

Prior and Pending Litigation Exclusion Bars Coverage for Claim Against Broker

June 2010

In an unpublished disposition, the United States Court of Appeals for the Ninth Circuit has held that, under either New York or California law, a pending and prior litigation exclusion barred coverage for a claim alleging failure of the insured broker to obtain workers' compensation insurance for its client because the claim arose out of an act "underlying or alleged" in the employee tort suit against the broker's client. *Hilb Rogal & Hobbs Ins. Serv. of California, Inc. v. Indian Harbor Ins. Co.*, 2010 WL 1972081 (9th Cir. May 17, 2010). The broker's professional liability policy excluded coverage for claims "arising out of" any litigation pending on or resolved prior to the inception of the policy period or "any actual or alleged act. . . underlying or alleged" in any such litigation. The court noted that, under California law, the employee tort suit against the broker's client could not have proceeded to judgment if the client had workers' compensation insurance. Therefore, the pending and prior litigation exclusion barred coverage for the claim at issue because the broker's failure to obtain such insurance for its client was an "act" underlying the employee lawsuit and the claim against the broker "arises out of" that "act."

The court rejected the broker's contention that it improperly adopted a "but for" test instead of a "significant factual nexus" test applied in California precedent regarding the connection between a claim and prior litigation. Instead, the court reasoned that the importance of the same failure to obtain workers' compensation coverage in both the employee suit and the claim against the broker constitutes the requisite "factual nexus" between them.