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NEWSLETTER

Tenth Circuit Finds Insurer Must Defend an Insurance Agency and Its President under E&O Policy Because Policy Exclusions Did Not Bar All Allegations

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The United States Court of Appeals for the Tenth Circuit, applying Oklahoma law in an unpublished decision, has held that an insurer had a duty to defend an insurance agency and its president in actions brought against them in connection with their procurement of health insurance coverage for an employee leasing company. *Utica Mut. Ins. Co. v. Voyles*, 2008 WL 2019652 (10th Cir. May 12, 2008). The court held that exclusions for claims arising out of (a) the formation of self-insurance programs and (b) an insurance carrier's inability to pay claims, while applicable to some of the underlying allegations, did not bar the insurer's duty to defend because other allegations fell outside the scope of the exclusions.

The insurance agency and the agency's president allegedly set up a partially-self-funded health insurance plan, with high deductibles, for an employee leasing company. When the employees began to submit claims for reimbursement, the leasing company was unable to pay benefits. The employees brought several suits against the leasing company and the insurance agency and its president, alleging that the defendants did not procure traditional insurance coverage but instead negligently or fraudulently placed them into the high-deductible, partially-self-funded plan. Plaintiffs also alleged that certain employees were not covered by any health insurance plan or workers' compensation coverage. The leasing company also sought recovery from the insurance agency and its president.

The insurer initiated this coverage action, arguing that two policy exclusions barred coverage in the claims against the agency and its president.

The first exclusion barred coverage for claims arising out of:

The ownership, formation, creation, administration, or operation of any Health Maintenance Organization, Preferred Provider Organization, Self-Insurance Program, Risk Retention Group and/or Risk Purchasing Group formed under the Federal Liability Retention Act of 1981 and 1986 as amended or any amendment thereto, Multiple Employer Trust, Multiple Employer Welfare Arrangement, or any pool, syndicate, association or other combination formed for the purpose of providing insurance or benefits, if not fully funded by an insurance product.

The court acknowledged that, because of this exclusion, "claims made against [the insureds] that rest liability solely upon the ownership, formation, creation, administration, or operation of [the leasing company's] partially self-funded plan . . . cannot lead to recovery. . . . Nor can such claims give rise to a duty to defend." However, the court held that the exclusion did not preclude the insurer's duty to defend because certain of the underlying action allegations fell outside the terms of the exclusion. The court specifically pointed to allegations that the agency and its president failed to provide what they promised in terms of health insurance and failed to provide workers' compensation coverage.

The second exclusion barred coverage for claims arising out of:

The insolvency, receivership, bankruptcy, liquidation or inability to pay of any entity, person, corporation, estate, trust, or other organization including, but not limited to:

- Insurance companies or reinsurance companies; (b) Health maintenance organizations or preferred provider organizations;
- Captive insurers or risk retention groups and/or risk purchasing groups; or
- Investment funds or self-insurance programs.

The court held that this exclusion did not preclude the insurer's duty to defend because the employees' claims were based at least in part on allegations of negligence in the procurement of, or failure to procure, insurance. Also, the leasing company alleged that, although the insureds knew that certain health insurance plans were not in place, they failed to inform the leasing company of this fact. These allegations, the court determined, gave rise to the possibility of recovery under the policy, thereby triggering a duty to defend.

The court concluded that "although the policy exclusions may eventually preclude recovery for some of the claims against [the insureds], the exclusions do not cover all the claims they currently face." The court emphasized, however, that the insurer's duty to indemnify was not at issue. The court acknowledged that the duty to defend is not coextensive with the duty to indemn and, although the insurer was required to defend against all of the claims against the agency and its president, it would only be required to indemnify the claims that fell within the policy's coverage.