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NEWSLETTER

Expert Testimony on Exclusion's Application Inadmissible; Oral Notice Evidence and "Habit or Practice" Evidence May Be Admissible

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The United States District Court for the Northern District of Illinois, applying Illinois law to decide numerous motions in limine prior to trial, has held that: (1) an expert's proposed testimony regarding the application of two policy exclusions was inadmissible because the testimony constituted impermissible legal opinion; (2) evidence that the insured provided notice of the relevant claim orally rather than in writing, as required by the "claims made and reported" policy, was admissible, as such "actual notice" would be sufficient to trigger the insurer's duties under the policy; and (3) evidence of the insured's alleged "habit or practice" of providing oral notice was admissible. *Old Republic Ins. Co. v. Ness, Motley, Loadholt, Richardson & Poole, P.A.*, 2006 WL 3782994 (N.D. Ill. Dec. 21, 2006).

The insurer sought to bar the testimony of the insured's expert on the applicability of the policy's "conflict of interest" and the "fraudulent conduct" exclusions because the testimony constituted impermissible legal opinion. Citing two opinions from the United States Court of Appeals for the Seventh Circuit, *Ancho v. Pentek Corp.*, 157 F.3d 512 (7th Cir. 1998), and *Good Shepherd Manor Foundation, Inc. v. City of Momence*, 323 F.3d 557 (7th Cir. 2003), the court explained that expert testimony was admissible only if the expert draws on a special skill, knowledge or experience to reach an opinion and does not present legal conclusions that could affect the outcome of the case. Applying these standards, the court first determined that the testimony relating to the "conflict of interest" exclusion was inadmissible because "not only does [the expert's] written report on the issue set forth what he believes the relevant law to be, which is the court's role when it instructs the jury, but he sets forth what the legal conclusion should be based on the law and facts that he describes, which is the jury's role." The court then concluded that the expert's testimony relating to the "fraudulent conduct" exclusion was also barred, as the testimony was not based on the expert's role as an expert but rather simply on the facts provided by the record.

The insurer also sought to bar the admission of evidence that the insured had provided oral notice of the relevant claim. The insurer argued that the evidence was irrelevant since the claims-made and reported policy required written notice of a claim within 60 days after the end of the relevant policy period and since Illinois

law requires that notice provisions be strictly followed. The court noted an apparent tension in Illinois law, as the law recognizes that notice requirements in claims-made policies are strictly construed but also recognizes, based on *Cincinnati Cos. v. West American Insurance Co.*, 701 N.E.2d 499 (Ill. 1998), that it is "actual notice" of a suit that triggers an insurer's duty to defend. The court then observed that Illinois courts have noted on several occasions that the purpose and function of notice requirements in claims-made policies are different than those of occurrence-based policies and, in E*mployers Reinsurance Corp. v. E. Miller Ins. Agency, Inc.*, 773 N.E.2d 707 (Ill. App. Ct. 2002), accepted "actual notice" by another defendant's counsel within the policy period of a claims-made policy. The court emphasized, however, that no Illinois court had directly spoken on whether allowing oral rather than written notice would change the terms of a claims-made insurance contract.

Given these Illinois cases, the court concluded that "allowing oral notice would not inherently alter the terms of the insurance contract" since it was the timing of the notice that was critical rather than the manner of notice. The court thus held that if the insured could demonstrate that it provided the insurer with "actual notice," such notice would trigger the insurer's duties under the policy. The court then rejected the insurer's argument that the allowance of "actual notice" was limited to the issue of the duty to defend, where the concern is that the insured be adequately represented, and did not extend to the duty to indemnify. The court stated that it was unclear whether only the duty to indemnify was at issue in the case and that there was no suggestion in prior case law that "actual notice" would not apply to the duty to indemnify as well.

The insurer also argued that evidence of the insured's alleged "habit and practice" of providing oral notice of claims should be barred. The insured sought to rely on the testimony of an executive responsible for professional liability matters for the insured and an accounting assistant employed by the insured. The court noted that, while the executive testified that he had a "practice" of informing the insurer's agent of claims orally, that he "usually" followed that practice, and that he "sometimes" patched in various other executives for these conversations, such terms were too vague to suggest "repetition or regularity such that habit could be shown." The court concluded, however, that it was possible that the insured could, outside the jury's presence at trial, provide "sufficient foundation" for the testimony to constitute admissible habit evidence. The court thus denied the insurer's motion in limine as to evidence of "habit or practice."