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NEWSLETTER

Court Holds Notice of Potential Claim Letter Satisfies Policy Requirements

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The United States District Court for the District of Colorado, applying Colorado law, has denied an insurer's motion for summary judgment and granted in part motions for partial summary judgment by the policyholder's former CEO and a bankruptcy trustee as assignee of the policyholder's former directors. *Genesis Ins. Co. v. Crowley*, 2007 WL 1832039 (D. Colo. June 25, 2007). The court held: (1) that a notice of potential claim letter provided by the policyholder prior to expiration of the claims-made policy provided sufficient notice to the insurer; and (2) that pre- and post-policy period conduct constituted a single course of conduct that was covered under the policy. The court also withheld judgment on whether a non-recourse settlement between the bankruptcy trustee and the outside directors of the policyholder constituted "Loss" under the policy because the Colorado Supreme Court is currently considering the issue.

The insurer issued a claims-made directors and officers insurance policy to the policyholder, a healthcare company. Subject to all of its terms and conditions, the policy covered "Loss arising from Claims first made during the Policy (or Discovery) Period." The policy also provided that "if, prior to the effective date of the expiration of the Policy Period, the Directors, Officers, or the Company first become aware of circumstances which may subsequently give rise to a Claim and [they] as soon as practicable during the Policy Period give notice to the Insurer of the circumstances and the reasons for anticipating a Claim, then any Claim subsequently made based upon such circumstances . . . shall be deemed to have been first made during the Policy Period; provided, however, as a condition precedent for any coverage to arise hereunder, such notice must be specific and contain full particulars as to the facts and circumstances potentially giving rise to the Claim, including a narrative setting forth dates, names of the potential plaintiffs and affected Directors or Officers, names of other parties involved, the nature and scope of the anticipated Claim, and all reasons why such a claim is reasonably to be anticipated." The policy further provided that "[m]ore than one claim arising out of the same Wrongful Act(s), or facts, circumstances, or situations, or one or more series of similar, repeated or continuous Wrongful Acts, shall be considered a single Claim" that is "deemed to be first made on the date when the earliest Claim is first made . . . ." The policyholder purchased a "discovery period" that added an additional year to the policy period, but "solely for Claims first made during the Discovery Period which are based upon or arise out of Wrongful Acts occurring or allegedly occurring before January 27, 2001, and otherwise covered by the Policy."

The company filed for bankruptcy before the end of the policy period. In November 2000, two shareholders filed a class action suit alleging securities fraud and breach of fiduciary duty against the former CEO and the former directors of the company. The insurer advanced defense costs in connection with that action. The company's first plan of reorganization was then rejected by the presiding bankruptcy court in December 2000 based in part on the bankruptcy court's finding that the then-CEO of the company had a separate employment agreement with another entity that constituted an "actual conflict of interest."

In January 2001, before the expiration of the policy period, the company submitted a notice of potential claims letter to the insurer describing, *inter alia*, the bankruptcy court's denial of the first plan of reorganization. After a second plan of reorganization was denied and a trustee was appointed, a plan of reorganization was confirmed. Subsequently, after the policy period and its discovery period expired, the trustee filed an action against the former CEO and the former directors, who sought coverage from the insurer. The insurer denied coverage and filed the instant action, arguing that the notice letter was insufficiently detailed to satisfy the policy's requirements and that there could be no coverage for events occurring after the expiration of its policy period (*e.g.* the second denial of the company's bankruptcy plan's confirmation). The former directors later settled with the trustee and assigned their rights against the insurer to the trustee, who agreed to proceed solely against the insurer to seek the settlement amount.

On cross motions for summary judgment, the court first held that the January 2001 letter constituted sufficient notice of potential claims under the Policy. In so holding, the court first noted that "[t]he notice provision is unambiguous and clearly requires that notice be given to [the insurer] of a potential claim with specificity." The court held that the company had done so, noting that the company had provided the identity of the relevant parties, the alleged wrongful acts at issue, the likely plaintiffs, the nature of the claims to be asserted, and the reasons why such claims were to be anticipated. The court rejected the insurer's claim that the letter was insufficient, holding that the insurer "had adequate notice of the kind of claims that could be asserted based on the alleged conflict of interest and failure to discover and disclose it in the operation of the company and in the reorganization proceedings."

The court next determined that all of the alleged wrongful conduct at issue would be deemed to have occurred prior to the end of the policy period on January 27, 2001, regardless of the fact that some alleged Wrongful Acts took place after January 2001. The court concluded that pre- and post-policy period acts and omissions were "the same acts and omissions, and that their effect on the reorganization continued beyond" January 27, 2001, such that
"the entire course of conduct, including acts or omissions occurring after January 27, 2001, arises out of and is based on the wrongful acts occurring within the policy period and are thus covered."

Turning next to the exclusions in the policy, the court denied the former CEO's motion for partial summary judgment as to the carve out of matters deemed uninsurable as a matter of law from the Policy definition of "Loss." Noting that the insurer argued that disgorgement sought by the trustee in the underlying action would not constitute Loss, the court declined to rule on this issue, reasoning that there was no on-point Colorado law

on the subject and there were no facts before the court "concerning that basis for any not-yet-awarded portion of relief" in the underlying action.

Finally, the court denied the insurer's motion for summary judgment as to the Trustee's settlement with the former directors. The insurer had argued that the settlement agreement did not constitute "Loss" because the agreement relieved the insureds of any "legal obligat[ion] to pay" the settlement amount. The court rejected this argument, holding that "where, as here, a covenant not to execute is not accompanied by a release of liability, amounts awarded under a consent judgment remain a legal obligation." The court refused, however, to rule on whether the settlement was void under Colorado law or public policy because that issue is to be decided in connection with *Ross v. Old Republic Insurance Co.*, 2006 WL 2942523 (Colo. Oct. 16, 2006), a case currently pending before the Colorado Supreme Court.