time Executive Risk accepted the premium payments for the Insurance Policy, Executive Risk knew that Miller & Schroeder and Miller & Schroeder Financial were engaged in the business of securities underwriting and securities broker/dealer services, and that the exposure Miller & Schroeder's and Miller & Schroeder Financial's officers and directors would incur would relate to claims arising out of alleged violations of the Securities Act of 1933, state securities, or "Blue Sky" law, and/or common law imposing liability in connection with the offer, sale or purchase of securities.

45. Notwithstanding that knowledge, Executive Risk included the purported "Securities Exclusion" endorsement as part of the Insurance Policy. Intervenors reasonably believed and expected that because Miller & Schroeder and Miller & Schroeder Financial were in the business of securities underwriting and securities broker/dealer services, the Insurance Policy would cover them in their capacities as officers and directors from claims arising out of alleged violations of the Securities Act of 1933, state securities or "Blue Sky" laws, and/or common law imposing liability in connection with the offer, sale or purchase of securities.

46. If the purported "Securities Exclusion" endorsement is interpreted in the fashion that Executive Risk contends, Intervenors would never have coverage for the very claims which they sought to insure against, and Executive Risk would have collected \$193,000 in premiums without any risk of loss. As such, the Insurance Policy would afford illusory coverage and Executive Risk should be estopped from relying on the purported "Securities Exclusion" endorsement to deny coverage.

**COUNT IV
(Attorney's Fees)**

47. Intervenor's re-allege Paragraphs 1 through 46 above as if set forth in full herein.

48. Intervenor's have and will continue to incur attorney's fees in connection with this action to establish Executive Risk's breach of its duty to defend and indemnify them against the Underlying Actions.

49. Due to Executive Risk's breach of its duty to defend under the Insurance Policy, Executive Risk is required to pay the Intervenor's' attorneys fees incurred in this action, which amount shall be proven at trial.

REQUEST FOR RELIEF

WHEREFORE, Intervenor's, and each of them, respectfully request that the Court adjudicate the rights of the parties and issue a recommendation and report as follows:

- a. Declaring that Executive Risk is obligated to defend and indemnify Intervenor's for the claims asserted in the Underlying Actions;
- b. Awarding Intervenor's the damages they incurred in defending and settling certain of the Underlying Actions, including attorneys fees and costs;
- c. Awarding Intervenor's the damages they incurred in prosecuting this action, including attorneys fees and costs;
- d. Awarding Intervenor's interest, costs and disbursements; and
- e. Awarding such other relief as this Court deems just and appropriate under the circumstances.

Dated: September 27, 2004

JOHNSON • PROVO-PETERSEN, LLP

s/ Klay C. Ahrens

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