wiley

NEWSLETTER

Insolvency Exclusion Bars Coverage for Allegations that Actuarial Services Firm Contributed to Client's Insolvency

April 2011

The United States Court of Appeals for the Ninth Circuit has held that, under California law, an insurer had no duty to defend an insured actuarial services firm in litigation alleging that the insured's reserve reviews and rate level recommendations contributed to the insolvency of a medical malpractice self-insurance fund. *Zurich Specialties London Ltd. v. Bickerstaff, Whatley, Ryan & Burkhalter, Inc.*, 2011 WL 1118463 (9th Cir. Mar. 28, 2011). The underlying third-party complaint, filed by the insolvent fund's accountants, sought contribution from the actuarial services firm in an action by the fund's receiver against the accountants. The actuarial services firm sought coverage under its professional liability policy, which excluded claims "arising out of . . . the insolvency or bankruptcy of the Insured or any other person, firm or organization."

The court held that the allegation that the insured played a causal role in the insolvency of the self-insurance fund was sufficient to satisfy California's broad definition of the term "arising out of" and to trigger the insolvency exclusion. The court found the doctrine of concurrent causation inapplicable because the conduct excluded by the policy–that the insured's work allegedly contributed to the self-insurance fund's insolvency–was the same as, and not independent of, any covered malpractice. The court concluded that no duty to defend was triggered because the underlying action fell squarely within the insolvency exclusion. The insured could not establish a duty to defend by speculating that the financial condition of the currently insolvent entity might improve and potentially render the insolvency exclusion inapplicable.