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NEWSLETTER

Lawyer Can Pursue Coverage from Reinsurer That Acted As Undisclosed Principal for Insolvent Insurer

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A federal district court, applying Florida law, has held that an attorney could pursue an action seeking coverage for a claim from the reinsurer of an insolvent insurer where the attorney alleged that the reinsurer (1) acted as an undisclosed principal and (2) tortiously interfered with the contract between the insurer and the attorney. *Law Offices of David Stern v. Scor Reins. Corp.*, 2005 WL 273137 (S.D. Fla. Feb. 2, 2005).

The case, involving legal malpractice policies, stemmed from a lawsuit initiated against the insured attorney on October 20, 1998. In early 2000, the insured attorney entered into a settlement to which both the insurer and reinsurer had consented. Shortly thereafter, the policies' third-party administrators (TPAs) issued a reservation of rights letter and refused to pay the settlement. The attorney then initiated a coverage action against the insurer. The attorney did not move to join the reinsurer even though the attorney learned of the reinsurer's alleged status as an undisclosed principal during discovery. While the coverage action was pending, the insurer was placed into rehabilitation and the coverage action was stayed and administratively closed by the court. The attorney then brought this action seeking damages against the reinsurer for alleged breach of its obligations as an undisclosed principal of the insurer. Alternatively, the attorney sought damages for the reinsurer's alleged tortious interference with the attorney's rights under the malpractice policy issued by the insurer.

The reinsurers brought this motion to dismiss asserting that 1) the claim based upon "undisclosed principal" liability was procedurally barred because the attorney made a "binding election" to sue the insurer, not the reinsurer in the coverage action, and because the insurer is an indispensable party to this action and 2) the tortious interference claim failed to state a claim upon which relief could be granted because it was barred by the economic loss doctrine and because the reinsurer's actions were not privileged under Florida law.

In rejecting the first argument, the court noted that, under Florida law, after the agency is disclosed and the principal is identified, the plaintiff must elect which of the two parties it will hold liable. The court explained, however, that this election is only required after final judgment is entered. Since the coverage action never reached this point, the fact that the attorney chose to sue the insurer does not constitute a binding election.

The court also rejected the reinsurer's argument that the attorney failed to join the insurer as an indispensable party to this action. The reinsurer asserted that the insurer was a necessary party under Federal Rule of Civil Procedure 19(a) because the insurer's participation was required to allow the jury to resolve a number of factual issues. The court held that the insurer's participation as a party was unnecessary since the factual issues could be resolved by making the insurer a witness. Thus, the court determined that under Rule 19(a)(1), complete relief could be granted without the insurer as a party and as a result, the insurer was not indispensable.

The court also rejected the reinsurer's assertion that the tortious interference claim was barred under the economic loss doctrine. The court noted that Florida recognizes tortious interference claims and that such a claim is only barred by the economic loss rule if it merely restates a claim for breach of contract. Since the attorney's tortious interference claim sought damages for the reinsurer's alleged interference with the insurer's contractual obligations, the court held that this was separate and distinct from the attorney's claim against the reinsurer, as an undisclosed principal of the insurer, for breaching its obligations under the insurance policy.

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