

"Reasonably Expected To Result in a Claim" Deemed Ambiguous

January/February 2010

Applying Ohio law, the United States District Court for the Southern District of Ohio has held that a policy provision specifying that a claim is made when the insured receives information that "could reasonably be expected to result in a claim" is ambiguous. *Professionals Direct Ins. Co. v. Wiles, Boyle, Burkholder & Bringardner Co., LPA*, 2009 WL 4281263 (S.D. Ohio Nov. 24, 2009). The court also held that notice of the claim, provided shortly after the claim was made but after the expiration of the original policy period, was timely where the same insurer provided coverage in both policy periods and the notice was provided within a reasonable amount of time.

The case involved two claims-made-and-reported professional liability policies issued to a law firm for the successive policy periods of November 15, 2002 to November 15, 2003 (the 02-03 Policy) and November 15, 2003 to November 15, 2004 (the 03-04 Policy). In 2002, the insured handled the defense of a lawsuit that went to trial. The jury returned a verdict of more than \$8 million against the insured's client, and the court entered judgment accordingly on December 30, 2002. Sixteen days later, the insured filed various post-trial motions on behalf of its client. Those motions were denied on March 4, 2003, on the grounds that they were untimely because they had not been filed within 14 days as required by the applicable rules. The insured filed a notice of appeal on March 13, 2003. The intermediate appellate court, however, rejected the appeal as untimely, concluding that although post-trial motions ordinarily toll the applicable deadline, it is not tolled when those motions are filed out of time. On further appeal to the state supreme court, the firm argued that the "three-day mail rule" applied to post-trial motions and therefore those filings were in fact timely filed. The supreme court disagreed and affirmed the dismissal of the appeal in August 2004. Shortly thereafter, the firm provided notice of the matter to its insurer.

In the coverage litigation that followed, the insurer moved for summary judgment, arguing that coverage was not available because the insured had knowledge of circumstances that could have reasonably been expected to result in a claim during the 02-03 Policy period and failed to report the claim until September 2004, outside the 02-03 Policy period. The court considered the meaning of the relevant policy provision, which specified that a claim is made when the insured receives information that "could reasonably be expected to result in a claim." First, the court concluded that the provision contains a mixed subjective/objective analysis, which requires the court to consider what the insured was subjectively aware of and whether that information would be expected by a reasonable insured to result in a claim. The court then concluded that the

"reasonably expected" element of the provision was ambiguous, holding that a claim is "reasonably expected" if a claim would be considered "likely or certain" by a reasonable insured. Using this framework, the court held that a claim was not "reasonably expected" until the Ohio Supreme Court dismissed the appeal filed by the insured on behalf of its client in August 2004. Thus, the court rejected the insurer's argument that coverage was precluded on the basis that the claim was first made during the 02-03 Policy period but not reported until the 03-04 Policy period, as well as the related argument that the matter should have been identified on the renewal application for the 03-04 Policy. The court also concluded that, even if the claim were deemed made during the 02-03 Policy period, the court would not hold the insured to a strict requirement that the claim be both made and reported during the same policy period, concluding that Ohio law would not permit the insurer to disclaim coverage where the insurer was on the risk during both policy periods and notice was provided within a reasonable amount of time after the insured became aware of the claim.