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NEWSLETTER

Insolvency Exclusion Applies to Claim Arising Out of Insolvency of a Third Party

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The United States District Court for the Central District of California, applying California law, has granted summary judgment in favor of an insurer because a lawsuit against the insured actuarial services firm was a claim "arising out of the insolvency" of the insured's client and therefore was barred by the policy's insolvency exclusion. *Zurich Global Corp. U.K. v. Bickerstaff, Whatley, Ryan & Burkhalter, Inc.*, 2009 WL 2827969 (C.D. Cal. Aug. 26, 2009).

The insurer issued a professional liability policy to the insured actuarial services firm that was sued in connection with services it provided to a corporation that operated a self-insurance pool. The receiver for the insolvent corporation sued the corporation's accountant for failing properly to audit and to test the adequacy of loss reserves. The accountant filed a third-party complaint for contribution from the insured based on the insured's alleged negligence in providing actuarial services.

In subsequent coverage litigation, the insurer sought a declaratory judgment that coverage for the contribution claim was excluded by the policy's "insolvency exclusion," which barred coverage for claims "arising out of . . . the insolvency or bankruptcy of the Insured or any other person, firm, or organization." The court granted summary judgment in favor of the insurer, rejecting the insured's arguments that the exclusion was not conspicuous and was ambiguous. The court found that the phrase "arising out of" is not ambiguous and could not be interpreted to require that the insured cause the insolvency or that the damaged company be insolvent at the time it files suit. The court found that the insolvency exclusion "applies to all claims and expenses 'arising out of' insolvencies, and therefore encompasses receivership actions that 'arise out of' an insolvency." In this case, the contribution claim alleged that the insured's actuarial reports caused the insolvent corporation to lose opportunities for profits and to enter liquidation and that the insolvency was directly caused by the failure to set adequate loss reserves based on the insured's actuarial reports. Accordingly, the court found that the complaint against the insured had "at least a minimal causal connection or incidental relationship" to the insolvency and therefore "[arose] out of it."

The court also rejected the insured's argument that the doctrine of "concurrent causation" required coverage because the insured's alleged malpractice was an independent concurrent cause of the claim. The court found that the alleged malpractice was the cause of damages incurred from the corporation's insolvency and that the doctrine of concurrent causation was therefore inapplicable.