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NEWSLETTER

Other Decisions of Note

August 2007

Federal Court Holds That Ohio's Notice-Prejudice Rule Does Not Apply Where Policy Requires Notice Within 30 Days

The United States District Court for the Southern District of Ohio, applying Ohio law, has ruled that Ohio's notice-prejudice rule does not apply where the policy at issue requires the policyholder to notify its insurer of a claim within a specific number of days of learning of the claim. *Certain Underwriters at Lloyds of London v. Jeff Wyler Dealer Group, Inc.*, 2007 WL 1989836 (S.D. Ohio July 9, 2007). At issue in the case was a provision in an EPL Policy that required, as a condition precedent to coverage, that the insurer be "notified as soon as practicable, *but in no event more than thirty (30) days* from the time that an [sic] management or supervisory Employee [of the policyholder] becomes aware of the making of a Claim." Pursuant to this provision, the insurer asserted it had no duty to defend or indemnify the policyholder against a sex discrimination charge because the policyholder had waited almost two years before notifying the insurer of the claim.

The district court agreed with the insurer, holding that the notice-prejudice standard under Ohio law was inapplicable to the facts of the present case. The court distinguished between policies requiring that notice should be provided "promptly," and this EPL policy, which contained a strict 30-day deadline in the notice provision.

No Coverage When No Claim Has Been Made During the Coverage Period

The United States District Court for the Western District of Louisiana, applying Louisiana law, has held that no coverage existed under consecutive claims-made policies when the insured failed to give notice of a claim and where no claim has been made against the insured during the applicable coverage period. *University Rehabilitation Hosp., Inc. v. Int'l Cooperative Consultants, Inc.*, 2007 WL 1805756 (W.D. La. June 21, 2007). The court explained that no claim was made against the insured during the coverage period, which ended in 2002. Although the insured asserted that the reporting period had been extended until 2005, the court held that, even if this were true, such an extension would not affect the coverage period. Additionally, the court saw no evidence that the insurer was given notice of a claim during any reporting period. Accordingly, the court granted summary judgment in favor of the insurer and found no coverage under the policies.

Insurer Can Rescind Policy Based on Untrue Material Misrepresentations in Application

The United States District of Connecticut, applying Connecticut law, has held that an insurer could rescind a legal malpractice policy where the lawyer applying for the policy made material misrepresentations in the

application. *Liberty Int'l Underwriters v. Claydon,* 2007 WL 1795839 (D. Conn. June 19, 2007).

The lawyer represented that he had no business relationships with clients even though he was serving as both counsel and an officer for three corporations. He inaccurately stated that he had not sued a client for unpaid fees. Finally, the insured maintained that there were no incidents under a previous policy that may lead to a claim against him despite the fact that he had committed larceny against a client during that period. Based on these misrepresentations, the court granted summary judgment on behalf of the insurer and rescinded the policy.

Ohio Appellate Court Holds That Billing Clients Is Not a Professional Service

An Ohio appellate court has held that an insurer did not have a duty to defend under an E&O policy against a suit involving claims that the insured charged excessive fees. *Davis & Meyer Law, Ltd. v. ProNational Ins. Co.*, 2007 WL 2009666 (Ohio Ct. App. July 12, 2007).

The plaintiffs in the underlying suit alleged that the insured title agency charged excessive courier service fees and county recording fees in connection with real estate transactions. The court further determined that "the act of billing or charging clients for ministerial, or non-ministerial activities, is not a service 'performed by an Insured for others for a fee,' and thus does not fit the definition of 'professional services' under the policy."