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NEWSLETTER

Two Alleged Breaches of Professional Obligations by Accountant Held to Be Separate Claims

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In an unreported decision involving an accountant insured under a claims-made professional liability policy, a California appellate court has held that two lawsuits brought against the accountant alleging that he breached his professional and fiduciary obligations to a client in connection with the client's retention of an investment advisor and the client's retention of a surgeon were not related, even though the insurer argued that both lawsuits alleged that the accountant failed to disclose that the individuals retained by the client had financial interests in the client's sports agent. *Pope v. Chicago Ins. Co.*, 2003 WL 21640888 (Cal. Ct. App. July 14, 2003).

The insurer issued consecutive claims-made professional liability policies to an accountant in 1998 and 1999. The policies each contained a limit of $2 million per claim, with an aggregate limit of $4 million. The policies provided that "[a]ll Claims arising out of the same or related act, [or] omission...shall be considered a single Claim for the purpose of this insurance and shall be subject to the same limit of liability."

The accountant provided services to a sports agent. He subsequently entered into a fiduciary relationship with a professional baseball player who used that sports agent. In 1998, the baseball player sued the accountant, alleging that the sports agent had referred him to an investment advisor who had converted and misappropriated funds. The player alleged that the accountant was liable for the losses because the accountant had failed to inform the player of the fact that the investment advisor was also an investor in the sports agent or of the fact that there were business irregularities and accounting discrepancies in the accounting methods used by the investment advisor. The insurer accepted a defense of the 1998 suit under the 1998 policy.

In 1999, the baseball player sued the accountant alleging that the sports agent had referred him to a surgeon to treat a sports injury. According to the player, the accountant failed to inform him that the surgeon was an investor in the sports agent and, had the player known of the conflict of interest, he would have engaged in additional investigation into the surgeon's qualifications. The player alleged that negligence by the surgeon resulted in a premature end to his playing career. The insurer took the position that the 1999 suit was a related claim to the 1998 suit and therefore subject to a single per claim limit. Coverage litigation followed.

The appellate court applied the framework for addressing related claims set out by the California Supreme Court in *Bay Cities Paving & Grading, Inc. v. Lawyers' Mutual Insurance Co.*, 5 Cal. 4th 854 (1993). The first part of that framework requires a determination whether the allegations involve separate injuries. The court concluded that here the player had asserted two claims against the accountant because he "alleged two distinct species of injury, one being the loss of funds caused by [the investment advisor's] malfeasance and the other being the physical injury caused by the [surgeon's] medical malpractice. These injuries occurred at different times and were attributable to different malefactors."

The appellate court then addressed the second component of the *Bay Cities* framework: whether, even if the claims are distinct, they should be deemed related under the related-claims language of the policy. The court explained that in *Bay Cities*, while the California Supreme Court had rejected the argument that the term "related" was *per se* ambiguous, it had noted that "[a]t some point, of course, a logical connection may be too tenuous reasonably to be called a relationship, and the rule of restrictive reading of broad language would come into play." The appellate court therefore explained that, "[u]nder the *Bay Cities* approach, we must resolve whether the term 'related' is ambiguous in the context of this policy and the circumstances of this case." The court concluded that in this case the two claims were too attenuated to be considered related because, among other things, they involved distinct injuries, the injuries occurred at different times and they resulted from different "efficient" causes (medical malpractice vs. financial malfeasance). The court also noted that there were differences in the alleged knowledge and failures to disclose by the accountant in the two cases. The court concluded that, although the claims "may at some level of abstraction be characterized as involving the same or related conduct by [the accountant], we do not interpret *Bay Cities* as permitting the amalgamation of distinct claims into a single claim where the actionable conduct by the insured is distinct in time, character and impact, and shares only broad and generic similarities."

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