

Prior Notice, Prior Litigation and Prior Demand Exclusions May Bar Coverage for Company Implicated by Prior Litigation to Which Company Was Not a Party

March 2006

In an unpublished decision, a Missouri federal district court, applying Missouri law, has held that coverage is barred under the prior notice, prior litigation and prior demand exclusions for an indemnity action against an insured company arising out of prior litigation to which the company was not a party, where the conduct of the company was implicated in the prior litigation. *North Am. Specialty Ins. Co. v. Correctional Med. Svcs., Inc.*, 2006 WL 208635 (E.D. Mo. Jan. 26, 2006).

A subcontractor that provided medical services to prison inmates was insured under a health care providers liability policy providing coverage for "bodily injury . . . caused by a medical incident . . . arising from the insured's profession as a health care professional." Prior to inception of the policy, an inmate sued the primary contractor and the state, but not the subcontractor, alleging that he was injured as a result of negligent medical care. The contractor sought defense and indemnity from the subcontractor, which had provided the medical services at issue. Although the subcontractor refused to defend or indemnify the contractor, its insurer at the time indicated that it would provide coverage for the contractor for liability arising out of the subcontractor's conduct. The subcontractor's insurer was subsequently placed into rehabilitation and could not fulfill its promise.

The inmate subsequently obtained a judgment against the state. The primary contractor's professional liability insurer satisfied the judgment and brought an action for contribution and indemnity against the subcontractor and several of its insurers. The subcontractor tendered defense of the suit to its current health care provider liability insurer. The insurer denied coverage based on the prior notice, prior litigation and prior demand exclusions.

The prior notice exclusion barred coverage for any claim "for which the insured is entitled to indemnity and/or payment by reason of having given notice of any circumstance which might give rise to a claim under any other policy or policies." The court concluded that the exclusion applied in the instant matter because the

subcontractor had notified its prior insurer of the circumstances underlying the inmate's claim, and the prior insurer had agreed to cover that claim. The court rejected the subcontractor's argument that the exclusion was inapplicable because the prior insurer never paid the claim, reasoning that the phrase "entitled to indemnity and/or payment" did not require that the policyholder actually be successful in obtaining indemnity or payment.

The court also considered the policy's prior litigation exclusion, which barred coverage for any claim "arising from any pending or prior litigation or other proceeding as of the inception date of this policy, as well as all claims or litigation based upon the pending or prior litigation or derived from the same, or essentially the same, facts . . . that gave rise to the prior or pending litigation." Relying on *ML Direct, Inc. v. TIG Specialty Insurance Co.*, 79 Cal. App. 4th 137 (2000), the court concluded that the exclusion applied even though the subcontractor was not a party to the inmate's suit at the inception of the current insurer's first policy period. Noting that the current litigation derived from the inmate's lawsuit, the court concluded that the language of the exclusion was "broad and unambiguous" and did not require that litigation be "against the insured" for the exclusion to apply.

Finally, the court concluded that coverage was also barred by the prior demand exclusion, which provided that coverage was not available for any claim "arising from a demand, summons or other notice received by the insured prior to the effective date of this policy." Noting that the contractor had sought defense and indemnity from the subcontractor prior to inception of the current insurer's policies, the court refused to equate the phrase "demand, summons or other notice" with a formal "claim" (*i.e.*, a formal demand for damages or a lawsuit). The court ruled that the contractor's letters seeking defense and indemnity clearly constituted a "demand" under the policy, and failing that, at least fell squarely within the plain meaning of "other notice." The court further concluded that the present suit arose from the prior demands, in which the contractor had requested that the subcontractor accept responsibility for its role in the inmate's injury.