

# Demand Letter and Draft Complaint Constitute a "Claim"

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In an unpublished decision, the United States Court of Appeals for the Ninth Circuit, applying California law, has held that a draft complaint sent to an insured with a letter expressing the claimant's intention to file the complaint constituted a "Claim" under a professional liability policy. *Charles Dunn Co. v. Tudor Ins. Co.*, 2009 WL 117868 (9th Cir. Jan. 14, 2009).

An insurer issued four successive claims-made-and-reported professional liability policies to the insured. Nine days prior to the expiration of the 2004-2005 policy, a claimant sent the insured a letter that alleged fraudulent conduct and breach of fiduciary duty by the insured and sought damages. The claimant enclosed a draft complaint, stated that it intended to file the complaint, and asked for the insured's response by a certain date. Approximately three weeks later, during the 2005-2006 policy period, the claimant filed the complaint. The insured gave notice of a claim three months after the claimant filed suit, during the 2005-2006 policy period. The insurer denied coverage on the basis that the insured did not give notice of the claim during the applicable 2004-2005 policy period.

The court held that the insured failed to report the claim in the applicable policy period as required by the policy. The court stated that a "claim," which term was undefined in the policies, was "a demand for something as a right, or as a due." Applying this definition, the court concluded that the letter enclosing the draft complaint was a "claim" because the claimant "asserted its intent to file a lawsuit unless a monetary payment was made . . . ." Therefore, a claim was first made during the 2004-2005 policy period but not reported until the 2005-2006 policy period. The court accordingly affirmed summary judgment in favor of the insurer.

In reaching its determination, the court rejected the insured's argument that successive renewals created a single, four-year policy period. The court stated that each renewal policy was a "separate and distinct contract for a period of time . . . ." The court also rejected the insured's argument that it was equitably excused from reporting the claim outside the applicable policy period because the insured had nine days in which to report the letter and draft complaint before the expiration of the 2004-2005 policy, yet failed to report the claim until approximately three and a half months later. Finally, because the court determined that no coverage was due the insured, it determined that the insured could not have breached the implied covenant

of good faith and fair dealing as a matter of law.