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ALERT

Prior Knowledge Exclusion Inapplicable Where Imputation Unavailable

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The United States for the Southern District of Texas, applying Texas law, has held that a professional liability insurer had a duty to defend where the allegations of the underlying complaint did not indicate that the relevant insured defendant had knowledge of circumstances likely to lead to the Claim at the time the policy incepted. *Arboretum Nursing & Rehab. Ctr. of Winnie, Inc. v. Homeland Ins. Co.*, 2012 WL 6161115 (S.D. Tex. Dec. 11, 2012). In addition, the court held that factual issues precluded summary judgment on the issue of the insurer's duty to indemnify.

An insurer issued a professional liability insurance policy to a nursing home for the claims-made-and-reported period of February 2, 2007 to February 2, 2008. The policy provided that coverage was excluded for any Loss arising out of any actual or alleged "Wrongful Act or Occurrence that happened . . . after the Retroactive Date if, on the Inception Date of this Policy [February 2, 2007], the Insured knew, had been told, should have known or had notified a prior professional liability insurer or administrator of any other risk transfer instrument that such Wrongful Act or Occurrence would or could result in a Claim" (the "Prior Knowledge Exclusion"). The policy also stated that "[n]o knowledge or information possessed by any Insured shall be imputed to any other Insured, except for material facts or information known to the person or persons who signed the [Policy] Application."

In January 2008, a lawsuit was filed against the nursing home in which plaintiffs alleged that a former resident died in 2006 as a result of injuries he sustained during an assault by another resident and other negligent care by the nursing home. The nursing home tendered the lawsuit to the insurer, and the insurer denied coverage based on the Prior Knowledge Exclusion. The insured initiated

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coverage litigation after the underlying litigation settled, and the parties filed cross-motions for summary judgment.

The court first analyzed the imputation provision in the policy. It concluded that, under Texas law, a prior knowledge exclusion referring to "the Insured" meant that the exclusion applies if the Insured against whom a Claim was made—not "any" Insured—had the requisite knowledge. Here, the president of the nursing home signed the application, and only his knowledge could be imputed to the nursing home, which was the defendant in the underlying lawsuit.

The court next considered the insurer's duty to defend and noted that it was determined by Texas's "eight-corners rule." Although the complaint alleged that the nursing home had "actual, subjective awareness" of the circumstances that were allegedly harmful to the deceased, it did not include any allegations regarding whether the president knew or should have known about the alleged Wrongful Acts. Accordingly, the court concluded that the allegations of the underlying lawsuit on its face did not implicate the Prior Knowledge Exclusion, and thus that the insurer breached its duty to defend when it denied coverage for the lawsuit.

Turning to the insurer's duty to indemnify, the court assessed whether the president knew or should have known that a Claim could be made against the nursing home or if the nursing home had given notice of the matter to a prior insurer. The court found that the insurer did not present any evidence that the nursing home negligently cared for the deceased or any evidence that the 2006 assault caused "any significant or long-term injury" or was in any way related to the patient's death. In addition, the nursing home demonstrated that the president did not have knowledge of the deceased's condition until the president was notified of the death by letter in June 2007. Although another employee may have had knowledge that the deceased's family could or would bring a lawsuit arising out of the assault, that knowledge could not be imputed to the nursing home. Accordingly, the court concluded that the insurer could not demonstrate that the president, the only insured whose knowledge could be imputed to the nursing home, knew or had been told of allegations that would or could result in the underlying lawsuit. The court also determined that a factual issue remained with regard to whether the nursing home gave notice of the 2006 assault to its prior professional liability carrier. The court therefore denied the insurer's motion for summary judgment.

The opinion is available here.