

No Coverage Where Counterclaim Filed Prior to Policy Inception Was Revived in a Separate Lawsuit

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The first United States District Court for the Eastern District of Missouri has held that an exclusion in a professional liability policy that barred coverage for claims based on negligent acts, errors or omissions occurring prior to policy inception applied to a claim asserted against the insured during the policy period, where the facts underlying that claim had previously been asserted against the insured in the form of a counterclaim that had been dismissed without prejudice prior to the policy's inception. *ACI/Boland Inc. v. U.S. Specialty Ins. Co.*, 2009 WL 90131 (E.D. Mo. Jan. 14, 2009).

The insured entered into a contract to provide architectural support services to a builder. In May 2004, the insured filed suit against the builder for breach of contract. Two months later, the builder filed a counterclaim against the insured. In April 2005, the parties entered into a partial settlement agreement and agreed to dismiss the lawsuit without prejudice. The settlement, however, left open the possibility that the builder would revive its counterclaim and, in April 2006, the builder did so by filing a new lawsuit against the insured.

In February 2005, the insured submitted a policy application for professional liability insurance that did not disclose the existence of the builder's counterclaim. In May 2006, the insured provided notice of the April 2006 lawsuit to the insurer. The insurer denied coverage because it contended that the insured was aware of the facts that gave rise to the April 2006 lawsuit in connection with the 2004 litigation, prior to the inception of the policy.

In the resulting coverage litigation, the insured sought a declaration that coverage existed for the April 2006 lawsuit. The insured argued that the dismissed counterclaim was not a "claim" that had to be reported because it had been dismissed. The court rejected this argument, noting that the dismissal was without prejudice and that it was thus likely that the dismissed counterclaim would be revived. Further, the court noted that the fact of the dismissal did not impact the determination of whether the counterclaim was a "claim" as defined by the policy because "claim" and "lawsuit" are not synonymous. Accordingly, because the 2004 counterclaim constituted a claim based on the same negligent acts at issue in the 2006 lawsuit, the court determined that the exclusion for claims based on negligent acts, errors or omissions occurring prior to policy

inception applied to bar coverage.