

Other Decisions of Note

January 2005

Mississippi Court Enforces Mandatory Arbitration Provision

The Supreme Court of Mississippi enforced the mandatory arbitration provision of an employment practices liability policy where the policy originally issued under a form that was inadvertently approved by the Mississippi Department of Insurance. *Gulf Ins. Co. v. Neel-Schaffer, Inc.*, 2004 WL 2823081 (Miss. 2004). The court reasoned that the Federal Arbitration Act requires that arbitration provisions in contracts be enforced unless the provision is contrary to state law. The court concluded that a policy by the state insurance department is not the equivalent of a state law and therefore cannot reverse-preempt the Federal Arbitration Act.

Illinois Federal Court Holds No Duty Exists between Excess Insurers

A federal district court, predicting Illinois law, has held that a lower-level excess liability insurer does not owe a duty to settle to a higher-level excess insurer because the lower-level carrier did not have full control of the underlying litigation. *Liberty Mut. Ins. Co. v. Am. Home Ins. Co.*, 2004 WL 2979791 (N.D. Ill. Dec. 22, 2004). The insured carried its own \$5 million self-insured retention and exercised primary control over the underlying litigation, which resulted in a \$54 million jury verdict. The lower-level excess carrier became involved in the case only 11 days before trial in a limited capacity. The higher-level excess carrier argued that the lower-level excess carrier owed it a duty to attempt to settle the case in good faith. The court rejected this argument, holding that "the Illinois Supreme Court would not create a direct duty between [excess carriers] because there is no contract between them and because [the lower-level excess carrier] did not have complete control over both the defense and settlement of the case." The court also rejected the higher-level excess carrier's attempt to rely on the doctrine of equitable subrogation because the insured, into whose "legal shoes" the carrier was attempting to step, controlled its own defense and had the contractual right to settle the action for any amount within the lower-level excess carrier's limit and thus would have no claim against the lower-level excess carrier for failure to settle.

Illinois Federal Court Holds Attorney Associated with Firm Covered Under Firm's Professional Liability Policy

A federal district court, applying Pennsylvania law, has held that a lawyer associated with a law firm under a "Joint Venture and Fee Agreement" falls within the meaning of the undefined term "of counsel" in a law firm's professional liability policy and thus is an insured under the policy. *TIG Specialty Ins. v. Executive Risk Indem.*

Inc., 2004 WL 2980475 (N.D. Ill. Dec. 23, 2004). The policy at issue provides that "Insured" means the Firm and each person who was, is or becomes . . . 'counsel' or 'of counsel' to the Firm." The court rejected the defendant insurer's contention that "the insurance policy only intended to cover attorneys 'of counsel' who are 'affiliated with a law firm, though not a member, partner or associate'" because it found the term "of counsel" ambiguous and subject to at least one meaning that could be interpreted to include an attorney affiliated with a firm under a "Joint Venture and Fee Agreement." Based on this interpretation and the facts of the attorney's involvement in the underlying action, the court held that no question of material fact existed as to whether the attorney was covered under the insured law firm's professional liability policy.

Exclusions Barring Coverage Only for a Subcategory of Covered Acts Do Not Render Policy Ambiguous

The United States Court of Appeals for the Eighth Circuit, applying Missouri law, has ruled that exclusions barring coverage for claims arising out of "tax assessments, tax penalties, or tax adjustments" and "willful violations of any . . . statute, ordinance, rule or regulations" do not render ambiguous an E&O policy. *Oak River Ins. Co. v. Truitt*, 390 F.3d 554 (8th Cir. Dec. 3, 2004). The underlying claim arose from a suit against the policyholder county commissioners for improper expenditure of tax proceeds. The insurer denied coverage and sought a declaration that coverage was barred by both exclusions. The insureds countered that the exclusions rendered the policy ambiguous by negating all coverage for the commissioners, asserting that every act of a commissioner affects assessment, collection, disbursement or application of taxes. The Eighth Circuit rejected this argument, ruling that, although the exclusions barred coverage for a subcategory of acts relating to taxes, they did not create ambiguity because they did not negate all or even most policy coverage for commissioner malfeasance, referencing a variety of other conduct that would not fall within the exclusions' terms.

Plaintiff in Underlying Suit Allowed to Intervene in Coverage Litigation Where the Policyholder Has Defaulted

A Connecticut federal district court has allowed the plaintiff in an underlying suit to intervene in a declaratory judgment action between the insurer and its policyholder, where the policyholder has defaulted. *Gulf Underwriters Ins. Co. v. Hurd Ins. Agency*, 2004 WL 2935794 (D. Conn. Dec. 16, 2004). The policyholder was insolvent and did not defend itself in the declaratory judgment action. The underlying plaintiff sought to preserve its rights to any insurance proceeds by intervening under Rule 24(b)(2) of the Federal Rules of Civil Procedure, which allows permissive intervention when "an applicant's claim or defense and the main action have a question of law or fact in common." The court explained that to establish a claim or defense, "[a] party need not have a direct interest in the subject of the litigation, though something more than a general interest is required." The court found that the underlying plaintiff's cause of action against the policyholder was sufficient to state a claim allowing permissive intervention in the declaratory judgment action.

For more information, please contact us at 202.719.7130.