

Insolvency Exclusion Bars Professional Liability Coverage for Claims Against Administrator of Workers Compensation Trusts

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An Illinois intermediate appellate court, applying Illinois law, has held that a workers compensation risk-pooling trust constitutes "insurance," rendering claims against the trust administrator arising out of the insolvency of the trust subject to the insolvency exclusion of the administrator's professional liability policy. *CNA Cas. of Cal. v. E.C. Fackler, Inc.*, 2005 WL 2291190 (Ill. App. Ct. Sept. 20, 2005).

The insurer issued a professional liability policy to the administrator of three workers compensation self-insurance pooling trusts. Employers joining the trusts transmitted funds to the administrator to be deposited in the trusts for payment of workers compensation claims against the employers. The director of the Illinois Department of Financial and Professional Regulation investigated the administrator and found that its negligent management jeopardized the trusts' financial status. The director revoked the administrator's license to manage trusts and was subsequently appointed as the trusts' liquidator. In that capacity, the director brought suit against the administrator alleging breach of fiduciary duty, negligent misrepresentation and aiding and abetting a breach of fiduciary duty. The insurer defended the administrator against the suit but sought a declaration that coverage was barred by several policy exclusions.

The appellate court found that coverage for the director's claims was barred by the professional liability policy's "insolvency exclusion." The exclusion provided that coverage was unavailable for "any Claim arising out of or in connection with . . . the insolvency, receivership, bankruptcy, liquidation or inability to pay of any insurer, trust, organization, or other vehicle . . . in which [the administrator] has placed or obtained insurance coverage, or placed funds of a client or account." Relying on *Chicago Hospital Risk Pooling Program v. State Medical Inter-Insurance Exchange*, 758 N.E.2d 353 (Ill. App. Ct. 2001), the appellate court concluded that, under the terms of the trust and pooling agreements, the workers compensation trusts were the "functional equivalent of insurance for the participating employers." Therefore, the court continued, the administrator "placed or obtained insurance coverage" when it solicited participants in and administered the trusts. The court further found that the administrator "placed funds of a client" in the trusts, rejecting the administrator's argument that the trusts themselves, rather than the participating employers, were its clients. Based on these characterizations of the administrator's activities, the court concluded that coverage for claims arising out of the liquidation of the trusts was barred by the exclusion.

The court also concluded that coverage for the director's claims was barred under an exclusion for "any Claim arising out of or in connection with a governmental intervention." The court noted that the director undertook several actions with respect to the trusts—including revoking the administrator's license, placing the trusts into conservation, liquidating the trusts, and filing lawsuits against the administrator—that constituted "governmental intervention." The court rejected the director's argument that the exclusion was inapplicable because the losses at issue arose out of the administrator's wrongful acts rather than the director's actions. Noting that the exclusion also encompassed claims "in connection with" the intervention, the court concluded that the claims were sufficiently connected to governmental intervention to trigger the exclusion.

Finally, the court rejected the insurer's argument that an exclusion for claims arising out of "any actuarial act, error, omission or assumptions" applied. The appellate court reasoned that the administrator was not acting as an actuary with respect to the trusts and noted that the administrator had hired an actuarial consulting firm.

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