

Court Holds that Each Count in Complaint Constitutes a Separate "Claim"

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The United States District Court for the Eastern District of Pennsylvania, applying Pennsylvania law, has held that each count in a complaint constituted a "claim" under a policy that defined "claim" as "any proceeding initiated against any of the 'insureds'" *Cincinnati Ins. Co. v. Willow Fin. Bank*, 2008 WL 4348010 (E.D. Pa. Sept. 23, 2008).

An insurer issued a duty to defend policy to a bank that faced three lawsuits arising out of the bank's handling of three school districts' investments. The insurer was defending the underlying lawsuits under a full reservation of rights but sought a declaration that it had no duty to defend under the policy.

The relevant coverage part afforded trust department E&O coverage for financial institutions. It excluded coverage for claims based upon or arising out of any actual or alleged conflict of interest by the insureds. In addition, the policy excluded coverage for claims based on or arising out of "wrongful acts" committed prior to the policy period if the insured knew or should have reasonably foreseen that the "wrongful acts" might be the basis of a "claim." The insurer relied on the prior acts exclusion and the conflict of interest exclusion to support its argument that it had no duty to defend under the trust department E&O coverage part.

The policy defined "claim" to mean "any proceeding initiated against any of the 'insureds' before any governmental body which is legally authorized to render an enforceable judgment or order for money damages or other relief, including any appeal from such proceedings." The insurer argued that "'claim' [was] defined in the contract so as to preclude coverage whenever a civil proceeding as a whole involves any allegations excluded from coverage." The bank argued that "excluded claims work on a count-by-count basis" and that the insurer had a duty to defend unless the lawsuit consisted entirely of excluded counts.

The court concluded that the definition of "claim" was ambiguous because it could support either party's position. The court therefore interpreted the language in favor of the bank and held that a "claim" is an individual count or charge against the insured party that must be filed as a 'proceeding' against the insured party." Under this interpretation of "claim," each count of the underlying complaints constituted a "claim," and the insurer would have a duty to defend unless or until only excluded counts remained in the suits.

The court found that each of the lawsuits included counts that fell within the trust department E&O coverage part and that were not excluded by either the prior acts exclusion or the conflicts of interest exclusion. Because each complaint contained potentially covered counts, the insurer had a duty to defend the underlying suits.