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NEWSLETTER

# Arbitration Provision Governs Claim First Made Prior to Policy Period

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The United States Court of Appeals for the Seventh Circuit, applying Illinois law, has refused to compel arbitration of an insurance coverage dispute, holding that a federal presumption of arbitration cannot override unambiguous policy language permitting arbitration solely at the option of the insured. *BCS Ins. Co. v. Wellmark Inc.*, 2005 WL 1324846 (7th Cir. June 1, 2005).

An insurer issued annual errors and omissions insurance policies providing "claims made and reported" coverage to the insured between 1994 and 1997. Whereas policies issued from 1994 to 1996 contained mandatory arbitration clauses, the 1997 policy provided that "[a]ny controversy arising out of or relating to this Policy or the breach thereof shall, at the option of the Participant Insured, . . . be settled by binding arbitration."

After the insured filed suit seeking coverage under the 1997 policy, the insurer filed suit to compel arbitration. The insurer argued that the inclusion of an arbitration clause required a "federal presumption of arbitration" and that a "relation back" provision in the 1997 policy brought the claim within the mandatory arbitration provision of the 1994 policy. The court rejected both of the insurer's arguments.

First, the court recognized that, because "[a]rbitration is a matter of consent," the presumption of arbitration is inapplicable where the parties' manifest intent is not to require arbitration as the exclusive method of dispute resolution. Contrary to the insurer's position, the court noted that the federal policy favoring arbitration was not implicated because arbitration was optional under the plain language of the parties' contract.

Second, the court found the insurer's "relation back" argument unavailing. The court noted that the "relation back" provision, which stated that all claims related to a single wrongful act would be considered as one claim, had no bearing on whether to compel arbitration of the 1997 claim. Instead, the decision to compel arbitration depended entirely on the plain language of the 1997 policy, which gave the insured the option of seeking arbitration.

For more information, please contact us at 202.719.7130.