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NEWSLETTER

Letter That Sought Information To Determine Whether Legal Action Was Warranted Did Not Constitute a "Claim" for Claims-Made Purposes

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The Appellate Division of the New York Supreme Court has held that a letter sent to an insured prior to inception of the policy at issue from counsel for certain of its employees requesting information relating to counsel's investigation of whether legal action was warranted did not constitute a claim such that the lawsuit subsequently filed by the employees during the policy period constituted a claim first made when the letter was sent. *The Yale Club of New York City, Inc. v. Reliance Ins. Co. in Liquidation*, 2008 WL 4007407 (N.Y. App. Div. Sept. 2, 2008).

The insurer in this case had issued a claims-made professional liability policy for the policy period of November 23, 1993 to November 23, 1994. In August 1993, an attorney representing 13 employees of the insured club sent a letter to the insured that alleged that the employees had been "deprived of tips and bonuses" and that requested "information to enable compliance with counsel's stated 'obligation to make a reasonable inquiry into the facts before filing a pleading with the court.'" The letter further alleged that the insured's actions "constitute[d] criminal violations, as well as civil violations of RICO and the New York State Labor Law, and fraud and conversion." The insured did not forward this letter to the insurer that was on the risk at the time, nor did the insured notify the insurer at issue in this case of the circumstances relating to the employees' allegations or of counsel's investigation until after the lawsuit was filed in February 1994.

After liquidation proceedings were initiated against the insurer, its receiver denied coverage for the lawsuit, taking the position that because the letter was received before the inception of the insurer's policy, the claim arose outside the policy period. In the coverage litigation that followed, the insured argued that the letter was merely a request for information and, as such, not a claim—rather, it was the lawsuit that was the claim that triggered coverage. The trial court agreed and entered judgment in favor of the insured.

Affirming the judgment on appeal, the court observed that the term "claim" was not defined in the policy and that the situation presented an ambiguity that must be resolved against the insurer. The court reviewed

definitions of the term commonly found in other policies, as reported in opinions from courts in New York, and recognized that the term ordinarily involves "a demand for money or services." In this connection, the court found that the letter fell "far short" of such a demand, "or even the expression of a present intent to initiate legal proceedings." As to the latter point, the court noted that any action that might have been contemplated in pursuit of the employees' allegations against the insured was implicitly conditioned on the outcome of counsel's investigation of the merits of those allegations. The court also noted that the letter did not include "any assertion of legally cognizable damage . . . [or] a type of demand that can be defended, settled and paid by the insurer." Moreover, according to the court, it did not matter that the letter put the insured on notice that legal action against it was being contemplated because "[t]he mere awareness of alleged wrongdoing is not a claim."

Additionally, the court rejected any reliance on the policy's notice of potential claim provision as a basis to exclude coverage for the lawsuit. The court found that "[t]he provision only applied if the insured, 'during the policy period . . . *shall become aware* of any occurrence which may subsequently give rise to a claim being made . . .'" It did not, according to the court, "exclude a claim of which the insured *had become aware* prior to the effective date of the policy." (Emphasis in original.)