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NEWSLETTER

Notice to Broker Does Not Comply with Policy Terms

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A Tennessee appellate court has held that notice to a broker who was not an authorized agent for the insurer did not constitute notice under policy terms. *Marlin & Edmondson, P.C. v. National Union Fire Ins. Co.*, 2005 WL 3508011 (Tenn. Ct. App. Dec. 22, 2005).

The policyholder, a professional accounting firm, purchased professional liability insurance through an independent broker who acted without a direct agency contract with the insurer. The policy provided coverage from August 1, 1996 through August 1, 1997. It stated that it applied "only to Claims first made against the Insured and report to the Company during the Policy Period or an Extended Reporting Period." It also provided that "[a] Claim shall be deemed to have been reported when written notice of such Claim is received by the Company or its authorized agent." The policy did not define the term "authorized agent." According to the policy, receipt of written notice was "a condition precedent to coverage" under the policy. The policy also required that the accounting firm provide written notice "as soon as practicable" after becoming aware of a reasonable basis for a claim during the coverage period and "immediately" in case of receipt of service of process or a demand.

In July 1997, the policyholder received notice of a potential suit filed against it by one of its clients. The client asked to enter into a tolling agreement to extend the statute of limitations for the cause of action by nine months. The accounting firm then sought permission to enter into the agreement from the broker, who allegedly told the accounting firm that the insurer consented to the tolling agreement. The accounting firm received a complaint from the client in December of that year. The accounting firm faxed the complaint to the insurer, stating on the cover sheet that the broker had notified the insurer of the potential claim in July. The insurer denied coverage on the basis of the accounting firm's failure to give written notice during the policy period as required by the policy. It also denied that the policyholder purchased the extended reporting option.

The accounting firm subsequently initiated coverage litigation, alleging breach of contract by the insurer and both negligence and breach of contract against the broker. The trial court held that, although there was no agency contract between the broker and the insurer, the term "authorized agent" should be construed against the insurer in regards to the broker. The trial court therefore held that the notice given in July 1997 constituted notice under the policy terms.

The appellate court disagreed, noting that an oral conversation regarding a tolling agreement would not constitute notice under the policy terms. If the tolling agreement was provided in writing, the court stated, then that would constitute written notice. However, the court found that there was no evidence that the tolling agreement was provided in writing to the insurer during the policy period.

The court also rejected the trial court's interpretation of the meaning of "authorized agent." In the absence of a policy definition, it noted, the term should be defined in its ordinary, common and popular sense. It found the common definition of an authorized agent as "[o]ne who represents and acts for another under the contract or relation of agency." The court, reviewing the trial testimony of the broker, noted that the broker admittedly did not have a contract or agency relationship with the accounting firm. Therefore, it found that the accounting firm did not provide notice to the insurer or an authorized agent as required under the policy. The court ordered the lower court to enter judgment in favor of the insurer and directed further consideration of the negligence claim against the broker.