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NEWSLETTER

# Other Decisions of Note

March 2006

**Routine Practice of Reporting Claims Is Insufficient to Establish Notice Under Policy**

The United States District Court for the Middle District of Florida has held that mere evidence of a routine practice of reporting claims is insufficient to establish timely written notice under a claims-made and reported policy. *Lot v. Fireman's Fund Ins.*, 2006 WL 229217 (M.D. Fla. Jan. 31, 2006).

The policyholder submitted an affidavit of an employee who asserted that it was the policyholder's regular practice to contact its insurer upon receiving notice of a claim. The court, however, noted the affiant's lack of independent recollection of the date, sender or recipient of the notice and even whether the alleged notice was in writing. Citing these deficiencies, the court concluded that "mere evidence of a mailing custom or practice is an insufficient basis for establishing actual mailing" and granted the insurer's motion to dismiss.

**Hotel's Discriminatory Practices Falls Under Professional Services Endorsement**

The United States District Court for the Middle District of Pennsylvania has denied an insurer's motion to dismiss, holding that there is coverage for a Section 1981 lawsuit under the professional services endorsement to a commercial general liability policy. *General Direct Marketing v. Lexington Ins. Co.*, 2006 WL 148884 (M.D. Pa. Jan. 19, 2006). The endorsement to the policy provided that the insurer would pay "on behalf of the Insured all sums which the Insured shall become legally obligated to pay because of . . . injury arising out of the rendering or failure to render . . . professional services by the Insured, or by any person for whose acts or omissions such Insured is legally responsible."

The policy excluded "actual discrimination against a past, present, or prospective employee . . . [or] any other person." The National Association for the Advancement of Colored People and twelve of its members filed a lawsuit against the insured alleging discriminatory policies and procedures by a hotel owned by the insured. The court stated that because the injuries alleged in the underlying complaint arose out of the rendering of services unique to a hotel proprietor (*i.e.*, discrimination in rendering guest accommodations), there is coverage under the professional services endorsement.

The court further held that because the alleged discrimination claims did not require proof of intent to discriminate by the vicariously liable insured, the lawsuit did not fall under the "intentional discrimination" exclusion.

**No Coverage for EPL Complaint Alleging Same Facts As Pre-Policy Demand**

The United States District Court for the District of Oregon, in an unpublished decision, has held that a D&O policy did not afford coverage for an EPL lawsuit because it involved the same facts at issue in a demand letter and administrative complaint prior to the inception of the policy. *Southern Coos Hospital & Health Center v. Executive Risk Indem.*, 2006 WL 118440 (D. Or. Jan 12, 2006).

Prior to the inception of the policy, the insured received a letter from an employee, stating that the employee had been subjected to harassment at work and slanderous accusations and had been denied rights to medical leave. Also prior to the inception of the policy, the employee filed a complaint with the Bureau of Labor and Industries (BOLI) that included substantially the same allegations as were contained in the letter. After the policy incepted, the employee filed suit against the insured in district court, again including substantially the same allegations as were included in both the letter and the BOLI complaint.

The court stated that because the letter, the BOLI complaint and the district court complaint all constitute "written notice received by Insured that any person or entity intends to hold an Insured responsible for a Wrongful Act," and because the district court complaint asserts substantially the same facts as does the demand letter and the BOLI complaint, the district court complaint is "a claim first made when plaintiff received the demand letter," prior to the inception of the policy.

**Professional Liability Policy of Radiologist May Cover Claim by Medical Insurer of Patients**

In an unpublished decision, a California appellate court has held that an insurer had a duty to defend radiologists insured under a professional liability policy against a lawsuit alleging that they performed elective surgery on patient whose medical insurance did not cover the surgery and then disguised the procedures as medically necessary. *Grusd v. Admiral Ins. Co.*, 2006 WL 205113 (Cal. Ct. App. Jan. 27, 2006).

The appellate court rejected the insurer's argument that the policy afforded coverage only to claims by patients and not to claims by medical insurers of the patients. The court explained that the policy contained no such limitation and reasoned that the underlying litigation "was predicated entirely on [the medical center's] conduct in providing radiology services to patients referred by cosmetic surgery centers." The court also rejected the insurer's argument that it had no duty to defend because the gravamen of the action involved fraud. Accordingly, to the court, "it remains within the realm of possibility that appellants' liability in the underlying action could have been predicated on conduct under a negligent misrepresentation theory."

**Exclusion for Failure to Pay Not Triggered by Employee's Failure to Pay Upon Demand When Independent Causes of Action Asserted Against the Employer**

In an unpublished opinion, the United States District Court for the Western District of Washington, applying Washington law, has held that that an exclusion for liability contributed to by a "failure to pay" was not triggered where the alleged failure to pay was by the policyholder's employee and the underlying plaintiff had asserted separate and independent causes of action against the policyholder directly. *Security Ins. Co. of Hartford v. Sea'N Air Travel*, 2006 WL 197130 (W.D. Wash. Jan. 23, 2006).

The policy provided coverage for "any negligent act, error or omission of the 'insured.'" In the underlying action, the plaintiff sued the defendant travel agency for the negligent hiring and supervision of an employee who had stolen plane tickets. The former employee had been unable to pay court ordered restitution, and the insurer attempted to invoke the exclusion for "any liability arising out of or contributed to by the co-mingling of money or the inability or failure to pay." The court held that the claim against the employer was independent and did not arise out of the employee's failure to pay. The court stated that to hold otherwise would exclude coverage whenever a complaint or demand was served and left unpaid.