

E&O Policy Does Not Respond to Lawsuits Filed After the Expiration of the Policy

April 2013

A federal district court in California has held that claims based on lawsuits filed after the expiration of a claims-made-and-reported E&O policy did not trigger coverage under the policy. *ACE Capital Ltd. v. ePlanning, Inc.*, 2013 WL 927084 (E.D. Cal. Mar. 8, 2013). The court also held that the insurer did not act in bad faith by paying prior covered claims and defense costs and refusing to pay amounts in excess of the policy limit because such actions were expressly permitted in the policy.

The insured was named in four lawsuits brought by the same plaintiffs alleging breach of fiduciary duties and misrepresentations and/or omissions of material facts in connection with selling certain investments. The parties settled the lawsuits and as a part of that settlement, the insured assigned its claims under its E&O policy to the plaintiffs.

The E&O policy was a claims-made-and-reported policy that provided that the insured "shall give written notice [of any Claim] to the [insurer] as soon as possible, but in no event more than sixty days after the Claim is made." The policy also included an "Extended Reporting Period," which provided for the insured's right to purchase an extension of the reporting period of the policy up to twelve months in the event of the insurer's cancellation of or refusal to renew the policy. The insurer filed a complaint to determine the allocation of the remaining proceeds under the policy, and the claimants filed a counterclaim alleging breach of contract and of the covenant of good faith and fair dealing and seeking a declaratory judgment from the court.

The insurer argued that the claimants' counterclaim should be dismissed because the underlying claims were not first made during the policy period and because the claimants failed to allege that the underlying claims were reported to the insurer. The claimants contended that the insurer breached its duty not to favor one insured over another and not to exhaust its policy limits in a way that would leave its insured exposed to additional covered claims.

In agreeing with the insurer and dismissing the claimants' counterclaims, the court explained that, under a claims-made-and-reported policy, such as the policy at issue, "an insurer provides coverage for any loss resulting from claims *made* during the policy period." (emphasis in original) The court reasoned that because the four lawsuits were filed after the expiration of the policy, including the expiration of the Extended Reporting Period if it had been purchased, they could not have been timely reported. The court also found

that the insurer could not be liable for bad faith because it was expressly permitted by the policy to pay prior covered claims and defense costs and was not obligated to pay amounts in excess of the policy limit.