

Policy Deemed Ambiguous as To Whether Uncovered Claims Must Be Reported

November 2010

Applying Utah law, the United States District Court for the District of Utah has denied an insurer's motion for summary judgment, finding that the policy's reporting requirements were ambiguous and could reasonably be read both to require the reporting of all claims within the policy period and to require only that claims for covered loss be reported during the policy period. *St. Paul Fire & Marine Ins. Co. v. Metropolitan Real Estate, LLC*, 2010 WL 3855285 (D. Utah Sept. 29, 2010).

The insurer issued a real estate agents or brokers professional liability policy to a real estate agency for a policy period September 1, 2005 to September 1, 2006 (the 2006 Policy). During the 2006 policy period, a lawsuit was brought against the insured agency and its insured agent alleging fraud. The claim was not reported to the insurer. An amended complaint was filed in February 2007, adding causes of action against the insureds for negligence and other torts. The insureds finally provided notice of the claim in February 2008.

In a declaratory judgment action, the insurer contended that no coverage was available under the 2006 Policy because the underlying claim was not reported within the policy period as the policy required. The court agreed that the insurer's reading of the policy was reasonable, noting that the policy required the insurer to pay damages for covered loss only if it results in a claim first made and reported while the policy is in effect. Noting that the policy required the insureds to report any act, error, event, incident, offense or omission that may result in covered damages, the court found that it was "reasonable to read the policy language and understand that the insured is required to report any claim or suit . . . that is first brought against the insured while the policy is in effect."

The court concluded, however, that an alternative reading of the policy was also reasonable. Because the policy contained an exclusion for "fraudulent wrongful acts," it was plausible to read the policy not to require that the underlying claim be reported while the policy was in effect because the underlying claim initially asserted only fraud. The court acknowledged that the insurer's duty to defend could still apply when an insured is accused of fraud because the fraud exclusion could not be applied until the commission of a fraudulent wrongful act was "determined through legal processes." The court found, however, that the policy's "duty to defend provision has no express reporting requirement" and that it was "reasonable to read the policy language and believe that the insured is only required to report claims or suits for a covered loss." Finding that the policy was susceptible to more than one reasonable interpretation, the court held policy to be

ambiguous. The court thus denied the insurer's motion for summary judgment, concluding that there were disputed issues of fact as to whether the 2006 Policy applied to the underlying claim.