

Federal Court Allows Breach of Contract and Indemnity Claims by Broker Against Insurer to Proceed

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The United States District Court for the District of Vermont, applying New York law, has denied an insurer's motion for judgment on the pleadings and summary judgment with respect to third-party breach of contract and indemnity claims brought by a broker alleging that the insurer failed to remove a prior acts exclusion from a policy issued to the broker's client. *Price v. J.H. Marsh & McLennan, Inc.*, 2005 WL 2428758 (S.D.N.Y. Sept. 30, 2005).

The insurer issued a D&O policy to a client of the broker that contained a prior acts exclusion but that indicated the exclusion would be removed upon receipt of a warranty executed by the policyholder. The policyholder returned the application but marked "N/A" in the space reserved for the warranty statement.

The insurer concluded that this did not constitute a sufficient warranty and retained the prior acts exclusion through two subsequent renewals of the policy at issue. Ultimately, the policyholder was sued in connection with acts occurring, in part, prior to the initial policy period, and the insurer denied coverage. After filing an unsuccessful declaratory judgment action against the insurer, the policyholder sued the broker for failure to obtain the proper insurance. The broker initiated a third-party claim against the insurer for breach of contract and indemnity. The insurer moved for judgment on the pleadings and summary judgment.

With respect to the breach of contract claim, the court denied the insurer's motion for judgment on the pleadings, holding that the broker sufficiently pled its breach of contract claim. The court also determined that collateral estoppel did not apply because the broker had not been a party to the prior action and because issues related to the putative warranty had not been litigated fully in that action. The court also denied the insurer's motion for summary judgment, holding that: (1) the fact that the insurer allegedly erred in issuing the first policy but denied coverage under the second renewal policy was not fatal to the broker's claim, (2) material questions of fact existed as to whether the policyholder's "N/A" response to the warranty question was a sufficient certification that no such claims were known to exist and (3) the "conclusive presumptive knowledge rule" and the broker's failure to object to the Prior Acts Exclusion did not preclude the broker from pursuing its breach of contract claim. The court also denied the insurer's motion for summary judgment as to the broker's indemnity claim, holding that: (1) the indemnity dispute was ripe for adjudication because it

would facilitate resolution of the rights and obligations of all parties and (2) the facts did not establish that the broker breached the agreement with the policyholder or acted so unreasonably as to be negligent in procuring the policies at issue.

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