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NEWSLETTER

# Other Recent Decisions

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**Exclusions for Bodily Injury, Assault and Battery Do Not Bar Coverage for Negligent Hiring, Supervision Claim Against School District Arising Out of Teacher's Sexual Misconduct:**
The Supreme Court of New York, a trial court, has held that a school district's errors and omissions policy covers the district for claims of negligent hiring and supervision in connection with a teacher who engaged in sexual misconduct with students. The court rejected the insurer's contention that the claim arose out of bodily injury or assault and battery, which were excluded, and held instead that the claim arose out of the board's alleged negligence in protecting a student. According to the court, while the teacher himself may not be entitled to coverage, a denial of coverage to the district under these circumstances "would effectively eviscerate the errors and omissions policy altogether."*Watkins Glen School Dist. V. National Union Fire Ins. Co.*, 732 N.Y.S.2d 70 (Sup. Ct. 2001).

**Attorney's Awareness of Typographical Error in a Will Does Not Constitute Knowledge of a Fact or Circumstance that Might Give Rise to a Claim:**
An attorney testified at a deposition prior to the inception of his malpractice policy that there was a typographical error in a will that he prepared for the decedent. During the policy period, one of the beneficiaries of the will subsequently filed suit against him for negligence. The court rejected the argument that the attorney's awareness of the typographical error gave rise to knowledge of facts or circumstances that might give rise to a claim, which would have triggered the policy's exclusion for any claims arising out of such facts or circumstances. No party had challenged the will at the time, and there was no "other evidence that [the attorney] should have foreseen a malpractice claim at the time." *Karen Neff Sanches v. Frank L. Morris*, Case No. 01-CA-398, 2001 La. App. LEXIS 2693 (La. App. Nov. 13, 2001).

**California Court: Claimant Can Give Notice Under Policy; Claims-Made Insurer Must Show Prejudice from Defective Notice to Deny Coverage:**
Although the policy required that notice be given by an insured, the California Court of Appeal has held that notice by a claimant to a legal malpractice insurer of the suit against the insured attorney constitutes effective notice. The court emphasized that the notice by the claimant to the insurer specifically was intended to trigger the attorney's malpractice coverage and that the insurer was not prejudiced by the identity of the party that furnished the notice. The court also rejected the argument advanced by the insurer that prejudice is irrelevant under a claims-made policy. It reasoned that, while preju-dice may be irrelevant when the issue is timeliness of notice under a claims-made policy, it was relevant when the issue was the source of the notice to the

insurer. *Great American Ins. Co. v. Ernest H. Short*, No. EO28861, 2001 Cal. LEXIS 1231 (Cal. App. Oct. 23, 2001) (unpublished opinion).

**Bankruptcy Trustee Cannot Agree to Rescind D&O Policies Based on Misrepresentations in Application When Directors and Officers Object; Rescission Issue Must Be Litigated:**
Two insurers sought to rescind D&O policies issued to EquiMed, Inc. when they uncovered misrepresentations in the policy applications. After investigating the claims, the bankruptcy trustee agreed that the insurers had been misled and agreed to void the policies in return for the payment of premiums for the policy plus certain other consideration. The insurers and the trustee sought approval of the settlement, which would have terminated the policies and barred any other claims under those policies against the insurers. The court declined to approve the settlement. It reasoned that proceeds of the D&O policies belonged to the directors and officers and not the trustee, so the trustee could not agree to the rescission of the policy without the consent of the directors and officers. Thus, the coverage litigation, which was pending as an adversary proceeding in the bankruptcy court, must proceed to a decision on the merits by the bankruptcy court.*United States ex rel. Syed Rahman v. Oncology Associates*, P.C., 269 B.R. 139 (D. Md. 2001).

**Insolvency Exclusion Precludes Coverage under Insurance Agents E&O Policy:**
In an unpublished decision, the United States Court of Appeals for the Ninth Circuit ruled that a claim for coverage arising out of an insurance agency's allegedly negligent placement of insurance with an insurer that became insolvent is barred by the policy's insolvency exclusion. That provision precluded coverage for any claim arising out of the insolvency of any insurer. Because the insolvent insurer stopped paying claims only after it was placed in liquidation, the claim against the agent who placed the insurance directly arose out of the liquidated insurer's insolvency, and the exclusion therefore applied. *James W. Hawes v. General Star Management Company*, Case No. 99-56432, 2001 U.S. App. LEXIS 24521 (9th Cir. Nov. 6, 2001).

**No Prejudice Required under Illinois Law to Deny Coverage Based on Untimely Notice under Claims-Made Architects & Engineers Policy:**
A federal court in Chicago has held that prejudice to the insurer is irrelevant under Illinois law to the question whether tardy notice precludes coverage under a claims-made Architects & Engineers professional liability policy. Stressing the distinction between occurrence policies and claims-made policies, the court cited to well-established authority for the proposition that, where timely notice is a condition precedent to coverage, the existence of prejudice is immaterial. *Pacific Ins. Co. v. Eckland Consultants, Inc.,* Case No. 00 C 2140, 2001 U.S. Dist. LEXIS 18369 (N.D. Ill. Nov. 9, 2001).

**Grand Jury, SEC Investigative Subpoenas Not a "Claim" or "Securities Claim" under D&O Policy:**
In an unpublished decision, the California Court of Appeal ruled that investigative subpoenas issued by the U.S. Department of Justice and the Securities & Exchange Commission do not constitute a claim under a D&O policy. The definition of "Claim" and "Securities Claim" in the policy required "a judicial or administrative proceeding" in which the insureds "may be subjected to a binding adjudication of liability for damages or other relief, including any appeal therefrom." The court reasoned that, because new proceedings would have to be initiated after the investigative proceedings before they became adjudicative in nature, the policy did not respond. *JB Oxford Holdings, Inc. v. Certain Underwriters at Lloyd's, London*, Case No. B141597, 2001 Cal.

App. LEXIS 911 (Cal. App. Oct. 5, 2001).