

Coverage Barred By Insured's Failure To Report Suit Until After Motion for Default Judgment

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Applying Michigan law, the United States District Court for the Western District of Michigan has held that an insurer has no duty to defend or indemnify an insured where the insured neglected to notify its insurer of suit or to forward pleadings as required by the policy. *Podiatry Ins. Co. of Am. v. Povich*, 2010 WL 1531408 (W.D. Mich. Apr. 16, 2010). The court ruled that the insurer was prejudiced as a matter of law by the insured's failure to provide notice of suit until after receiving notice to appear for entry of a default judgment.

The insurer had issued a claims-made-and-reported professional liability policy to a podiatrist and his practice. The policy required that the insured notify the insurer of claims "as soon as practicable" and, in the event suit is filed, to "immediately forward to the [insurer] every demand, notice, summons or other process received by him or his representatives."

On May 12, 2008, the doctor received notice of a claim and timely notified his insurer. However, upon receipt of a formal complaint on November 8, 2008 and other pleadings, including a motion for default judgment on March 13, 2009, the doctor neglected to forward anything to the insurer. On April 24, 2009, the doctor received a notice to appear for entry of default judgment and finally, on May 7, 2009, he notified the insurer of the pending default. A default judgment was entered three weeks later, which defense counsel appointed by the insurer under a reservation of rights unsuccessfully sought to have set aside.

Recognizing that the question of prejudice typically is a question for the jury, the court held that it may determine the issue as a matter of law where the undisputed facts allow for only one conclusion. Here, according to the court, the insurer was prejudiced because it: had no opportunity to investigate liability or damages issues; did not receive notice of the suit before the question of liability was determined; had no chance to evaluate, defend, negotiate or settle the suit; could not analyze counterclaims; and could neither contest the insured's liability nor its own liability under the policy. In reaching this conclusion, the court rejected the doctor's argument that the insurer was required to establish that there was a valid defense to his liability. The court pointed out that the standard for prejudice under Michigan law does not require a finding that "but for" the delay, the insurer would have avoided liability on the claim.