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NEWSLETTER

Vague Description of "Possible Claim" Not Sufficient Under Claims-Made-and-Reported Policy

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The United States District Court for the Middle District of Florida, applying Florida law, has held that a title agent did not provide adequate notice of a claim against it to trigger coverage under its claims-made-and-reported professional liability policy. *Lake Buena Vista Vacation Resort v. Gotham Ins. Co.*, 2013 WL 5532677 (M.D. Fla. Oct. 7, 2013). The court also held that the claim, asserting the title agent fraudulently converted escrow funds, was barred by exclusions for services in an attorney capacity, damages from conversion, breach of express contract, and willful or intentional failure to comply with escrow instructions.

The underlying claimant, standing in the shoes of the insured title agent, sought coverage for its cross-claim against the policyholder. The policyholder sent a letter to the insurer's agent during the policy period referencing a "possible claim . . . arising as a result of alleged negligence and/or defalcation of monies by certain employees and agents of the insured." The policyholder declined to provide additional details. Over a year later, the insured and its principal were named in a cross-claim alleging that the principal committed ethical breaches as an attorney to the claimant and that the insured title agent, along with the principal "intentionally and fraudulently defalcated, converted, and/or misappropriated . . . deposits from [the insured] 's escrow trust account."

The court determined that the policyholder's initial letter did not provide sufficient notice under the policy to trigger coverage for the later cross-claim. The letter, held the court, identified only a "possible claim," and did not identify the potential claimant, the project or amount of money at issue or, "except in the vaguest possible terms, describe the circumstances giving rise to the potential claim." The letter did not itself constitute a "claim," which the court defined for the sake of argument as "the assertion of an existing right; any right to payment or to an equitable remedy, even if contingent or provisional." The letter, the court reasoned, merely stated that some party may at some point in the future assert a right to payment. Accordingly, the letter did not satisfy the policy's reporting requirement so as to bring the later cross-claim within coverage.

In addition, the court found that coverage for the cross-claim was barred by an exclusion for "damages resulting from attorney services" because the cross-claim was "shot through" with allegations that the insured title agent, through its principal, provided legal services to the underlying claimant. Moreover, the policy

barred coverage for damages from conversion, misappropriation, commingling, or defalcation of funds, as well as for breach of any express contract and willful or intentional failure to comply with escrow instructions. The claimant argued that it was attempting to collect damages for the policyholder's failure to supervise its principal, and its breach of fiduciary duty, and failure to advise the claimant of the alleged thefts—not the thefts themselves or any breach of contract. The court rejected this argument, holding that "the theft of the escrow funds was at the core of the allegations set forth in the cross-claim, despite [the claimant]'s current effort to reinterpret that document. The exclusions therefore apply."

Finally, the court rejected the claimant's reliance on self-serving factual findings inserted into the underlying judgment upon its *ex parte* motion to amend. The court distinguished case law precluding an insurer from challenging findings in an underlying judgment after wrongfully declining to defend. The court noted that the insurer here did not decline to defend the underlying cross-claim, as it had no notice of the cross-claim within the policy period. Moreover, even if it had declined to defend, it would not have acted wrongfully, as the allegations of the cross-claim were not within the policy's coverage. In any event, the gratuitous findings inserted into an amended judgment here were not material to the judgment.