

Amended Complaint Does Not Constitute a New Claim

August/September 2002

The U.S. Court of Appeals for the Fifth Circuit has held that (1) the addition of a negligent representation claim in an amended complaint does not constitute a new claim under a claims-made D&O policy, and (2) the insured officer's duty to notify the insurer was triggered by the initial filing of the action against him, and his failure to timely report the claim precluded coverage. *National Union Fire Ins. Co. v. Willis*, 2002 WL 1369092 (5th Cir. June 25, 2002).

The insurer sought a declaratory judgment that an officer was not entitled to coverage under any of its claims-made directors and officers policies in connection with a suit alleging fraud and tortious interference with contract that was first filed in 1998. The applicable policies covered the time period of March 1998 to March 1999, March 1999 to March 2000 and March 2000 to March 2001. In 2000, the plaintiffs filed a fourth amended petition, adding a claim for negligent misrepresentation against the insured. National Union was first notified of the lawsuit in February 2000. The insurer denied coverage, asserting that because National Union was not notified of the lawsuit until 2000, the claims were not timely reported.

The insured officer asserted that he was not required to notify the insurer until the fourth amended complaint since the earlier petitions asserted intentional torts that fell outside of the policy coverage. Thus, the insured claimed, the 2000 notification of the claim after the amended fourth complaint was under the 2000 policy. The court disagreed and found that the amended claim, which was based on the same facts as the alleged original complaint, was part of the initial lawsuit that fell under the 1998 policy. Thus, the insured should have given notice to the insurer "in 1998 when he was first made aware of circumstances that could reasonably be expected to give rise to a claim against him."

Moreover, the court found that in determining whether the original complaint was "potentially" covered, it was not necessary to undertake an analysis of whether a "reckless" act is equivalent to a "deliberate" act. "The gist of the original petition's factual allegations are that [the officer] made misrepresentations... These factual allegations are enough to implicate the 1998 policy." "Whether a director or officer ultimately is found to have committed a wrongful act based on the legal theory of tortious conduct, be it intentional or negligent, is irrelevant for requiring notification under the claims-made policy in this case."