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NEWSLETTER

Other Decisions of Note

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Eighth Circuit: Suit Alleging Premature Contract Termination Fails to Allege a "Wrongful Act" Under E&O Policy

In an unpublished decision, the United States Court of Appeals for the Eighth Circuit has held that an E&O policy did not cover a lawsuit filed against the policyholder for alleged premature termination of a services contract because the claim did not allege wrongful acts "arising out of" the policyholder's performance of services under the contract. *FirePond Liquidating Trust v. Vigilant Ins. Co.*, 2008 WL 2597555 (8th Cir. July 2, 2008). The November 2007 issue of *Executive Summary* reported on the trial court's decision, which granted summary judgment to the insurer in a coverage action following the insurer's decision not to defend or indemnify the policyholder.

The policyholder, a computer technology firm, had contracted with another company to provide computerized sales and marketing information. The agreement allowed the policyholder to terminate the contract for failure to make timely payments. When a billing dispute arose, the policyholder terminated the contract after the company failed, as demanded, to cover some overdue payments within ten days. The company asserted that it had 30 days in which to make payment on its outstanding invoices. The company subsequently brought suit, alleging breach of contract and other claims based on the policyholder's alleged premature termination of the contract.

In the subsequent coverage action, the trial court determined that the insurer owed no duty to defend because the underlying lawsuit did not assert claims for acts "arising out of a wrongful act" stemming from the policyholder's "performance or failure to perform electronic and information technology services"—as provided for in the policy—but instead arose out of a billing dispute. In a brief per curiam opinion, the Eighth Circuit stated that it agreed with the trial court's reasoning and therefore affirmed its grant of summary judgment.

Court Abstains from Adjudicating Coverage Action Concerning Insured's Breach of Cooperation Clause

A federal district court declined to adjudicate an insurer's action seeking a declaration that the insured had breached its duties under the policy's cooperation clause, holding that the coverage issues overlapped with issues that would be determined in the underlying actions. *Medical Assurance Co., Inc. v. Weinberger*, 2008 WL 2755843 (N.D. Ind. July 11, 2008).

A surgeon and various entities were sued in numerous medical malpractice actions. The defendants sought

coverage under a professional liability policy. After the surgeon fled the country, the insurer instituted a coverage action seeking a declaration that it had no duty to defend or indemnify the defendants in the underlying lawsuits because the defendants had breached the policy's cooperation clause. The insureds filed a motion to stay, arguing that the court should abstain from hearing the coverage action.

The court held that the coverage action and the underlying actions constituted "parallel proceedings" for purposes of analyzing abstention pursuant to *Wilton v. Seven Falls Co.*, 515 U.S. 277 (1995). The court held that the proceedings concerned "substantially the same" issues, reasoning that the insurer would need to demonstrate that it was prejudiced in order to establish a breach of the cooperation clause and that determination of that issue necessarily would involve a consideration of the merits of the underlying actions. Specifically, the court reasoned that the surgeon's absence might or might not affect the defense of the underlying actions. The court held that abstention was appropriate given the overlap between the coverage and underlying actions. The court further held that the issue of the insurer's duty to indemnify was not yet ripe because there had yet been no finding of liability in the underlying proceedings.

Service of Suit Clause Does Not Preclude Insurer from Instituting Coverage Action

The Supreme Court of New Jersey has held that a service of suit clause does not preclude an insurer from instituting a declaratory judgment action or allow an insured to trump the insurer's suit by later filing suit in a different jurisdiction. *Chubb Custom Ins. Co. v. Prudential Ins. Co. of Am.*, 948 A.2d 1285 (N.J. 2008).

The insurer instituted a coverage action in New Jersey after a dispute arose with the policyholder company concerning coverage under a professional liability policy. The policy contained the following service of suit clause:

It is agreed that in the event of the failure of the Company hereon to pay any amount claimed to be due hereunder, the Company hereon, at the request of the Insured, will submit to the jurisdiction of any court of competent jurisdiction within the United States of America and will comply with all requirements necessary to give such Court jurisdiction, and all matters arising hereunder shall be determined in accordance with the law and practice of such Court.

The insured company subsequently brought a separate coverage action in Delaware and sought to dismiss the New Jersey action based on the service of suit clause. The company argued that the service of suit clause entitles an insured to its choice of forum for any coverage action. The insurer countered that the clause merely provided that the insurer was willing to submit to the jurisdiction of the insured's choosing but did not preclude the insurer from first initiating suit against the insured in any available forum.

The court determined that both readings of the clause were plausible and therefore deemed the clause ambiguous. However, rather than adopting the insured's interpretation based on ambiguity, the court considered the purpose of the clause. It explained that service of suit clauses were first added to Lloyd's of London policies to counter concerns that those insurers would not be subject to coverage actions in the United States. The court determined that "to the extent that an insurer submits to a court of competent jurisdiction in

the United States, by filing its own lawsuit, the primary purpose of the service of suit clause would appear to be satisfied." The court also considered case law from other jurisdictions to aid its interpretative efforts, finding that other courts have "overwhelmingly rejected the notion that [under a service of suit clause] an insured has the right to choose the forum in all instances and to avoid participation in a first-filed action by the insurer." Accordingly, the court concluded that the clause was "a consent to jurisdiction by the insurer and a prohibition against an insurer interfering with a forum initially chosen by the insured" that did not "inhibit the insurer from filing first [n]or . . . allow the insured to trump a first-filed action by the insurer." The court then observed that an insured remained free to seek relief under *forum non conveniens* and other doctrines of judicial economy should it choose to do so.

Eighth Circuit Holds "Arising out of" Language in Exclusion Requires Only "but for" Causation

The United States Court of Appeals for the Eighth Circuit has held that, under Minnesota law, the phrase "arising out of" in an exclusion requires only "but for" causation and that a suit alleging misappropriation of deposit funds was not covered under an E&O policy because of an exclusion in the policy barring coverage for suits arising out of misappropriation or improper use of funds. *Murray v. Greenwich Ins. Co.*, 2008 WL 2629958 (8th Cir. July 7, 2008). In so holding, the court rejected the argument that the negligent misrepresentation count was distinct from the allegation of failure to return or safeguard funds and that, as a result, that count was covered. The court concluded that "[e]ach of the claims asserted within the underlying complaint, either directly or by incorporation, allege an injury originating from, or having its origin in, growing out of, or flowing from the failure to return the deposited funds."