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NEWSLETTER

Libel Suit for Pre-Policy Newspaper Articles Not a "Known Loss"

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Applying Massachusetts law, the United States Court of Appeals for the First Circuit has held that the "known loss" doctrine did not bar coverage for a libel lawsuit arising in part out of articles published before the insured newspaper applied for an insurance policy because the loss was not substantially certain when the policy was obtained. *Employers Reinsurance Corp. v. Globe Newspaper Co., et al.*, 2009 WL 709426 (1st Cir. Mar. 19, 2009).

The newspaper published articles in early 1995 making various statements about mistakes made in an experimental cancer treatment protocol that resulted in the death of a patient. A March 1995 article attributed responsibility to a particular doctor, and subsequent articles severely criticized the program. After contact from the doctor's counsel, the newspaper learned that published statements regarding the doctor's involvement were erroneous. The newspaper printed a correction in May 1995, but the doctor's counsel continued to be dissatisfied and stated that the doctor sought damages. A further correction was published in June 1995, but the request for damages was not dropped. The newspaper applied for an insurance policy on October 12, 1995. The application listed past and present litigation but did not list the May 1995 demand from the doctor's counsel. Another article referencing the doctor's involvement in the treatment protocol was published on October 31, 1995. The doctor sued the insured newspaper and columnist in February 1996, alleging libel. Ultimately, judgment was entered against the newspaper and columnist in state court.

The First Circuit held that the known loss doctrine does not apply in this case. The court relied upon its previous interpretation of Massachusetts law, which held that the known loss doctrine applies only when the insured knows "that a specific loss has already happened or is *substantially certain* to happen." *U.S. Liab. Ins. Col. v. Selman*, 70 F.3d 684, 690 (1st Cir. 1995). The court reasoned that the newspaper, as a matter of policy, should be able to obtain insurance for past acts that only "might" lead to claims for coverage, especially where the insurance is for a class of risks that are part of its ongoing business. Although the newspaper had published articles in early 1995, before the policy was issued, no lawsuit had been filed or adjudicated. The court reasoned further that, even if a suit had been brought, liability was not certain because the Massachusetts Supreme Judicial Court found in 2001 that the doctor was a limited-purpose public figure, making the standard for recovery more difficult.