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NEWSLETTER

Other Decisions of Note

April 2007

District Court Holds No Coverage Under Occurrence or Claims-Made Policies

The United States District Court for the District of Maine has held that coverage for a default judgment was not available under two claims-made insurance policies issued to affiliate companies, because there was no evidence to suggest that a claim was made during the policy period or the extended reporting period. *Edwards v. Lexington Ins. Co.*, 2007 WL 603017 (D. Me. Feb. 23, 2007).

Three affiliate companies were insured under three separate insurance policies issued by the insurer for the period April 8, 2002 to April 8, 2003. One of the insured companies was sued after a safety belt it had manufactured malfunctioned, causing a bow hunter using the belt to fall from a tree on October 11, 2002. The hunter sued the insured for his injuries, and a default judgment was entered after the insurer refused to provide a defense. The hunter sought to enforce the default judgment against the insurer. The court rejected the hunter's argument that, based on the insurer's refusal to defend and the default judgment entered against the policyholder, the court could infer that a claim had been made within the allotted time period, noting that the burden on that issue was on the policyholder, and the hunter failed to provide any evidence in that regard.

Professional Services Exclusion Bars Coverage for Failure to Regulate Nursing Home Temperature

The United States Court of Appeals for the Eighth Circuit, applying Missouri and Illinois law, ruled that a nursing home administrator's failure to turn on the nursing home's air conditioning system during a heat wave, resulting in the deaths of multiple patients, was a professional service within the meaning of a professional services exclusion. *American Economy Ins. Co. v. Jackson*, 476 F.3d 620 (8th Cir. Feb. 14, 2007). The insurance policy contained a professional services exclusion that precluded coverage "due to rendering or failure to render any professional service" including services such as "[m]edical, surgical, dental, x-ray or nursing services, treatment, advice, [] instruction . . . [and] [a]ny health or therapeutic service treatment, advice or instruction." The court concluded that the administrator's decision not to turn on the air conditioning constituted "professional services" because she "drew upon her training, expertise, and knowledge" of the medical conditions of residents "before she exercised professional judgment and determined that the HVAC system would not be adjusted." The court also reasoned that the insured's "hiring, management and training of [the administration], the allocation of funds for the purpose of maintaining a working air conditioner and the lack of implementation of an emergency plan, are all decisions that were made using specialized training, skill, experience and knowledge."

Professional Services Exclusion Bars Coverage for Mishandling of Crematory Remains

The United States District Court for the Eastern District of Virginia, applying Virginia law, has held that a professional services exclusion in a policy issued to a crematorium barred coverage for a lawsuit stemming from the policyholder's mishandling of crematory remains. *Bohreer v. Erie Ins. Group*, 2007 WL 569901 (E.D. Va. Feb. 16, 2007). The underlying suit alleged that the policyholder contracted to cremate the plaintiff's husband's remains and mishandled those remains. The insurance policy excluded coverage for "damages due to any service of a professional nature." It did not define the phrase "professional nature." The court held that the handling, labeling and delivery of remains were all part of the professional service of cremation and were therefore within the meaning of the professional services exclusion.

Sixth Circuit: Timely Notice Is a Condition Precedent Under Tennessee Law to Coverage Under Claims-Made Policies

The United States Court of Appeals for the Sixth Circuit has held that, under Tennessee law, coverage was precluded under three excess policies as the policyholder did not comply with the policies' notice conditions. *Union Planters Bank v. Continental Cas. Co.*, 2007 WL 581656 (6th Cir. Feb. 27, 2007).

Following a mortgage lender's default on a revolving line of credit provided by the policyholder bank, the bank was left with worthless collateral in the form of forged promissory notes and mortgages. After the bank determined it could not recover the lost sums from the mortgage lender, it sought coverage from its primary and three excess insurers for the amount of the worthless collateral under policies providing coverage for loss resulting from "forgeries" and "counterfeits."

Applying Tennessee law, the Sixth Circuit found coverage under the primary policy. The court then evaluated the notice requirements under the excess policies. The court concluded that coverage was not available under those policies, as they required "simultaneous notice" of any claim made under the primary policy, and the insured notified the excess insurers of the loss nearly a month after it provided notice to its primary insurer. In reaching this result, the court rejected the bank's argument that late notice should be excused because of the lack of prejudice to the carriers. According to the court, because the policies were claims-made rather than occurrence policies, coverage was precluded regardless of whether the insurer suffered prejudice as a result of the delay in notice, as proper notice was a condition precedent to coverage.