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NEWSLETTER

Claims-Made E&O Policy Provides Coverage for Loss Caused by Continuous Exposure to Harmful Conditions Prior to Retroactive Date

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A Washington appellate court has held that a claims-made policy provided coverage for loss caused by continuous or repeated exposure to harmful conditions that existed prior to and after the policy's retroactive date. *State of Wash. v. Zurich Specialties London, Ltd.*, No. 50211-5-I, 2003 WL 1824966 (Wash. Ct. App. Apr. 7, 2003). The court also held that the loss could not be allocated based on the number of negligent acts occurring before and after the retroactive date because, under Washington law, a court may not allocate loss unless allocation is expressly provided for in the policy or the court can devise a rational allocation scheme.

In 1999, a disabled woman sued the State of Washington for injuries sustained between 1984 and 1997 that she alleged were caused by her husband, who was her state-appointed caregiver. After settling the case for $8.8 million, the state brought a declaratory judgment action against its E&O insurer. The insurer had issued a claims-made policy that had a retroactive date of July 1, 1990 and had a $5 million deductible. According to the terms of the policy, coverage existed for "that amount of the Ultimate Net Loss which the Insured shall be obligated to pay by reason of the liability...assumed by the Insured under...[an] agreement, for damages on account of Personal Injuries resulting from each Loss." "Loss" was defined as "an accident, or offense, including continuous or repeated exposure to the same general harmful conditions, or a breach of professional duty, which took place on or after the retroactive date."

The appellate court rejected the insurer's argument that the policy did not provide coverage because the husband was appointed as a caregiver prior to the retroactive date and that any breach of duty must therefore have occurred prior to that date. The court noted that the state annually renewed the husband's appointment as caregiver and that it had received warnings of abuse and neglect after the retroactive date. Therefore, the court explained, the husband "remained in that position due to ongoing negligence by the State that extended well into the policy period." The court concluded, based on the insuring agreement and definition of "loss," that "this language provides coverage not just for harms commencing after the retroactive date, but also for continuous or repeated exposure to preexisting harmful conditions, as long as the repeated exposure takes place after the retroactive date. Further, the policy clearly provides coverage for personal injuries resulting from any breach of professional duty that takes place after the retroactive date."

The appellate court also rejected the insurer's argument that the loss should have been allocated based on the number of negligent acts that occurred before and after the retroactive date. The court explained that Washington courts do not allocate loss based solely on the number of years during which a policy was in effect and that allocation is improper unless the policy expressly provides for allocation or the court can devise a rational allocation scheme. Reasoning that an allocation based on the timing of negligent acts would not be rational because there was no causal connection between the specific acts and injuries alleged, the court rejected the insurer's argument that the retroactive date was an express allocation scheme based on the timing of the alleged negligent acts.

The court also rejected the insurer's argument that the trial court erred by considering an email message the insurer had sent to the state in which it took the position that 50% of the injury occurred prior to the retroactive date and invited the State to discuss the matter further. The court explained that the email was not an "offer of compromise" because the "statement that only half of the claim was covered was not an offer of compromise but an outright denial of indemnity." The court also explained that the email was admissible because "the parties were not engaged in negotiations or preparing for litigation at the time [the insurer] made the statements."

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