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NEWSLETTER

Insurance Agent's Employee Not an "Insured" When Alleged to Be Acting on Behalf of an Uninsured Agency

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The United States District Court for the Southern District of Texas, applying Texas law, has held that an insurance agent's E&O carrier had no duty to defend the policyholder's employee when he was alleged to have been performing services solely on behalf of another, non-insured agent. *Carter v. Westport Ins. Corp.*, 2013 WL 5934606 (S.D. Tex. Oct. 23, 2013).

The employee of the policyholder, Smith-Reagan & Associates, was named as a defendant in a lawsuit alleging that he and another agent fraudulently collected premiums for policies sold to the underlying claimant. The employee sought coverage under an E&O policy issued to the policyholder. The insurer denied coverage because the underlying complaint alleged that the insurance services at issue were performed solely by a separate agency, Swetnam Insurance Services, or by the policyholder's employee on behalf of Swetnam. In the fourth and fifth amended complaints of the underlying lawsuit, the claimant added the allegation that "according to [the employee] all of [his] actions at issue in this case were performed in the course and scope of his employment with Smith-Reagan and not on behalf of Swetnam Insurance Services." The employee asserted that this allegation triggered a duty to defend by Smith-Reagan's insurer.

The court disagreed. Under Texas's "eight corners" or "complaint-allegation" rule, an insurer's duty to defend is determined solely by comparing the factual allegations of the underlying complaint to the policy at issue. The court concluded that the underlying complaints here did not allege that the employee acted on behalf of the policyholder and therefore that he was not an "insured." The court further determined that the claimant's recitation of the employee's insistence that he acted on behalf of Smith-Reagan was simply not a factual allegation made by the plaintiff and could not trigger coverage.

The court's conclusion was bolstered by further amendments to the underlying complaint that explicitly alleged that the employee acted in the course and scope of his employment with the policyholder, Smith-Reagan, and not on behalf of Swetnam. These allegations were made in a sixth amended complaint filed one day before the employee settled the underlying action. Accordingly, the employee qualified as an "insured" based on the allegations of the sixth and final amended complaint but not based on any prior version lacking such allegations. The court therefore granted the insurer's motion seeking summary judgment that it had no duties

arising out of the prior complaints in the underlying lawsuit.