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NEWSLETTER

Notice During Extended Reporting Period Inadequate When Claim First Made During Policy Period

October 2006

The U.S. District Court for the District of Kansas, applying Texas law, has held that coverage was not available under a claims-made E&O policy because the insured failed to provide timely notice of the claim to the insurer during the policy period. *Star Ins. Co. v. Berry Ins. Agency*, 2006 WL 2460646 (D. Kan. Aug. 23, 2006).

The insurer issued a claims-made E&O policy to an insurance agency, effective from January 25, 2001 to January 25, 2002, with an extended reporting period of 90 days. The policy required the agency, when it received a claim under the policy, to "notify [the insurer] in writing as soon as possible during the Policy Term" and to "immediately forward to [the insurer] all documents which [the insured] receive[d] in connection with the claim." The policy further specified that such notice was to be provided to the insurer's agent. "Claim" was defined by the policy as "a written demand received by you for money or professional services including the serving of a suit or receipt of notification of arbitration which alleges a wrongful act." The policy included a 90-day extended reporting period provision for "claims made against you during this 90-day period arising from wrongful acts that took place subsequent to the retroactive date and before the end of the policy period. "

The underlying suit stemmed from an "agency and service agreement" entered into between the agency and three insurance companies. In March 2001, the insurance companies filed suit against the agency, alleging that the agency failed to perform under the agency agreement, breached fiduciary duties and refused to remit earned premiums to the insurance companies. In December 2001, the insurance companies moved to amend the complaint, and, over the agency's opposition, the court granted the motion in February 2002. In January 2002, counsel for the insurance companies forwarded a copy of the amended complaint to the insurer's agent, and informed the agent that the letter constituted "formal notice that we have made a claim against your insured which falls within the coverage you have provided." One day later, the agent notified the insurer of the pending suit. The insurer denied coverage, asserting that the claim was not reported prior to the policy's expiration date and that, because the agency was aware of the suit prior to the extended reporting period, the extending reporting period did not apply. In connection with bankruptcy proceedings instituted by the agency, the agency and the insurance companies, along with the agency's creditors and chapter 7 trustee, sought approval of a settlement of the underlying suit. As part of the settlement, the insurance

companies agreed to attempt to collect a portion of the $12 million judgment, up to the policy limits, through a garnishment action against the insurer. In the action, both parties moved for summary judgment.

Recognizing that, under Texas law, "claims-made policies . . . cover only injuries or damages that come to the attention of the insured and are made known to the insurer during the policy period," the court first found that both the March 2001 complaint and the December 2001 amended complaint, attached to the motion for leave, potentially stated causes of action covered by the terms of the policy. It then found that both complaints alleged wrongful acts occurring during the policy period that were made known to the agency before the expiration of the policy.

The court rejected the insurance companies' argument that the allegations in its first amended complaint did not constitute a claim until the court granted the motion for leave to file the amended complaint in February 2002, after the policy's expiration. The court emphasized that, because the amended complaint was attached to the motion for leave and was served on the agency in December 2001 and because the proposed amended complaint constituted a claim under the policy, the agency should have notified the insurer of the lawsuit as soon as possible and forwarded all related documents to the insurer. The court also noted that the insurance companies' argument was undermined by the correspondence sent to the insurer before the court granted the motion for leave, which notified the insurer of the proposed amended complaint and stated that the insurance companies "believed the allegations in the proposed amended complaint to be covered by the policy." Because the agency did not provide notice of the allegations, of which it was aware, in the original complaint or the amended complaint before the policy expired, the court concluded that coverage was barred under the claims-made policy.