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NEWSLETTER

Other Decisions of Note

July 2004

No Duty to Defend Employee Sued Outside Scope of Duties for Insured

In an unreported decision, a New York appellate court has held that an insurer had no duty to defend a physical therapist in a malpractice action because the therapist was not sued "while acting within the scope" of his duties as an employee of the insured entity. *Rescott v. Am. Cas. Co. of Reading, Pennsylvania*, 2004 WL 1328404 (N.Y. App. Div. June14, 2004). The court explained that the employee worked for two different physical therapy providers and that, although he was insured in his capacity as an employee of the first entity, the underlying complaint named him as a defendant solely in his capacity as a therapist for the second, uninsured entity.

Insurer Cannot Appeal Settlement in Case Where It Was Not Required to Pay

The United States Court of Appeals for the Third Circuit has held that an insurer lacked standing to appeal a district court's approval of an underlying settlement where the settlement did not require the insurer to make any payment. *IPSCO Steel (AL.), Inc. v. Blaine Const. Co.*, 2004 WL 1277959 (3rd Cir. June 10, 2004). The insurer issued a professional liability policy for a construction project that required it to pay money only after any project-specific policies were exhausted. The settlement agreement approved by the trial court required payment only from the project-specific insurer, but it also "capped" the potential exposure policy at an amount below the policy limits. The professional liability insurer sought to challenge the settlement, arguing that it was aggrieved because it was more likely to face exposure as a result of a second underlying suit in light of the cap on the project-specific insurer's policy. The Third Circuit held that the insurer was not aggrieved for purposes of standing because it was "at least two steps removed from any real effect" since there would first have to be a finding that the insured was liable and that the policy afforded coverage. The court also noted that even if the insurer had standing, its argument would fail because a district court generally has no obligation to evaluate the fairness and reasonableness of settlements of non-class action lawsuits.

"In Any Way Involving" Language Precludes Coverage

A Texas intermediate appellate court has held that an exclusion in an E&O policy issued to an insurance broker for any claim "arising out of...or in any way involving...[p]lacement of risk or an insurance or reinsurance contract...with any insurance company...that is not rated B+ or higher by A.M. Best...and...becomes bankrupt" precluded coverage for lawsuits brought against the broker after it placed coverage with an insufficiently-rated insurer that became insolvent. *Greenwood Ins. Group, Inc. v. U.S. Liab. Ins. Co.*, 2004 WL 1351413 (Tex. Ct. App. June 17, 2004). The broker argued that the insolvency exclusion did not preclude

coverage because the insolvent insurer's policy would have precluded coverage for the lawsuit brought against the broker's client irrespective of the insurer's insolvency and because the lawsuits against the broker contained misrepresentation claims that were "unrelated to, and independent of," the underlying insurer's insolvency. The court rejected the broker's arguments, stating that the "broadly-worded [insolvency exclusion] excludes, not only claims 'arising out of' [the underlying insurer's] bankruptcy, but also claims 'in any way involving' [the underlying insurer's] bankruptcy." The court reasoned that the underlying insurer's insolvency "set into motion a chain of events" that led to the suits against the broker, and that the insolvent insurer never denied coverage because of an exclusion but rather failed to pay because of its insolvency.

Voided Transfer Coverage for Auto Dealer

A Florida appellate court has held that a "Title Errors and Omissions Liability Endorsement" to a commercial lines policy issued to an auto dealership did not provide coverage for a lawsuit by a bankruptcy trustee to set aside the transfer of five automobiles that had been fraudulently purchased by employees of the bankrupt company, with the company's funds, but titled to themselves or their friends. *Pompano Motor Co. v. Chrysler Ins. Co.*, 2004 WL 1335811 (Fla. Dist. Ct. App. June 16, 2004). Under the endorsement, coverage was available only if the auto dealer was sued because of negligence and the purchaser, the lienholder or legal owner filed suit "for damages because of the error or omission title or omission in the title registration." The court reasoned that coverage for the $50,000 settlement of the lawsuit was unavailable in this case because the bankruptcy trustee, which stood in the shoes of the company, was neither the lienholder nor the legal owner of the cars, which were owned by individuals. In addition, the court held that coverage was unavailable because there was no negligence on the part of the auto dealer since it had no duty "to look behind the transactions and conduct quasi-criminal investigations" into the details of each transaction.