

Duty To Defend Triggered Where At Least Some Aspect of the Alleged Negligence Possibly Occurred After the Retroactive Date

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Applying South Carolina law, the United States District Court for the District of South Carolina has held that an insurer's obligation to defend was triggered despite the fact that the claim involved allegations of misconduct that pre-dated the policy's retroactive date. *Berenyi, Inc. v. Landmark Am. Ins. Co.*, 2009 WL 233861 (D.S.C. Jan. 14, 2010). The court also declined to find that the suit for which coverage was sought actually was a claim first made before the inception of the policy.

The policy at issue provided professional liability coverage to a civil engineering firm for the claims-made period of May 18, 2008 to May 18, 2009. The policy included a retroactive date of May 18, 2005 and stated that "any alleged or actual negligent act, error or omission must have first taken place [on or after this date] in order to be considered for coverage." The policy defined "claim" to mean "a written or verbal demand received by the Insured for money or services."

On September 5, 2008, a hotel owner brought suit against the insured firm, asserting causes of action for professional negligence and breach of implied warranty arising out of surveying, planning and engineering services that the firm rendered for the construction of the hotel. The insurer initially accepted the defense of the action based on the allegations in the complaint. However, after an expert retained for the defense reported that one of the purportedly negligent acts alleged in the suit—specifically, the erroneous designation of the flood plain—occurred on April 8, 2005, the insurer withdrew the defense and denied coverage based on the policy's retroactive date, among other reasons.

In the coverage action that followed, the court found that the underlying complaint alleged three other distinct negligent acts by the insured firm. The complaint did not include specific dates for these acts but did allege that they occurred "throughout" and "during" the construction of the hotel. Because the construction started after May 18, 2005, the court concluded that these other alleged negligent acts by the insured "may have occurred" after the retroactive date. As a result, according to the court, there was a "possibility of coverage" for at least "one aspect of the claim" and therefore the insurer was obligated to defend the entire suit.

The court also rejected the insurer's argument that the claim was not first made during the policy period but rather was first made two years earlier. In September 2006, a flood inspector sent a letter to the construction company working on the project advising that the building was at least two feet below the elevation necessary for the proper flood designation. This letter was passed on to the insured firm, and the firm "agreed to redesign a workable solution." According to the court, however, the letter did not constitute a "claim" within the meaning of the policy because it was not addressed to the insured and provided no indication that money or services were demanded of the insured. The court similarly concluded that the letter did not support a defense to coverage based on the policy exclusion for claims arising out of facts or circumstances likely to give rise to a claim of which an insured had knowledge of prior to the inception of the policy because there was no indication at the time that litigation was forthcoming, especially in light of the insured's voluntary agreement to correct the situation.