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NEWSLETTER

Other Decisions of Note

June 2008

Evidentiary Hearing as to Whether Attorney Committed Fraud in Inducement May Be Claim under Policy
The United States Court of Appeals for the Third Circuit has held that a policyholder sufficiently pled allegations in his complaint against a malpractice insurer to raise a contested issue of fact regarding whether the policyholder had provided timely notice of a "claim" under a claims-made legal malpractice policy. *Wolk v. Westport Ins. Corp.*, 2008 WL 1962277 (3d Cir. May 7, 2008).

The policyholder was an attorney who had represented a plaintiff in settling a tort action. Subsequent to the settlement, a defendant in the tort action accused the plaintiff and attorney of concealing the availability of insurance coverage. In connection with the settlement dispute, a state appellate court ordered the trial court to hold an evidentiary hearing to determine whether the plaintiff or the attorney had committed fraud in the inducement. The attorney forwarded the opinion to his malpractice insurer with a letter stating that "I think we are going to need counsel." The insurer refused to defend the attorney, reasoning that the evidentiary hearing was brought against the attorney's client and not the attorney. The attorney filed suit against the malpractice insurer seeking coverage. The district court granted the insurer summary judgment at the inception of the case on the grounds that no claim had been made against the attorney.

The appellate court reversed, explaining that, in finding that no "claim" had been made against the attorney, the district court "may have overlooked" the state appellate court's opinion, which ordered the state trial court to determine, in part, whether the attorney had committed fraud in the inducement. Furthermore, it emphasized that the attorney had clarified that he was seeking reimbursement for fees incurred on behalf of himself and his law firm in connection with the evidentiary hearing, not fees the attorney would incur in representing the plaintiff. The Third Circuit then concluded that the attorney's complaint raised an issue of fact as to whether he was entitled to a defense in the evidentiary hearing.

Florida Federal Court Holds Prior Knowledge Exclusion Bars Coverage
The United States District Court for the Southern District of Florida has held that a prior knowledge exclusion in a lawyers' professional liability policy barred coverage for the law firm with respect to an underlying malpractice action. *Albareda, Rosso, Maluje & Nies, P.A. v. Westport Ins. Corp.*, 2008 WL 1766733 (S.D. Fla. Apr. 17, 2008).

The insurer issued a claims-made and reported lawyers' professional liability policy to a law firm for a policy

period beginning April 18, 2006. The policy's prior knowledge exclusion barred coverage for claims "based upon, arising out of, attributable to, or directly or indirectly resulting from: any act, error [or] omission . . . occurring prior to [April 18, 2006] if any INSURED at [April 18, 2006] knew or could have reasonably foreseen that such act, error [or] omission . . . might be the basis of a CLAIM."

The plaintiffs in the underlying litigation alleged that, in August 2005, the law firm negligently represented them as a title agent in connection with a contract to purchase real estate. The court concluded that, in light of the undisputed facts concerning when the alleged negligent act occurred, the plain terms of the policy's prior knowledge exclusion barred coverage.

Letter Discussing Alleged Breach of Trademark and Potential for Settling Dispute Constitutes a Claim
The United States District Court for the Eastern District of Michigan, applying Michigan law, has held that a letter alleging wrongful use of a trademark and discussing the possibility of settling the dispute constitutes a "claim" under a D&O policy, such that later litigation involving the same allegation is not covered under the policy because the original claim arose prior to the policy's inception. *Axis Surplus Ins. Co. v. Clear!Blue, Inc.*, 2008 WL 2026123 (E.D. Mich. May 12, 2008).

In June 2003, the insured company received a letter alleging trademark violation but noting that the trademark holder would "consider a proposal so long as it recognizes its prior rights in the trademark and provides a satisfactory, concrete basis for concluding that the arrangement would be sufficiently remunerative to allow a third party to use rights under the marks and registration." The letter warned that the trademark holder would insist that the company stop using the trademark if an agreement could not be reached.

More than two years later, in September 2005, the company obtained the D&O policy. The policy defined "claim" as "a demand or assertion of a legal right seeking Damages against any insured." The policy defined "Damages" as a "money judgment, award or settlement." In August 2007, the authors of the June 2003 letter brought suit against the insured for trademark infringement. The insurer refused to defend the suit, arguing that the claim was not covered because it was first raised in the June 2003 letter, prior to the inception of the policy.

In the ensuing coverage litigation, the district court considered cross-motions for summary judgment. The court explained that, to make a claim under the policy, a party must (1) make a demand or assert a legal right and (2) seek damages. The court concluded that the letter met the first element of the test because it alleged a trademark violation. As to the damages element, the court concluded that the letter "was written for the express purpose of seeking a money settlement." The court noted that the letter asserted a right, provided grounds for a settlement request, and concluded with a threat of action. In these circumstances, the court held that the letter satisfied the definition of a claim. Accordingly, the court granted summary judgment to the insurer.

New York Federal Court Holds that Policyholder's Receipt of Disciplinary Complaint Prior to Policy

Effective Date Triggered Prior Knowledge Exclusion

The United States District Court for the Southern District of New York, applying New York law, has held that an insurer owed no duty to defend or indemnify under a lawyers' professional liability policy because the policy's prior knowledge exclusion barred coverage. *Citak & Citak v. St. Paul Travelers Cos., Inc.*, 2008 WL 1882660 (S. D.N.Y. Apr. 28, 2008).

The insurer issued a lawyers' professional liability policy to a law firm for a policy period beginning April 28, 2006. The policy's prior knowledge exclusion barred coverage for claims "arising out of any act, error, omission, negligent act or 'personal injury' occurring prior to [April 28, 2006] if any insured prior to [April 28, 2006] knew or could have reasonably foreseen that such act, error, omission, negligent act or 'personal injury' might be expected to be the basis of a 'claim' or 'suit.'"

In the underlying litigation, the plaintiffs alleged that the law firm committed legal malpractice in delaying the plaintiffs' pursuit of an arbitration award against a contractor. Before filing a lawsuit in state court in November 2006, the underlying plaintiffs filed a complaint against the law firm with the Departmental Disciplinary Committee of the First Judicial Department of the Supreme Court of the State of New York (the "DDC Complaint") in December 2005.

The court concluded that the policy's prior knowledge exclusion barred coverage. Applying an objective reasonableness standard, it reasoned that receipt of the DDC Complaint put the law firm on notice of a potential claim. The court also found that the law firm reasonably could have foreseen the damages caused by the delay in bringing arbitration.