

Judge Posner: "Arising from" Is Not Literally "But for," Nor Is the Extended Reporting Period the Policy Period

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Applying Illinois law, the United States Court of Appeals for the Seventh Circuit has held that a lawyers professional liability policy did not provide coverage for a claim that arose out of facts and circumstances that occurred during the period of a prior policy and that were reported as a claim under that policy. *James River Ins. Co. v. Kemper Cas. Ins. Co.*, 2009 WL 3447447 (7th Cir. Oct. 28, 2009).

The case involved two insurers that had issued separate claims-made policies to a law firm. The first insurer's policy had a policy period of September 27, 2000 to September 27, 2002, and the firm purchased a five-year extended reporting period for that policy that ran through September 27, 2007. The policy period of the second insurer's policy ran from November 8, 2004 to November 8, 2005.

The claim at issue was a malpractice suit filed against the insureds in May 2005. The plaintiff was a former client who the insureds had represented in connection with divorce proceedings beginning several years earlier. In December 1999, the insureds had negotiated a property settlement on behalf of the client, pursuant to which she was to receive a substantial portion of her husband's stock options from his employer. Two months later, the employer advised the parties that their agreement was not a valid means by which the husband's options could be transferred to the wife. The insureds proceeded to file suit on behalf of the wife to enforce the agreement and, while that action was pending, the employer declared bankruptcy and the options were rendered worthless. The wife then claimed that the insureds acted negligently by instituting the suit and not otherwise effectuating the transfer of the stock options before the employer's bankruptcy filing. The wife also alleged in her complaint that the insureds improperly had concealed from her that they had a business relationship with the husband's divorce lawyer. This conduct, along with certain of other alleged wrongdoing by the insureds, purportedly spanned the two policy periods.

The insureds reported the wife's malpractice action to both insurers. The first insurer accepted the defense of the claim and ultimately paid to settle it, while the second insurer denied coverage based on the exclusion in its policy for any claim "arising from . . . any common fact, circumstance[], transaction advice or decision involved in a 'professional service' reported as a claim or potential claim under any prior [p]olicy." The second insurer then brought suit for a declaration supporting its position. The district court denied the second

insurer's motion for summary judgment and entered summary judgment in favor of the first insurer. See *James River Ins. Co. v. Rinella & Rinella, Ltd.*, 2008 WL 421150 (N.D. Ill. Sept. 10, 2008), reported in the November 2008 edition of Executive Summary.

Writing for the court on appeal, Judge Posner first addressed the issue whether the malpractice claim arose from conduct alleged to have occurred during the first policy period and concluded that it did. Specifically, the court pointed to the insureds' efforts to obtain the stock options for their client both in the initial property settlement and after the employer refused to transfer the options, contending that the method of transfer in the settlement was invalid. In addressing this issue, Judge Posner noted that the concept of "arising from" must not be pressed "too hard" and stated that there must be a "tighter connection . . . than a mere 'but for' caus[ation]." That said, however, the court did recognize that "a claim need not have been foreseeable to be deemed to arise from an act by the insured." The court also noted that the claim against the insureds involved an "intertwined set of wrongful acts that straddled two policy periods" and that it was "apparent" that the second insurer "excluded coverage in situations in which the wrongful acts committed during its policy period were a continuation of wrongful acts committed during the policy period of [a] previous insurer."

Next, the court turned to the issue whether the first policy was in fact a "prior [p]olicy" as contemplated by the exclusion. The first insurer had argued that its policy was not because the insureds had purchased the five-year extended reporting period, which ran through and beyond the policy period of the second policy. The court rejected this argument on the grounds that "the reporting period is not the policy period." The court noted that the two periods are distinct and pointed out that the first policy was explicit in limiting coverage for claims reported during the extended reporting period to those that arose "prior to the end of the policy period." Accordingly, the court concluded that the first policy was a prior policy, and the exclusion applied.