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NEWSLETTER

Agent's E&O Policy Excludes Coverage for Amounts Administratively Ordered Paid As Restitution to Policyholders of Defunct Insurer

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In an unpublished opinion, a Michigan intermediate appellate court, applying Michigan law, has held that an E&O insurer had no duty to defend or indemnify its insurance agent policyholder because: 1) an administrative suspension proceeding brought by the state insurance regulator did not constitute a "claim" or "suit," 2) an exclusion for fines and penalties barred coverage for restitution sought to be imposed on the agent as a penalty and 3) a voluntary payments clause was enforceable without a showing of prejudice by the insurer. *Dupuis v. Utica Mutual Ins. Co.*, 2006 WL 1084336 (Mich. App. Apr. 25, 2006).

The policyholder was an insurance agent insured under a claims-made E&O policy issued by the insurer. The agent placed coverage for at least two of his clients with a property insurer neither admitted nor eligible to conduct business in the state. When those two clients suffered losses, the property insurer failed to pay their claims. The agent paid a portion of the clients' losses from his own funds. The E&O insurer defended the agent against a suit brought by one of the clients, and paid a portion of the total damages determined to be owed by the agent, less amounts the agent had voluntarily paid.

The state insurance bureau subsequently filed a Petition for Summary Suspension against the agent and his company. The petition alleged various instances of misconduct, primarily in connection with the sale of policies issued by the non-admitted insurer. The petition authorized the insurance commissioner, after a formal hearing, to order the payment of fines, refund of any overcharges, payment of "restitution to the insured or other claimant to cover incurred losses, damages, or other harm" attributable to the agent's acts and suspension of the agent's license. The E&O insurer did not provide the agent with a defense in the insurance bureau proceedings.

The agent later sued the insurer, alleging a breach of the duty to defend the agent in the insurance bureau proceedings and breach of contract due to the insurer's refusal to reimburse the agent for amounts paid to its clients for their unpaid claims. The complaint also included counts framed as "equitable subrogation," "misrepresentation" and "unfair trade practices." On cross-motions for summary judgment, the trial court held for the insurer on all counts.

The intermediate appellate court affirmed, holding that the insurer had no duty to defend the agent in the insurance bureau proceedings because those proceedings did not constitute a "claim" or "suit" as defined in the policy. The policy defined "claim" as "a written notice, including service of a suit or a demand for arbitration, received by one or more insureds asking for money or services." The policy defined "suit" as "a civil proceeding in which damages because of a loss from a negligent act, error, or omission are alleged." The court concluded that the nature of the proceedings against the agent, as well as the fact that those proceedings were conducted before the insurance commissioner, rather than a court of law, precluded finding a "claim" or "suit" present.

The court also held that the term "restitution" as used in the petition against the agent was not equivalent to the term "damages" as used in the policy. Noting that the policy expressly excluded coverage for any claim or suit seeking a "penalty," the court reasoned that the petition defined the restitution sought as a penalty. Accordingly, the court concluded, the insurer would have no duty to defend the agent even if the proceedings constituted a claim or suit because they did not seek "damages."

The court also held that the insurer was not required to indemnify the agent for amounts the agent voluntarily paid to its clients. The policy contained a voluntary payments clause stating that the agent, as a condition precedent to coverage, could "[n]ot voluntarily assume or admit liability nor, without prior written consent, settle any claim or incur any expense except at the insured's own cost." Relying on *Coil Anodizers, Inc. v. Wolverine Insurance Co.*, 327 N.W.2d 416 (Mich. App. 1982), the court rejected the agent's argument that the insurer was required to demonstrate prejudice in order to invoke the voluntary payments clause.

Finally, the court concluded that the trial court correctly granted summary judgment with respect to the agent's misrepresentation claim, based on its alleged reliance on a brochure describing the coverage available under the E&O policy issued by the insurer. The court noted that a misrepresentation claim requires that the plaintiff's reliance be reasonable. Because the agent had the policy itself, and the policy did not provide the asserted coverage, the court held, the agent's alleged reliance on the brochure was unreasonable.