

ALERT

Indiana Appellate Court: No Coverage for Claim Made after Claims Made Policy Period

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The Court of Appeals of Indiana, applying Indiana law, has affirmed a trial court's grant of summary judgment in favor of an insurer, holding that there is no coverage under a claims made policy for a claim made against an insured after the policy period expired and that notice of a similar claim against a different insured under the same policy during the policy period did not constitute notice for the subsequent claim against the other insured. *Jenkins v. Cumis Insurance Society, Inc.*, 2011 WL 4001006 (Ind. Ct. App. Sept. 9, 2011).

The insurer issued a Directors, Volunteers and Employees policy (the DVE policy) to the insured, a credit union. The insured entity filed suit against its former chief executive officer (CEO), alleging instances of misconduct and financial improprieties. The insured entity provided notice of the suit against its former CEO during the DVE policy's policy period. Subsequently, after the expiration of the DVE policy, the insured entity amended the complaint against its former CEO and added its former chief operating officer (COO) as a defendant, alleging that the former COO breached fiduciary duties and acted as the former CEO's agent in furtherance of a conspiracy to commit fraud against the insured entity. This amended complaint was filed in the insured entity's name by the insurer, acting as a subrogee of the insured entity. The former COO tendered the complaint to the insurer, seeking coverage as an insured under the DVE policy. The insurer denied coverage under the DVE policy on the grounds that the claim against the insured former COO was not made during the claims made policy period. The former COO filed a complaint for damages and declaratory judgment against the insurer, alleging, among other things, breach of contract and breach of the duty of good faith. Each party filed competing motions for summary judgment. An Indiana trial

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court granted the insurer's motion for summary judgment and the former COO appealed.

The Indiana intermediate court of appeals affirmed the trial court's ruling. In doing so, the court addressed the insured former COO's argument that notice of the insured entity's suit against the former CEO, which allegations in the suit purportedly were the basis of the allegations against the former COO, also provided notice of the potential claims against the former COO under the DVE policy, and thus, notice was provided during the policy period. The court first stated that the former COO waived the argument that the insurer was provided notice of a potential claim during the policy period by not raising the issue in the trial court. Next, the court stated that the former COO would not prevail on this issue even if it had been raised in the trial court. The court noted that the notice provision of the DVE policy required that notice of a potential claim include "specific details of . . . [the] act, incident or circumstance" and "the potential wrongful act involved" and "[t]he reasons for reasonably anticipating that a 'claim' will be made against the [insured]." The court then held that "notifying [the insurer] of the claims against [the former CEO] cannot be said to satisfy the requirements . . . with regard to the claims against [the former COO]," and accordingly, the complaint against the former COO, filed after the expiration of the policy period, was not a claim made within the policy period of the DVE policy.

The court next addressed the former COO's contention that the insurer should be estopped from denying coverage under the policy because the claims against her, which were brought by the insurer as a subrogee of the insured entity, were not made until after the expiration of the DVE policy's policy period due to an alleged conflict of interest on the insurer's part. After dismissing this argument as waived because the insured former COO failed to raise it in the trial court, the court rejected the merits of the argument as well. The court held that this argument was barred by the DVE policy's subrogation exclusion, which provided that the insurer "will not be liable to make any payment for 'loss' in connection with or arising out of any 'claim' . . . [b]ased upon or resulting directly or indirectly from the assertion of subrogation or recovery rights by" the insurer. The court agreed with the insurer's argument that "[i]t would make no sense to require [the insurer] to provide [the former COO] with a defense and indemnify her against the very subrogation claims which [the insurer] is asserting against her[.]" The court therefore held that because there could not be coverage for a claim brought from the assertion of subrogation rights, the insured former COO "could not have been prejudiced by any perceived conflict of interest that caused [the insurer's] alleged delay in bringing suit against her after the policy period."

The court also addressed the former COO's contention that the insurer's duty to defend "if it appears reasonably likely that coverage will be afforded under" the policy was ambiguous. The court recognized that, under Indiana law, an insurer may deny a duty to defend and protect its interest and rights by filing a declaratory judgment action for a judicial determination of its obligation or provide a defense under a reservation of rights. If an insurer simply denies a duty to defend without filing a declaratory judgment, the court noted, it does so at its own peril as it will be estopped from raising other coverage defenses. Here, the former COO maintained that the insurer should be equitably estopped from denying coverage because the insurer allegedly promised to defend her. In rejecting this argument, the court held that "nothing in the designated materials . . . indicates that [the insurer] concealed the terms of the policies or that [the former

COO], as an officer and director of [the insured entity] was in any way unable to review the terms of the policy herself,” and thus, the court held that there was no concealment on the part of the insurer, which is a required element of an equitable estoppel claim.

Finally, the court rejected the former COO’s claim for breach of the duty of good faith by failing to investigate the claim. The court held that the insurer promptly responded to the insured former COO’s claim for coverage and that “an insurer’s lack of diligent investigation is insufficient by itself to support a claim of breach of the duty of good faith.” Moreover, the court held that “because . . . the policies did not provide [the former COO] with coverage for the claims against her, . . . [the insurer] did not act with a dishonest purpose, moral obliquity, furtive design, or ill will, as is required for recovery in a claim of breach of the duty of good faith.”