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NEWSLETTER

Other Decisions of Note

March 2007

Oral Threat to Sue Is Not a "Claim"

The United States District Court for the Eastern District of Pennsylvania has held that a policyholder's oral communication to his insurer that he might be subject to a claim did not trigger coverage under a malpractice insurer's claims-made policy. *Wolk v. Westport Ins. Corp.*, 2007 WL 320289 (E.D. Pa. Jan. 29, 2007).

The policyholder was an attorney who purchased a legal malpractice policy. The attorney had represented a plaintiff in a tort action that settled. After settlement, one of the defendants accused the plaintiff and the attorney of knowingly concealing or misrepresenting the availability of insurance coverage for the tort action. The trial court rejected the fraud argument, but the appellate court reversed and remanded for an evidentiary hearing on the issue. The attorney sent the appellate opinion to his malpractice insurer, but since the action was against the attorney's client and not the attorney, neither the attorney nor the malpractice insurer thought that there was a covered claim. The attorney hired other counsel to represent him and the plaintiff in the evidentiary hearing.

In subsequent coverage litigation, the attorney sued the malpractice insurer to recover the attorney's fees from the evidentiary hearing. The attorney argued that at some point during the tort litigation, a lawyer for one of the defendants threatened to sue the attorney if the outcome of the tort action was ultimately unfavorable to the defendant. The attorney alleged that he orally conveyed this information to the malpractice insurer and argued that this constituted a claim.

The court rejected the attorney's argument, reasoning that the policy was a "claim-made" policy and that no "claim" had even been asserted against the attorney. Instead, the claim had been made against the attorney's client. Additionally, the court noted that the attorney did not give the malpractice insurer notice in writing of the alleged claim as required under the policy. Finally, the court found that the attorney was seeking reimbursement for legal fees that were paid to defend the attorney's client in the underlying evidentiary hearing, not to defend the attorney himself. Therefore, the court granted summary judgment to the insurer.

E&O Extension Covering Negligent Acts Does Not Provide Coverage for Breach of Contract Claim

The United States District Court for the Southern District of West Virginia, applying Virginia law, held that an Errors & Omissions Extension to a commercial general liability (CGL) policy did not provide coverage for liability based on a breach of contract claim. *M & S Partners v. Scottsdale Ins. Co.*, 2007 WL 39476 (S.D. W. Va. Jan. 4, 2007).

In the underlying action, a partnership sued the insured for,*inter alia*, the breach of two financing agreements. After the corporation failed to answer the complaint and failed to appear for trial, the partnership moved for default judgment, which was granted. The partnership then pursued an action against the insurer for payment of the default judgment.

The corporation was insured under a CGL policy that included an Errors & Omissions Extension. The Extension stated, in relevant part, that the insurer would provide coverage for amounts the insured "shall become legally obligated to pay because of any negligent act, error or omission committed during the policy period...." The court found that the language of the E&O Extension "presupposes a negligent act that results in the insured's legal obligation to pay. Inasmuch as the company is obligated to pay plaintiff damages arising out of its breach of the Financing Agreement" the E&O Extension "has no application."

Sexual Conduct Exclusion Bars Coverage Where Complaint against Doctor Contains No Allegations of Non-Sexual Malpractice

A New York appellate court, applying New York law, has held that an insurer had no duty to defend or indemnify a doctor under a professional liability policy containing a sexual conduct exclusion where the underlying complaint did not allege that the doctor committed any acts of medical malpractice "separate and apart" from sexual conduct. *Physicians' Reciprocal Insurers v. Giugliano*, 2007 WL 414488 (N.Y. Sup. Ct. App. Div. Feb. 6, 2007).

A patient brought suit against a doctor alleging that the doctor breached his duty of care by engaging in a sexual relationship with her while treating her for depression. The insurer denied coverage under the doctor's policy, relying on an exclusion for "[a]ny Claim which results from sexual intimacy, sexual molestation, sexual harassment, sexual exploitation or sexual assault." The insurer brought the coverage action against the doctor and sought summary judgment, which the trial court denied. The appellate court reversed, rejecting the doctor's contention that the patient's complaint could be read as alleging that his initial diagnosis was incorrect and/or that his proscribed treatment program was ineffective. Instead, the court found that the allegations in the complaint "did not potentially give rise to a covered claim" because the patient had not alleged that the doctor "committed any acts of medical malpractice separate and apart from the alleged sexual contact."