

# Dismissal and Subsequent Refiling of Action Does Not Alter Trigger Date for Claims-Made Policy

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A Missouri court of appeals has held that when a lawsuit is dismissed without prejudice for failure to prosecute and subsequently refiled, the trigger of coverage under a claims-made policy is based on the date of the filing of the original suit. *Northern, et al. v. Physicians Defense Association*, 2002 Mo. App. LEXIS 1905 (Mo. Ct. App. Sept. 16, 2002).

In May 1995, plaintiff in the underlying action was born with brain damages and suffered other birth complications. In January 1997, a medical malpractice action was filed on his behalf against the insureds, a doctor and a clinic. That action was dismissed for failure to prosecute in June 1999, but was refiled in August 1999. In July 2000, a consent judgment was entered in favor of plaintiff for \$14.4 million. Under the terms of a settlement agreement, the plaintiff agreed to enforce the judgment only against the insurance carriers. Thereafter, the plaintiff, standing in the shoes of the insureds, sought coverage from two professional liability insurers under consecutive claims-made policies. The first insurer provided coverage for claims made during the policy period from January 1, 1997 through December 31, 1997, with a retroactive date to cover medical occurrences after January 1, 1995. The second insurer provided coverage for claims made during the policy period from June 1, 1997 (the date the insureds canceled the first policy) through June 1, 2000, with a retroactive date to cover medical incidents occurring after May 1995. In its application for the second policy, the hospital informed the second insurer of the May 1995 incident and the January 1997 lawsuit. The plaintiff argued that the first policy applied because the refiled lawsuit constituted the same cause of action the first insurer received notice of during the policy period. The plaintiff further contended that the second policy also covered the claim because its notification of the newly refiled lawsuit to the second insurer occurred during the policy period. The court agreed with the plaintiff that the first policy applied but rejected the insureds' argument as to the second policy.

The court initially noted that, had the case not been dismissed, it was indisputable that the first policy applied because the alleged wrongful act, the subsequent January 1997 lawsuit and the insured's notice to its insurer all occurred during the first policy period. Although the court acknowledged that a voluntary dismissal of a claim renders the initial claim void, it reasoned that the dismissal had no impact because "a claims made policy is triggered when the claim is made to the insurer." Thus, because the refiled suit related back to when

the original claim was made, the court determined that the first policy was triggered.

The court applied the same rationale to the second policy and concluded that the second policy did not provide coverage. The second policy provided that "[a]ll claims arising out of the same medical incident will be considered as having been made at the time the first report was made." In its application, the insureds had referenced the May 1995 incident and its notice of the claim to the first insurer. The court, relying on an Eighth Circuit case applying Missouri law in which the court held that coverage "a claims made policy is triggered when a claim is first made, but not every time a claim is made," (*Berry v. St. Paul Fire & Marine Ins. Co.*, 70 F.3d 981 (8th Cir. 1995)), held that the second claims-made policy was not triggered because the initial claim was made before policy inception of the policy.

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