

# Allegation of Complaint Insufficient to Establish Date Claim First Made

---

April 2007

The United States District Court for the Western District of Michigan, applying Michigan law, has determined that an insurer owes both a duty to defend and a duty to indemnify its insured under a claims-made Architects and Engineers Professional Liability policy despite the insurer's contention that the underlying claim was made prior to the policy's inception. *Corrosion Control Consultants & Labs, Inc. v. Maxum Indemnity Co.*, 2007 WL 475200 (W.D. Mich. Feb. 9, 2007).

This case arose from an underlying dispute between the insured sub-contractor and its contractor based on liability the contractor allegedly incurred because of the sub-contractor's faulty performance. The action filed by the contractor against the insured, which was brought during the insured's policy period, asserted that it had first notified the sub-contractor of its potential liability in 2002, before the professional liability policy inception. After the contractor filed suit in 2003, the insured sought coverage from the insurer, which denied because the claim was made prior to the policy period. The insured then instituted a declaratory judgment action to establish that the insurer owed both a duty to defend and a duty to indemnify the claim.

The court first ruled that the insured had a duty to defend the claim. In doing so, the court considered affidavits from the insured's employees, stating that they had first received notice of the contractor's claim in 2003, after the policy inception. The court also considered affidavits from the insurer that stated that the underlying complaint alleged that the contractor first notified the insured of its claim in 2002 and that the insurer had denied coverage on that basis. The court determined that, at a minimum, the insured had established that a factual issue as to when it received notice existed, and that there was thus a "potential for coverage" under the policy, which triggered the insurer's duty to defend.

The court then addressed the issue of the insurer's duty to indemnify. The court first stated that the insurer acknowledged that the insured had received notice of the contractor's lawsuit during the policy period, but disputed whether the insured had prior notice of the contractor's claim. It then cited the two affidavits from the insured's employees asserting they first received notice in 2003 and stated that the insurer's affidavits relying on the underlying complaint were insufficient to create a genuine issue of fact because they were not based on "personal knowledge of the events that occurred" between the contractor and the insured. Accordingly, the court determined that there was no genuine issue of fact regarding whether the claim was made prior to the policy period and granted summary judgment to the insured with respect to the duty to indemnify.