wiley

NEWSLETTER

Exclusion for Prior Claims Disclosed in Application Inapplicable Where Application Is Submitted After Policy Incepts

December 2005

The United States District Court for the Southern District of Texas, applying Texas law, has held that an exclusion in a malpractice policy issued to a medical staffing company for claims disclosed prior to the inception of the policy did not apply where the claims were disclosed in the application, which was mailed to the insurer the same day the policy issued. *Evanston Ins. Co. v. Encore Med. Staffing, Inc.*, 2005 WL 2561645 (S.D. Tex. Oct. 12, 2005). The court also held that a prior insurer did not have to provide coverage where the insured's insurance agent failed to forward notice of the claim to the insurer in a timely manner.

The policyholder, who provided contract physicians to hospitals, received a letter in late 2002 notifying it of injuries suffered by a patient caused by one of its physicians and of an intent to sue. The company forwarded the letter as a "potential claim" to the agent of the first insurer, which provided claims-made coverage at the time. The company also disclosed the letter in its application to the second claims-made insurer, from whom it purchased coverage for 2003. The second policy incepted on the same day that the company submitted the application.

The first professional liability policy required that proper and timely notice be furnished in order to obtain coverage. Although the policy allowed written notice of claims, defined as "a demand received by the insured for money or services," to be provided within 60 days of the expiration of the policy, notice of injury was only covered if made within the coverage period. The court held that, although the company had provided notice of the intended suit to its agent before the policy period ended, it was undisputed that the agent did not provide the insurer with that notice until after the policy period ended. Since the policy covered only those injuries for which notice had been received during the policy period, the court held that there was no coverage under the first policy.

The second policy limited coverage to "claims (a) first made against the Insured for medical professional services rendered or failed to be rendered subsequent to the retroactive date stated in the policy and (b) reported to the underwriters during the policy period or any applicable extended reporting period." The policy defined "claim" as "written notice of intent to file a lawsuit . . . against the Insured." The policy defined "written notice" as "a notice in writing delivered to the underwriter by a Named Insured." The second policy

also excluded coverage for "a claim which was first brought to the attention of the Insurer prior to the first date that the Named Insured had current continuous coverage by the underwriter."

The court held that the second policy afforded coverage. It explained that under the definitions in the policy, "there can be no 'claim' until there is a notice in writing delivered to the underwriter." Here, the company first provided notice in the supplement to the application submitted the same day the policy incepted.

The insurer argued that the disclosure in the application was inadequate because it was not made under an existing policy. The court rejected that argument, explaining that the policy required only that notice be given "during the Policy Period."

The court also rejected the insurer's argument that its ruling would allow prospective insureds to benefit from making disclosures in their applications for insurance. The court explained that this outcome resulted only where the insurer agrees to let the policy period begin prior to receipt of the application. According to the court, the insurer "was in the best position to avoid the strange result in this case."

For more information, please contact us at 202.719.7130