

Contractual Relationship Claim Barred by Breach of Contract Exclusion

June 2005

In an unreported decision, the Court of Common Pleas in Pennsylvania has held that an insurer does not have a duty to defend or indemnify under a school leaders errors and omissions policy containing a breach of contract exclusion where the underlying litigation was based on a breach of contractual duties. *Drexel Univ. v. Nat'l Union Fire Ins. Co.*, 2005 WL 1048116 (Pa. Com. Pl. 2005).

The policyholder, was sued in two underlying actions for allegedly violating an oral and written agreement not to disclose information regarding a conductive polymer fiber that was given to one of its professors. In the first lawsuit, from which the insured was ultimately dismissed for lack of personal jurisdiction, it was sued for breach of the duty of good faith and fair dealing, statutory misappropriation of trade secrets, conversion, intentional and negligent misrepresentation, negligent disclosure, negligent retention and supervision, tortious interference with contractual relations and *prima facie* tort. In the second action, it was sued for breach of contract, breach of the duty of good faith and fair dealing, common law theft of trade secrets, conversion, intentional and negligent misrepresentation, tortious interference with existing and prospective contractual relations, *prima facie* tort and unjust enrichment.

The insured brought this declaratory judgment action to force its insurer to provide a defense and indemnification under two school leaders errors and omissions policies. The policies provide that there would be no coverage for any claim "arising out of a breach of contract . . . this exclusion shall not apply to . . . any liability that the insured would have in the absence of a contract." In addition, the policies provide that there is be no coverage for any claim "arising out of any misappropriation of a trade secret"

In the second action, the court dismissed all of the tort claims under the "gist of the action" doctrine, which "precludes plaintiffs from re-casting ordinary breach of contract claims into tort claims." The insured argued that the breach of contract exclusion did not preclude coverage for the contract claims because they involved "liability that the Insured would have in the absence of a contract" as evidenced by the tort claims that were dismissed." The court disagreed with this reasoning. Noting that the tort claims had been dismissed under the gist of the action doctrine, the court explained that, as a result, the underlying court "necessarily found that the duties that the insured allegedly breached were contractual rather than tort duties" and that "the liability [the underlying plaintiff] is attempting to impose upon the insured would not exist in the absence of a contract between them." The court concluded that the claims were thus barred by the breach of contract exclusion.

The court further stated that the insurer was not obligated to provide a defense for the first action because, even though the tort claims remained viable, "[i]t is clear from the facts alleged by [the underlying plaintiff] that all of its tort claims arise out of the contractual relationship between the insured and [the underlying plaintiff]" and thus fall under the breach of contract exclusion. The court thus granted the insurer's motion for summary judgment.

For more information, please contact us at 202.719.7130.