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NEWSLETTER

Coverage Available for Claim Caused by Both Covered Act and Excluded Event

January 2003

The Ninth Circuit Court of Appeals, applying California law, has held that when two acts or events give rise to a claim, an errors and omissions policy affords coverage if one of the events (malpractice) was an act covered by the policy, even though the other event (bankruptcy) triggered an exclusion. *Conestoga Servs. Corp. v. Executive Risk Indem. Inc.* 312 F.3d 976 (9th Cir. Nov. 27, 2002).

The policyholder in this case was an insurance brokerage firm that assisted a surety in issuing a surety bond as part of a retail store's self-insurance plan. Several months after the bond had been issued, the surety and the retail store attempted to reduce the amount of the bond, but the brokerage firm failed to take the necessary steps to complete the reduction. The retail store later filed for bankruptcy, and the obligee on the bond attempted to recover for the bond's original value. The surety then sued the brokerage firm for malpractice, and the brokerage firm tendered the claim to the issuer of its errors and omissions liability policy for defense and indemnity. The insurer denied coverage based on an exclusion in the policy for claims "based on or directly or indirectly arising out of or resulting from the bankruptcy of, or suspension of payments or failure or refusal, in whole or in part, to pay by...any self-insurance plan." Coverage litigation followed.

The insurer argued that the exclusion applied because the claim was a result of the bankruptcy of the retail store. The brokerage firm contended that the claim was a result of its alleged negligence. The court ruled in favor of the brokerage firm, holding that the exclusion did not bar coverage. The court noted that the California Supreme Court had previously addressed the issue of assessing multiple causes for the purpose of determining coverage under a liability policy, and had *found that coverage was available in two scenarios. See* Garvey v. State Farm Fire & Cas. Co., 770 P.2d 704 (Cal. 1989) (*en banc*). First, *Garvey* held that coverage is available where "the efficient cause—the one that sets others in motion—is the cause to which the loss is to be attributed, though the other causes may follow it, and operate more immediately in producing the disaster." *Garvey* held that in the second scenario, where a claim is the proximate result of two independent causes, coverage is available based on either cause. Relying on *Garvey*, the Ninth Circuit reasoned that coverage for the brokerage firm's claim was available under either scenario because the firm's alleged malpractice was at least a proximate cause, if not the efficient cause, of the claim. In particular, the court pointed to the fact that the underlying suit was based on the grounds that the brokerage firm was negligent in

issuing the bond, not that the retail store surety bond was a poor risk or that the retail store went bankrupt.

For more information, please contact one of WRF's Professional Liability Attorneys at 202.719.7130.