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NEWSLETTER

Other Decisions of Note

April 2008

E&O Insurer That Breached Reimbursement Obligation Was Not Required to Pay Defense Costs Where Policyholder Recovered Its Costs in Full From a Third Party

The United States District Court for the Central District of Illinois, applying Illinois law, has held that an E&O insurer that breached its duty to reimburse its policyholder for defense costs was nevertheless not required to pay the policyholder's defense costs where the policyholder had already recovered those costs in full from another party. *Illinois School Dist. Agency v. Pacific Ins. Co.*, 2008 WL 474359 (C.D. Ill. Feb. 19, 2008). According to the court, "[p]roof of damage is a required element in a breach-of-contract claim." Therefore, due to the policyholder's recovery of its defense costs from another party, "the [policyholder] cannot establish a compensable injury."

The court rejected the policyholder's argument that it was not fully compensated because it incurred costs in bringing the action against the other party. The court explained that there was "[n]o contractual provision and no statute" that allowed for the policyholder to recover from its insurer attorney's fees incurred in bringing an offensive action against the third party. Similarly, the court held that the common fund doctrine was inapplicable, as the insurer had no interest in the judgment against the third party.

Ninth Circuit Holds Notice of Claim to Insurance Agency Insufficient

The United States Court of Appeals for the Ninth Circuit, applying Nevada law, has held that an insured did not satisfy the notice provision of a claims-made policy by sending notice to an insurance agency rather than to the insurer directly. *Raby v. Am. Int'l Specialty Lines Ins. Co.*, 2008 WL 538954 (9th Cir. Feb. 28, 2008). The policy required that the insured provide notice both to the agency and to the insurer. The agency had timely forwarded an earlier claim to the insurer, and the insureds' assignees argued that this precluded the insurer from arguing that the agency could not accept notice on the insurer's behalf. The court rejected this argument, finding no evidence that the insurer had indicated that notice to the agency without notice to the insurer itself would suffice.