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ALERT

Coverage Barred Where Claim Deemed First Made Prior to Policy's Inception

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Applying Florida law, the United States District Court for the Southern District of Florida has held that a claims-made professional liability policy does not afford coverage for a federal court action that was premised on the same alleged misconduct as an earlier state court action filed before the policy's inception date, reasoning that the claim was first made prior to the inception of the policy. *Zodiac Grp., Inc. v. Axis Surplus Ins. Co.*, 2012 WL 6214564 (S.D. Fla. Dec. 13, 2012). The court also held that coverage was barred because the insured had disclosed the state court action on its policy application and therefore had knowledge of circumstances that could reasonably be expected to lead to the claim prior to the policy's inception date.

In April 2008, a claimant filed a state court action against the insured, a telephone psychic services provider, for allegedly using her name and likeness without authorization. In January 2010, after the state action was dismissed for lack of prosecution, the claimant filed a second action against the psychic services provider in federal court based on the same allegations but asserting new causes of action. The psychic services provider sought coverage for the federal action under a claims-made professional liability policy that incepted on October 1, 2008. The policy provided coverage for claims arising from wrongful acts committed prior to the policy period, but only if "the claim is first made during the 'Policy Period'" and the insured did not know, before the policy's inception date, "of a circumstance that could reasonably be expected to lead to the Claim." The policy further provided that "[a]ll Claims arising from the same Wrongful Act will be deemed to have been made" when the first such claim was made. The insurer denied coverage for the federal action on the grounds that the claim was first made prior to the policy period, and

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coverage litigation ensued.

The district court granted the insurer's motion to dismiss, reasoning that the plain language of the policy did not afford coverage for the federal action. First and foremost, the court held that, because the federal action was premised on the same facts and alleged misconduct as the state action, the claim was first made in April 2008, prior to the inception of the policy on October 1, 2008. The court explained that the federal and state lawsuits were related by common facts, circumstances, transactions, events and/or decisions such that the conduct must be treated as one wrongful act, even though the causes of action and claims for relief were not parallel in both cases. Alternatively, the court held that the psychic services provider had knowledge of circumstances that could reasonably be expected to lead to the claim prior to the policy's inception date, reasoning that the psychic services provider had disclosed the state action and underlying facts on its policy application.

The opinion is available here.