

ALERT

Complaint Filed Prior to Policy's Inception Is Not "Claim Made" Within the Policy Period

November 12, 2012

The United States District Court for the District of Nevada, applying California law, has granted an insurer's motion to dismiss, holding that there is no coverage for a suit filed against the insured six months prior to the policy's inception. The court also held that coverage for the underlying suit was independently barred by the policy's professional services exclusion because the complaint alleged the insured mismanaged the claimant's investments.

Rupracht v. Certain Underwriters at Lloyd's of London Subscribing to Policy No. B0146LDUSA0701030, et al., 2012 WL 4472158 (D. Nev. Sept. 25, 2012).

In April 2007, a claimant filed suit against an insured brokerage firm and one of its financial advisors, alleging, among other things, breach of fiduciary duty, negligence and fraud in connection with the financial advisor's purported mishandled of investments in a life insurance policy. The parties eventually settled the suit for \$100,000 and an assignment of the insured brokerage firm's rights under its directors and officers liability policy to the claimant. That policy was a claims-made policy for the period of September 1, 2007 to September 1, 2008, which provided coverage only for a "claim first made during the policy period." The policy also contained a professional services exclusion, which barred coverage for any claim "for any act, error or omission in connection with the performance of any professional services by or on behalf of the Company for the benefit of any other entity or person." The policy did not define "professional services." The claimant sought coverage under the policy, and the insurer denied coverage. The claimant then filed a declaratory judgment action against the insurer.

Practice Areas

D&O and Financial Institution Liability
E&O for Lawyers, Accountants and Other Professionals
Insurance
Professional Liability Defense

The court granted the insurer's motion to dismiss for two separate reasons. First, the court held that the April 2007 lawsuit constituted a claim under the policy, and that because the claim was made "several months before the undisputed inception" of the policy, the "April 2007 lawsuit is not covered by the D&O policy." The claimant sought to avoid that limitation by arguing that the carrier had not cited it in its initial declination letter. The court commented that the insurer "did not provide any evidence of an intent" to relinquish its right to deny coverage based on the claims-made defense, and reserved the right to raise other policy provisions and defenses in its initial declination letter, and thus "[was] not estopped from raising its timeliness defense." The court did allow the claimant leave to amend the complaint to the extent a prior D&O policy may have been in place.

Second, the court held that, even if the April 2007 lawsuit was a claim made within the policy period, coverage would be precluded by the professional services exclusion. The court stated that "California courts have interpreted professional service exclusions broadly" and that the claims at issue "stem from [the financial advisor's] misconduct in the advisor role, not in the director role." The court held that such "misconduct falls within the definition of 'professional services' as interpreted by California courts: services 'arising out of a vocation, calling, occupation, or employment involving specialized knowledge, labor, or skill, and the labor or skill involved is predominantly mental or intellectual rather than physical or manual.'" The court rejected the claimant's contention that because the policy provided coverage for certain Individual Acts of a Director or Officer of the insured brokerage firm, such coverage may not be excluded by the professional services exclusion. The court clarified that the professional services exclusion and the definition of Individual Act, which includes "any actual or alleged error, omission, misstatement, misleading statement, neglect or breach of duty by any of the Directors and Officers, while acting in their capacity as: a director or officer of the Company," "clearly contemplate[s] separating these two roles." The court concluded that "[s]ince the D&O policy specifically excludes coverage for professional service claims, and since [the claimant] has only alleged professional service claims, [the] complaint must be dismissed."

The opinion is available [here](#).