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NEWSLETTER

Deposition Questioning Not a Claim for Purposes of Notice Requirement

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The U.S. District Court for the Western District of Wisconsin, applying Illinois law, has ruled that the depositions of an insured in prior litigation to which she was not a party did not trigger the notice obligation of a claims-made professional liability policy. *McCraw v. Mensch*, 2006 WL 3258232 (W.D. Wis. Nov. 9, 2006). The court also held that whether claims alleging various instances of legal malpractice over the course of 10 years constituted a single claim for the purpose of computing policy limits was a question of fact.

The underlying lawsuit was a legal malpractice claim against the insured attorney in connection with her representation of a musical group between 1985 and 1997. The malpractice suit arose out of a suit between the group and its former manager. The music group filed suit against the attorney in state court, and the former manager filed a separate action in federal court against the attorney and her insurer. The insurer filed a counterclaim in the federal action for a declaration of its coverage obligations and filed a motion for summary judgment declaring that it had no obligation to provide coverage to the attorney in either the federal or state court actions because the attorney had failed to give timely notice under the professional liability policy. The attorney cross-moved for a determination that notice of the claim was timely and that the two suits constituted two separate claims.

The court found that in June and July of 2004 the attorney was deposed in connection with the suit between the music group and its former manager. In December 2004, the attorney received a letter from the music group's counsel informing her that the group intended to assert a malpractice claim against her. The letter stated: "based on your own [deposition] testimony, I sincerely doubt that you are surprised to receive this letter." The attorney forwarded the letter to her insurer.

The first issue the court considered was whether the June and July 2004 depositions constituted a claim. The insurer argued that the attorney "first received knowledge of likely claims against her... at her depositions... and that this amounted to a 'claim' as defined in the policy." The insurer asserted that because the attorney did not give notice of the claim allegedly made in the depositions, coverage was barred by the policy's notice provision, which required notice "as soon as practicable." The insurer also argued that the attorney made a misrepresentation that barred coverage by failing to list the depositions as claims against her in her October 2004 renewal application.

The court first held that the depositions "were not sufficient to trigger a notice obligation." The court found that the attorney "learned nothing at the depositions... that she did not know ten years earlier." Even though, during the depositions, the attorney was asked "several questions concerning her relationship with [the music group's manager] during the negotiation of the employment agreement and several concerning whether she held a Wisconsin law license," the court found that "these brief exchanges would not have made it appear to a reasonable person that a claim may be commenced." The court therefore held that "coverage cannot be denied on the basis that notice of a claim was not provided as soon as practicable or that a preexisting claim was not properly included in the October 2004 application."

The court then stated an alternate basis for its holding, indicating that the attorney's notice of the claim was timely, even if the claim was first made during the depositions. The policy required the insured to give notice of any claim "as soon as practicable." The court explained that the "as soon as practicable requirement" requires "notification within a reasonable time," citing *Sears, Roebuck, and Co. v. Seneca Insurance Co.*, 627 N.E.2d 173 (Ill. App. Ct. 1993). The court found that here "the delay in reporting was relatively short, particularly in light of the tenuous nature of any claim and the period of time that had passed since the events which might be the basis for a claim." Furthermore, while the court acknowledged that prejudice to the insurer is not "a prerequisite to denial of coverage," the court considered the lack of evidence that the insurer "was somehow impeded in its ability to investigate the claim by the delay from July to December." The court held that "[e]ven assuming the limited questioning at her deposition constituted notice to her of a possible claim, her notification of Insurer less than five months after the second deposition was not in violation of the 'as soon as practicable requirement' in the policy."

The second issue the court considered was whether "the two pending lawsuits should be treated as a single claim for the purpose of computing policy limits." The policy stated that any claims arising "out of a single act, error or omission or a series of related acts, errors or omissions" would be treated as a single claim. Citing *Doe v. Illinois State Medical Inter-Insurance Exchange*, 599 N.E.2d 983 (Ill. App. Ct. 1992), the court stated that this policy language was ambiguous as a matter of Illinois law. The court framed the inquiry as "whether the insured committed more than one discrete act of negligence which caused injury." This, the court stated, was a matter for jury determination. The court found that a trial "may result in proof of discrete acts of negligence which would support a determination that there are multiple claims." Therefore, the court denied summary judgment as to whether the two suits constituted distinct claims.