wiley

ALERT

Issues of Fact Preclude Summary Judgment as to Whether Notice of Intent to Initiate Litigation Constituted a "Claim"

July 21, 2011

The United States District Court for the Middle District of Florida, applying Florida law, ruled that issues of fact precluded summary judgment as to whether a notice of intent to initiate litigation served on the policyholder constituted a "claim." *Colony Ins. Co. v. Suncoast Medical Clinic, LLC,* 2011 WL 2618874 (M.D. Fla. July 1, 2011). The court determined that the policyholder might reasonably have concluded that the notice of intent did not put it on notice of a claim that would be covered by the policy. The court also denied the parties' motions for summary judgment as to whether a prior knowledge exclusion barred coverage.

The insurer issued a claims-made-and-reported policy to the policyholder, a medical clinic, for the 2007-2008 policy period and a renewal policy for the 2008-2009 period. The policies define the term "claim" to mean "a written or verbal demand, including any incident, occurrence or offense which may reasonably be expected to result in a claim, received by the Insured for money or services . . . ." An exclusion in the policies bars coverage for claims arising out of "[a]ny act, error, omission, or circumstance likely to give rise to a Claim that an insured had knowledge of prior to the effective date of this policy."

The coverage dispute arose out of a wrongful death and medical malpractice action brought by the underlying claimant against the policyholder and two physicians it employed. Before filing a complaint, the claimant served the policyholder and the physicians with a notice of intent to initiate litigation (NOI) in June 2007, alleging in part that the policyholder failed "to have in place sufficient policies

Practice Areas

D&O and Financial Institution Liability

E&O for Lawyers, Accountants and Other Professionals

Insurance

Professional Liability Defense

and procedures, staff, and assitive technology to ensure that diagnostic tests and communication between physicians and other medical personnel was performed."

In October 2008, after the policyholder's general liability insurer denied coverage, the policyholder notified the insurer of the NOI under the claims-made policies. The insurer concluded that the NOI constituted formal, written notice that the claimant intended to initiate litigation against the policyholder, and that a claim therefore was first made in June 2007 during the 2007-2008 policy period. The insurer denied coverage under both policies on the basis that the NOI was not a claim first made during the term of the 2008-2009 policy and was not timely reported under the 2007-2008 policy. In addition, the insurer asserted that, even if the claim had been first made during the 2008-2009 policy period, the prior knowledge exclusion barred coverage under that policy.

The court denied both the claimant's and the insurer's motions for summary judgment. It noted that the policyholder had been served with other NOIs on several prior occasions that sought to hold the policyholder vicariously liable for acts of its physicians. According to the claimant, such claims for vicarious liability would not be covered under the insurer's policies, and the policyholder did not understand that a direct claim against it relating to its policies and procedures existed until the lawsuit had been filed. The court concluded that it would "invade the province of the jury" for it to decide "whether or not [the policyholder] acted reasonably in presuming that the [] NOI only reflected claims for vicarious liability that would not be covered under the [insurer's] policy." The court also concluded that issues of fact existed as to whether the policyholder had knowledge of a potential direct claim against it when the claimant served the NOI in 2007.