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NEWSLETTER

Contiguous Coverage Does Not Excuse Late Notice

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In an unreported decision, a California appellate court has ruled that a claim made during the first of two policy periods under claims-made-and-reported malpractice policies, but not reported until the second policy period, was not covered under either policy because it was reported too late for the first policy and was barred by an exclusion in the second policy for events that the insured "could have reasonably foreseen" might become a claim. *Goings & Goings v. U.S. Risk, Inc.*, 2005 WL 3320863 (Cal. App. Dec. 8, 2005).

The insured convalescent home purchased consecutive claims-made-and-reported malpractice policies. The first policy period was from November 1, 2000 to November 1, 2001, and the second policy period was from November 1, 2001 to November 1, 2002. Both policies provided coverage for claims made and reported within the policy period, with a 30-day additional reporting period. Both policies also contained an exclusion barring coverage for "[a]ny 'Event, offense or Medical Incident' committed prior to the effected date of this policy if ... at the effective date of this Policy you knew or could have reasonably foreseen that such 'Event,' offense or 'Medical Incident' might reasonably be expected to be the basis of a claim." Both policies had a retroactive date of November 1, 2000.

On October 1, 2001, with 30 days remaining on the first policy period, the convalescent home received a letter informing it that a suit for medical malpractice was to be filed within 90 days. The actual suit was filed on October 16, 2001, and the convalescent home was served on November 6, 2001, six days into the second policy period. The convalescent home did not report the claim to the insurer until December 11, 2001, which was beyond the 30-day additional reporting period for the first policy. The insurer denied coverage, and the convalescent home filed suit.

The court held that there was no coverage under the first policy because the claim was made in the October 1, 2001 letter that unambiguously stated there would be a lawsuit, and the convalescent home failed to report the claim within the 30-day extended reporting period. The court ruled that the existence of continuous coverage, by virtue of the second policy, did not change the result and make the notice timely: "Nor can the fact of continuous coverage excuse an unambiguous requirement to report claims within one-year policy periods . . . . Yes, that means a claim in Policy 1 and a report in Policy 2 can indeed equal no coverage . . . ." The court also held that in the event the initial letter threatening suit did not constitute notice, the letter triggered the exclusion in the second policy since, in light of the October 1 letter, the convalescent home could

have reasonably foreseen the suit.

The convalescent home also argued that because neither the letter nor the complaint indicated an amount of damages in excess of the self-insured retention, neither could be considered a claim under the policy. The court rejected this argument because the definition of claim did not state that a demand must be in excess of the self-insured retention. Finally, the court held that the insurer did not waive its defenses by providing counsel prior to rejecting the claim since the costs for the defense counsel never exceeded the self-insured retention, and the convalescent home did not argue it could have received better or more efficient legal counsel on its own.