

Other Decisions of Note

June 2005

D&O Dispute Remanded to State Court Because It Does Not Raise Federal Question

In an unreported decision, the United States District Court for the Northern District of Ohio has held that a purely contractual dispute regarding a D&O policy does not raise a federal question, and has therefore remanded a coverage action involving non-diverse parties to state court. *Morris v. Fid. & Deposit Co.*, 2005 WL 1176060 (N.D. Ohio 2005).

Insolvency Exclusion Applies Regardless of Whether Excluded Risk Was Proximate Cause of Loss Suffered by Insured

In an unpublished opinion, the United States Court of Appeals for the Fourth Circuit, applying South Carolina law, has held that an insolvency exclusion in an E&O policy issued to insurance brokers bars coverage for a claim based on unpaid medical claims. *American Auto. Ins. Co. v. Valentine*, 2005 WL 11403676 (4th Cir. 2005). The insurer issued an E&O policy to brokers who sold health and dental insurance in a plan that became insolvent, resulting in litigation against the brokers. The policy excluded coverage for any claim "arising out of the insolvency . . . of any organization in which the insured has (directly or indirectly) placed or obtained coverage." The court held that the insurer properly denied coverage since the underlying plaintiffs were "at bottom" seeking damages for unpaid medical claims as a result of the insolvency of their medical plan. In so ruling, the court explained that "South Carolina law does not require an insurance company to establish that a specially excluded risk was the proximate cause of the loss suffered by the insured in order for an exclusionary clause to apply." Instead, the existence of a "causal connection" that is "less direct or immediate" than proximate causation provides sufficient grounds for an insurer to deny coverage.

"Assumption-of-Defense" Estoppel Inapplicable Where Insurer Denies Defense

The United States Court of Appeals for the Eighth Circuit, applying Minnesota law, has granted summary judgment in favor of an insurer, holding that an insured may not create coverage though estoppel where the insurer did not control the defense of the action against the insured. *Minn. Commercial Ry. Co. v. Gen. Star Indem. Co.*, 2005 WL 1214339 (8th Cir. May 25, 2005).

The insured company sought coverage for a claim filed after expiration of the claims-made policy issued by the insurer. The company defended and eventually settled the underlying claim against it. The insurer denied coverage eight months after the company submitted the claim because the claim was made outside the policy period. The company argued that the insurer was estopped from denying coverage because its delay in responding implied that it had accepted the claim. The court disagreed, concluding that coverage may be

created by estoppel only where the insurer controls the defense of the insured. The court noted that "assumption-of-defense" estoppel is not available where the insurer refuses to defend the insured, gives notice of a reservation of rights, or does not conduct the defense with knowledge of the relevant facts. The court ruled that there was no coverage by estoppel in this case because the company controlled its own defense from the beginning of the underlying litigation and the insurer refused to defend and denied coverage.

U.S. Court Has Personal Jurisdiction Over Bermuda D&O Insurer Insuring Risks in U.S.

In an unreported decision, the United States District Court for the Western District of Washington has held that the insurance of risks within the state is sufficient to support the exercise of personal jurisdiction over a Bermuda D&O insurer with no physical presence in the state. *Amazon.com, Inc. v. Underwriters, Lloyd's of London*, 2005 WL 1172432 (W.D. Wash. May 17, 2005).

Washington's long-arm statute extended the jurisdiction of its courts to any person "[c]ontracting to insure any person, property or risk located within this state at the time of contracting." The insured company was headquartered in Washington. The insurer was incorporated and headquartered in Bermuda and alleged that the policy at issue was negotiated and executed there. The insurer claimed to have no registered agent, office or other contacts in Washington sufficient to justify the exercise of personal jurisdiction over it. However, the court held that, although the insurer was not physically present in the state, its "ongoing commitment to insure a company headquartered in Washington" provided a sufficient connection to the state to satisfy due process concerns. The court likewise found that service of process need not be served on unauthorized foreign insurers pursuant to the Hague Convention. The court concluded that service on the state insurance commissioner, which resulted in the insurer actually receiving the summons and complaint, was sufficient to satisfy minimum due process requirements.

Insurer Must Provide Defense Where Coverage for Cause of Action Exists

The Fifth Circuit Court of Appeals, applying Louisiana law, has held that an insurer has a duty to defend its insureds when at least one of the allegations against the insureds is not unambiguously excluded under the policy's terms. *Cont'l Cas. Co. v. Feingerts & Kelly, APLC*, 2005 WL 1170440 (5th Cir. May 18, 2005).

In this insurance dispute arising under a legal malpractice policy, the insurer had sought a declaration that it was not obligated to provide a defense arising out of a fee dispute because the policy specifically excluded legal fees from its definition of covered "damages." The court determined that, while those allegations centering on the legal fee dispute were not for "damages" under the policy, allegations that the insured had mishandled his client's case could potentially give rise to covered "damages." Thus, the court held that, since at least one of the claims in the underlying complaint was not unambiguously excluded from coverage under the policy, the insurer was obligated to provide a defense for the entire case.

For more information, please contact us at 202.719.7130.