

New York Public Policy Mandates Right to Purchase Extended Reporting Period Coverage

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In an unreported decision, a New York trial court, applying New York law, has held that even though a policyholder did not have a right under two claims-made professional liability policies to purchase extended reporting period (ERP) coverage upon the policyholder's decision not to renew, New York public policy required that the policyholder have such a right. *Segal Co. v. Certain Underwriters at Lloyd's, London*, No. 601110/03 (N.Y. Sup. Ct. Nov. 18, 2003).

The insurer had issued primary and excess policies in the excess and surplus lines market to a benefits consulting firm. The primary policy's extended reporting period endorsement provided that the firm could purchase ERP coverage in "the event of cancellation or non-renewal of the insurance by [the insurer]." The excess policy followed form to the primary policy. Several months before the policies expired, the firm's broker informed the firm that it would be unable to replace the firm's coverage "due to recent adverse loss experience." The firm responded that it would exercise its right to purchase the ERP for both the primary and excess policies. The insurer then offered to renew the primary and excess policies under different terms, but the firm refused and elected to purchase ERP coverage. The insurer argued that the firm did not have such a right since the firm, and not the insurer, had declined to renew the policy. Litigation concerning the firm's right to elect ERP coverage commenced.

The court first held that the insurer's renewal proposal did not trigger the firm's contractual right to purchase ERP coverage because the primary policy, and thus the follow-form excess policy, provided that "the quotation of different premiums, deductibles, limits of liability, or policy language in a renewal offer does not constitute a refusal to renew." Consequently, since the insurer had not cancelled or failed to offer renewal policies, the firm did not have a right under the language of the policies to purchase ERP coverage.

Nevertheless, the court concluded that New York public policy required that the firm have a right to purchase ERP coverage under both policies. In so holding, the court relied upon a New York Insurance Department regulation—11 NYCRR § 73.3(c)(1)—that requires that all claims-made policies allow the policyholder to purchase ERP coverage upon termination or non-renewal, even where caused by the policyholder. Citing a New York statute providing that all policies that fail to comply with New York's insurance laws "shall be

enforceable as if [they] conformed with such requirements or prohibitions," the court held that the firm had a right to purchase ERP coverage under the primary and excess policies. The court rejected the insurer's arguments that the insurance regulations did not apply because the insurer was a foreign insurer not authorized to do business in New York and the policies were issued in the excess and surplus lines market, explaining that the insurer "not being authorized to do business in New York has nothing whatsoever to do with the right of New York to regulate industries affecting its residents."

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