NEWSLETTER

Profit or Advantage Exclusion in Nonprofit Policy Bars Coverage for Claim Arising out of Overcharges

December 2001

A non-profit milk cooperative sold the milk of its member farmers to milk processing companies. Over the course of five years, the cooperative inadvertently overcharged one of its members, Marigold Foods, Inc., and the funds were distributed to its cooperative members. Marigold demanded a refund when the overcharges were discovered, and the cooperative agreed to repay $750,000. It then sought coverage for the settlement under its nonprofit liability policy.

In the ensuing coverage litigation, the court ruled that no coverage existed based on the exclusion for "any claim based upon, alleging or arising out of the gaining of any personal profit or advantage to which the insured is not legally entitled." *Plainview Milk Cooperative v. Westport Ins. Co.,* Case No. 01-63, 2001 U.S. Dist. LEXIS 19560 (D. Minn. Nov. 21, 2001). In so holding, the court rejected the assertion that the exclusion only applies to insureds who are natural persons. According to the court, there was no reason, either in the policy language or in case law invoked by the insured, to "limit the definition of 'insured' for purposes [of the exclusion] to natural persons." The court also rejected the nonprofit's assertion that the exclusion should not apply because it did not, in fact, retain any profit from its overcharge but distributed the funds to members. As an initial matter, the nonprofit was not entitled to the money it collected, so what it did with the funds thereafter is irrelevant. Further, the cooperative's members received the money, so their profit was, in essence, the profit of the cooperative itself. Finally, the court stressed that the overcharges amounted at the very least to an "advantage." The cooperative's "ability to provide its membership with dividends is, without question, a corporate advantage" to which the nonprofit was not entitled.