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NEWSLETTER

# Liability Insurer Must Share Equally with D&O Insurer in Defense of Mutual Policyholder

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In an unpublished opinion, the United States District Court for the District of Columbia has ruled that a communications liability insurer must share equally with a D&O insurer the defense costs incurred by the insurers' mutual policyholder, an association, in defending against lawsuits alleging that the association wrongfully published medical criteria for certain disorders in a widely circulated trade manual. *Executive Risk Indem. Inc. v. Employers Reins. Corp.*, No. 04-0189(JR) (D.D.C. Dec. 14, 2005). Wiley Rein & Fielding represented the plaintiff D&O insurer in the suit.

The matter arose from a series of lawsuits filed on behalf of users of the drug Ritalin against several defendants, including the American Psychiatric Association (APA). The suits alleged that APA wrongfully conspired with drug manufacturers and others in publishing medical criteria for attention deficit disorder (ADD) and attention deficit hyperactivity disorder (ADHD) in multiple versions of its *Diagnostic and Statistical Manual* (*DSM*), which is widely used for its classification of mental disorders. APA successfully obtained dismissal of all of the lawsuits.

APA purchased a D&O policy, which provided for the reimbursement of defense costs for "claims . . . to hold the Insured responsible for a Wrongful Act." The D&O insurer reimbursed APA for all of its defense costs for the underlying suits (subject to a retention). APA also purchased a communications liability policy, under which the liability insurer had a duty to defend suits alleging negligent error or omissions in matters uttered or disseminated during the policy period. The liability insurer disclaimed a duty to defend. The D&O insurer subsequently filed suit as subrogee of APA to recover defense costs from the liability insurer.

The court concluded that, even though the underlying complaints alleged that diagnoses of ADD and ADHD first appeared in the *DSM* before the communication liability insurer's policy period, the complaints also included allegations that the diagnostic criteria were modified and broadened in subsequent versions of the *DSM*, for which publication dates were not stated. Applying the District of Columbia's duty to defend standards, the court held that the allegations of the complaints were broad enough to include the possibility of publication of matter during the liability insurer's policy period, thus triggering a duty to defend.

The communications liability insurer also argued that coverage was barred because APA delayed for seven months providing notice of the underlying lawsuits. Alternatively, the communications liability insurer argued that it should only be responsible for post-tender defense costs. The court rejected both arguments. The court reasoned that, even though timely notice is a precondition of coverage under District of Columbia law, the liability insurer waived any late notice defense by delaying in providing its coverage position for approximately 10 months and by failing to assert a late notice defense in its coverage letter. The court also held that it would be inequitable to hold the liability insurer responsible only for post-tender defense costs given that the D&O insurer responded promptly and paid all defense costs.

The court concluded that the excess other insurance clauses in both insurers' respective policies were mutually repugnant, such that liability must be apportioned between the insurers. In the absence of controlling District of Columbia law on the method of apportionment, the court held that both insurers must share equally in the defense (subject to retentions), because the multiple differences in the respective policies makes *pro rata* allocation inappropriate.

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