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NEWSLETTER

Other Decisions of Note

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Late Notice Defense Barred Where Insurer Agrees to Pay Defense Expenses Without Reserving Right to Raise Defense

A Texas intermediate appellate court has ruled that waiver and estoppel barred an E&O insurer from disclaiming coverage due to a company's failure to provide notice of the claims against it until after expiration of the relevant policy because the insurer initially agreed to reimburse the company for its reasonable and necessary defense costs without reserving its right to deny coverage based on the company's late notice. *Ulico Casualty Co. v. Allied Pilots Assoc.*, 2005 WL 3436548 (Tex. App. Dec. 15, 2005). Upon receipt of the company's claim notice, the insurer reserved as to certain defenses, but not late notice. The insurer also informed the company that it was entitled to reimbursement of non-covered defense costs under the policy and provided the insurer's litigation guidelines and attorney forms. Six months later, the insurer filed a declaratory judgment action seeking to deny coverage based on late notice. Relying on *Farmers Texas County Mutual Insurance Co. v. Wilkinson*, 601 S.W.2d 520 (Tex. Civ. App. 1980), the appellate court reasoned that estoppel prevented the insurer from asserting the late notice defense because it undertook the defense of the case without qualification or reservation of its right later to deny coverage based on late notice. The court rejected the insurer's argument that *Wilkinson* requires that the insurer actually control the defense of its insured for estoppel to apply. The court concluded that the company was prejudiced by the insurer's actions because it was denied the opportunity to obtain an extended reporting period and was forced to incur additional attorney fees in defending of the declaratory judgment action.

Court Applies *Pro Rata* Allocation to Conflicting Excess Insurance Clauses

In an unpublished opinion, the United States District Court for the Western District of Oklahoma held that when two applicable policies have conflicting excess insurance clauses, the proper result is to impose costs upon the insurers pro rata according to the ratio of each of the policy limits in relation to the cumulative limit of all the concurrent policies. *Am. Cas. Co. of Reading Pa. v. Health Care Indem., Inc.*, 2006 WL 15489 (W.D. Okla., Jan. 4, 2006). In this malpractice insurance coverage dispute, both policies contained exclusions stating that the policies were to be considered excess policies in the event of other insurance. The court noted that if one of the policies had disclaimed all coverage in the event of any other insurance coverage—an "escape" clause —the policy with the escape clause would be deemed the primary insurance. However, the court found that while one of the policies did not use the word "excess" in describing its liability in the event of other insurance, the policy language clearly made the policy excess to any other coverage (rather than creating an escape clause) because the coverage was limited to losses "more than" the limits of any other insurance. Finding that

both of the policies contained excess clauses, the court explained that insurers should share in the defense costs on a *pro rata* basis according to the ratio of each of the policy limits in relation to the cumulative limit of all the concurrent policies.

Settlement Between Insurer and Insured Not Subject to Attack by Third Party

The Superior Court of New Jersey has ruled that a settlement agreement between an insurer and its insured, wherein the insured released any and all claims against its insurer in settlement of a declaratory judgment action initiated by the insurer after the underlying lawsuit was filed, is binding on a third party who was assigned the insured's claims. *Keyes v. Certian Underwriters at Lloyd's of London*, 2005 WL 3501882 (N.J. Super. L. Dec. 8, 2005). The court determined that the third-party, the claimant in the underlying litigation, had "no relevant rights" under the policy because the insured had waived all potential claims against the insurer. The court also rejected the third party's argument that it was not bound by the settlement agreement because it was not properly joined in the declaratory judgment action. According to the court, "[a]ny other holding would allow [the third party] to veto the settlement, a result which would have torpedoed the . . . settlement." Further, the court ruled that the third-party claimant's asserted "implied but unnamed third-party beneficiary" status has to be rejected as contrary to the "court's policy in favor of settlements."