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NEWSLETTER

Lawsuit Brought By Vendors Not a "Claim" under E&O Policy

May 2010

The United States District Court for the Northern District of Georgia, applying Georgia law, has held that an E&O policy does not afford coverage for a lawsuit brought against an insured by vendors because the plaintiffs were not customers of the insured as required by the policy's definition of "Claim." *MedAssets, Inc. v. Fed. Ins. Co.*, 2010 WL 1409852 (N.D. Ga. Mar. 31, 2010). The court also concluded that the same complaint triggered a duty to defend under a D&O policy and that an exclusion for misappropriation of trade secrets in the D&O policy did not bar coverage for the complaint.

An insurer issued an E&O policy and a D&O policy to a company that worked with healthcare providers to improve their financial strength. The company's wholly-owned subsidiary assisted medical organizations in reducing the prices paid for medical products. The subsidiary sometimes obtained historical purchasing data for particular medical products to help advise medical organizations on the optimal price for those products. A medical device manufacturer and a company that contracted with medical organizations to sell those devices initiated a lawsuit against the subsidiary. These vendor plaintiffs alleged that pricing for the medical devices was client-specific and confidential. They further alleged that the pricing constituted a trade secret and that the subsidiary had induced plaintiffs' customers to share the confidential pricing information. The complaint contained counts for tortious interference in inducing the breach of a confidentiality agreement, tortious interference in inducing the breach of a contract, tortious interference with prospective contractual relations and misappropriation of trade secrets.

The insurer denied coverage under the E&O policy based on, *inter alia*, the ground that the complaint was not a "Claim" as defined in the E&O policy. The E&O policy defined "Claim" as "a demand for damages by a customer." The court agreed with the insurer that the underlying plaintiffs were not "customers" of the subsidiary. The court rejected the insured subsidiary's argument that "customer" could be interpreted to mean customers of the insured's clients, rather than direct customers of the insured. The insured subsidiary cited a case that stated that one definition of customer was "a person [or entity] with whom a business house, or business man, has regular or repeated dealings" and contended that the underlying plaintiffs were "customers" because the insured's clients, such as hospitals, as well as the insured itself, had regular dealings with the plaintiffs. The court concluded that the term "customer" could not be "contorted" to include the underlying plaintiffs and concluded that the insured's construction was "unreasonable." According to the court, it was insufficient that the insured and the underlying plaintiffs had mutual customers where, with respect to

the lawsuit, neither was a customer of the other. The court accordingly upheld the denial of coverage under the E&O policy and granted summary judgment in favor the insurer.

Next, the court rejected the insurer's reliance on an exclusion in the D&O policy for Claims "based upon, arising from, or in consequence of any actual or alleged . . . misappropriation of ideas or trade secrets" and concluded that the insurer had a duty to defend under the D&O policy. Although a paragraph in the complaint alleged that the pricing information at issue was a "trade secret," the complaint also contained alternative allegations that the pricing information was confidential. The court noted that a legal distinction between confidential information and trade secrets existed and that three counts of the complaint did not rely upon allegations that the pricing was a trade secret. As such, the complaint potentially fell with the D&O policy's scope of coverage.