

ALERT

No Coverage for Claim Expenses Where Insured Did Not Obtain Prior Written Consent of Insurer

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The United States District Court for the District of New Jersey, applying New Jersey law, has held that a policy provision requiring written consent of the insurer in order for claims expenses incurred by the policyholder to be reimbursed is unambiguous. *Paulus Sokolowski & Sartor, LLC v. Cont'l Cas. Co.*, No. 12-7172 (D.N.J. Aug. 30, 2013). Wiley Rein represented the insurer.

The insured, a design and engineering firm, was retained during the construction of a residential townhouse community. The developer of the community and the community's condominium association later sued the firm for professional negligence, seeking damages for construction defects at the site. The firm sought coverage under its architects and engineers professional liability policy. The insurer provided a defense and ultimately settled the claims against the firm. The firm later sought reimbursement for claim expenses it incurred when its employees assisted the insurer and its engineering expert. The insurer denied the request for reimbursement on the grounds that the firm had not obtained written consent prior to incurring the expenses and that the firm had a duty to assist in the defense. The firm filed suit in New Jersey state court, which the insurer removed to federal court.

The court dismissed the firm's breach of contract claims, determining that the policy provision requiring the insurer's written consent prior to the policyholder incurring claim expenses was unambiguous, and that the firm's complaint had conceded that there had been no explicit consent from the insurer. In reaching this conclusion, the court noted that interpretive principles calling for insurance policies to be

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interpreted against the insurer are less applicable where the policyholder is a large business with the resources to bargain for particular policy provisions, as was the case with the insured. The court additionally dismissed the firm's claims for unjust enrichment and quantum meruit because the express written contract covered the issues in dispute.

The court also dismissed the firm's claims for breach of the duty of good faith and fair dealing, breach of fiduciary duty, and bad faith. The court concluded that the firm had failed to allege facts demonstrating that the insurer had bad motive or intention and that the implied covenant of good faith and fair dealing could not override the express terms of a contract. The court further held that the insurer did not owe the firm a fiduciary duty in the context of reimbursing claim expenses.