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NEWSLETTER

Claims Against Insured Clinic Reported Outside Policy Period Not Subject to Coverage Despite Timely Notice of Claim Against Insured Physicians Arising Out of Same Mishap

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A Texas appellate court has reversed a summary judgment ruling in favor of an insured, holding that a claims-made policy provided no coverage for a claim reported outside the policy period alleging a medical clinic's vicarious liability, despite prior notice of claims against individual insureds arising out of the same incident made within the policy period. *First Professionals Ins. Co., Inc. v. Heart & Vascular Inst. of Tex.*, 2005 WL 2438527 (Tex. Ct. App. Oct. 5, 2005).

The insurer issued a professional liability policy for claims made between April 1, 2002 and April 1, 2003. The policy identified a medical clinic as the first named insured and listed the doctors within the practice as additional insureds. During the policy period, the insured's agent forwarded two notice-of-claim forms, which attached demand letters addressed to the individual doctors. Subsequently, prior to the policy's expiration, the underlying claimant filed a negligence action, which named the clinic as a defendant and alleged various negligent acts by the two doctors. The practice notified the insurer of the lawsuit on May 2, 2003, approximately one month after the policy expired. The insurer denied coverage, citing the fact that the policy separately listed the practice and the doctors as named insureds and contending that notice had to be provided separately by each named insured during the policy period for a claim to be covered. The insured clinic subsequently initiated coverage litigation and the trial court entered judgment in its favor.

On appeal, the reviewing court first noted the fundamental difference between claims-made and occurrence policies, stating that, under claims-made policies, "it is the making of the claim which is the event and peril being insured . . . regardless of when the occurrence took place." It then discussed case law interpreting the Texas Professional Association Act, which required injured claimants to provide separate notice of "health care liability claims" to each health care provider implicated, including both individuals and entities. The court cited that conclusion as supportive of the insurer's position that notice of a claim provided by an individual doctor did not constitute notice of a potential claim against a separate corporate entity where that entity did

not receive a separate notice from the underlying claimant.

The court then considered the insured's reliance on *Employers Cas. Co. v. Glens Falls Ins. Co.*, 484 S.W.2d 570 (Tex. 1972), which addressed whether written notice by one insured under an occurrence policy inured to the benefit of all insureds. There, the state's highest court observed that "the purpose of the notice requirement, to enable an insurer to investigate while the matter is fresh in the minds of the witnesses, was served by the notice that was given." The appellate court distinguished the case, explaining that "the 'liability' event is not the triggering event for coverage under a 'claims-made' policy," but rather the "triggering event" was "the making of the claim which is the event and peril being insured." Thus, "notice of the 'liability event' is not relevant in determining whether coverage is triggered under a 'claims-made' policy," because "until a claim is made based on that liability event, coverage is not triggered."

Finally, the court rejected the insured's contention that a claim against either the individual physicians or the practice sufficed to trigger the coverage for both, explaining that because the policy focuses on liability "claims," not liability "events," the insured cannot notify its insurer of a claim until that claim is made. Here, the demand letters provided to the doctors failed to assert a claim against the clinic and, "therefore, those . . . letters could not provide written notice of a liability claim or intent to sue" the clinic. Accordingly, the court determined that the demand received by the insured doctors was not sufficient notice of a claim against the insured clinic and reversed the lower trial court's decision to the contrary.

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