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NEWSLETTER

Other Decisions of Note

February 2007

Southern District of New York Finds Copyright Exclusion Does Not Excuse Insurer's Duty to Defend
The United States District Court for the Southern District of New York, applying New York law, has held that a D&O insurer had a duty to defend a company that was the subject of a copyright action, despite a copyright exclusion that applied to at least one count in the underlying complaint. *Nat'l Cas. Co. v. Vigilant Ins. Co.*, 2006 WL 3749540 (S.D.N.Y. Dec. 21, 2006). The complaint in the underlying litigation included a copyright infringement count and, in the alternative, an unjust enrichment count. The court determined that the unjust enrichment count would exist independent of the copyright count, and therefore was a sufficient alternative grounds for relief to preclude application of the exclusion to the entire claim.

Notice 18 Months After Entry of Default Judgment Is Untimely
The United States District Court for the Eastern District of Pennsylvania, applying Pennsylvania and New Jersey law, has held that an insurer properly denied coverage under a claims-made legal malpractice policy where the policyholder provided notice more than 18 months after the entry of default judgment. *Coregis Ins. Co. v. Caruso,* 2006 WL 3762026 (E.D. Pa. Dec. 19, 2006). The insurer issued a claims-made policy to the insured that required notice to the insurer as soon as practicable and called for cooperation by the insured. In 2002, the insured notified the insurer that a claim might be made for legal malpractice by the defendant, but the insured never responded to the insurer's further inquiries. A suit against the insured was filed in November 2002 for legal malpractice, and a default judgment was entered in early 2003.

The court first held that the notice-prejudice requirement is inapplicable to claims-made policies under Pennsylvania and New Jersey law. The court also reasoned that, even if prejudice were required, notice a year following the entry of a default judgment prejudiced the insurer "by denying it the opportunity to negotiate a settlement or defend the suit."

Initial Misdiagnosis and Subsequent Care in Reliance on Misdiagnosis Constitute One "Dental Incident"
A New York state appellate court has held that when a dentist failed to diagnose a patient's condition in an initial diagnostic exam as well as in several subsequent exams, the claim by the injured patient involved a single "Dental Incident" and, as a result, the insurer only had to pay the limit of one of a series of policies available. *Connecticut Indemn. Co. v. Schindler*, 2006 WL 3803486 (Dec. 26, 2006).

The insurer issued consecutive one-year professional liability policies to the dentist. The policies provided that "all damages arising from the same, related, repeated on continuous Dental Incidents shall be deemed to arise from one Dental Incident." The policies defined a "Dental Incident" as "an act, error or omission in the rendering or failure to render professional services as a dentist." In the underlying action, the dentist was accused of failing to diagnose a patient's condition at an initial diagnostic exam and at several subsequent exams during which the dentist relied upon his initial misdiagnosis. The court stated that "all the alleged departures in care by [the dentist] are, when viewed in their entirety, the 'same, related, repeated or continued' acts, errors or omissions in the rendering or failure to render professional services as a dentist."