

Notice of Complete Policy Defense to Insured Organization Satisfies Statutory Requirement

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The United States District Court of the District of Utah, applying Utah law, has held that a professional liability insurer satisfied the statutory requirement that it provide "the insured" with timely notice of the intent to assert a defense to all claims under a D&O policy where, pursuant to the terms of the policy the insurer provided notice to the insured organization but not to a director that was an individual insured under the policy. *Exec. Risk Indem., Inc. v. Lewis*, No. 2:04-CV-01115 PGC (D. Utah Oct. 4, 2005). Wiley Rein & Fielding LLP represented the insurer in the case.

The insurer renewed a D&O policy for a Utah non-profit organization that sold fitness programs and equipment to schools. The policy contained an "Authorization and Notices" clause that provided that "[t]he Insureds agree that the Parent Organization will act on their behalf with respect to receiving any notices and return premiums from the Underwriter." Under Utah Code Ann. § 31A-21-105(5), an insurer wishing to assert a "general defense" to all claims under a policy must notify "the insured" of the intent to assert the defense within 60 days of acquiring knowledge of facts supporting the defense.

In December 2004, the insurer notified the organization and certain directors and officers that it believed a general defense to all claims existed under the policy. This notice was not provided to director Dan Clark. The insurer then brought a declaratory judgment action seeking, among other things, policy rescission because of material misrepresentations in the organization's renewal application.

The court denied Mr. Clark's motion to dismiss the rescission count, rejecting his assertion that the "Authorization and Notices" provision contravened Utah law and that the insurer had not provided him with the statutorily required notice of the intent to assert a general defense. The court first observed that nothing in the Utah statute prevented an insured from contractually appointing an agent to receive statutory notice—the effect of the policy provision—especially where the appointment appeared to have been made "freely," as there was no assertion that these terms were the product of a contract of adhesion. The court also reasoned that the use of an agent "promote[d] efficiency and fairness" because it eliminated the need for either the organization or the insurer to go to the expense of continually tracking the identities and locations of all directors, officers and trustees over the length of the policy. As a result, the court found that the insurer had satisfied the statutory notice requirement of Utah Code Ann. § 31A-21-105(5) by providing timely notice of its intent to assert a general defense to the organization pursuant to the terms of the policy.

For more information, please contact us at 202.719.7130