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NEWSLETTER

Other Decisions of Note

July 2007

Notice-Prejudice Rule Does Not Apply to Claims-Made Policy Even If Notice Is Given During Policy Period
In an unreported decision, the United States District Court for the Southern District of California, applying California law, has granted an insurer's motion to dismiss on the grounds that the policyholder provided late notice under its claims-made EPL policy. *Worldwater & Power Corp. v. Genesis Ins. Co.*, No. 3:07-cv-00026-DMS-RBB (S.D. Cal. May 1, 2007).

The policy provided that "[a]n INSURED as a condition precedent to its rights under this Policy, shall give the insurer notice in writing, as soon as practicable of any CLAIM first made during the POLICY PERIOD . . . , but in no event later than sixty (60) days after such CLAIM is made . . . ." The policyholder notified the insurer of the action within the policy period but more than 60 days after the action was filed.

In ruling for the insurer, the court reasoned that California courts have recognized the "heightened importance" of notice in claims-made policies and that "a majority of California courts have declined to apply the notice-prejudice rule to these types of policies." The court rejected the policyholder's argument that the California Supreme Court would distinguish those prior cases, because the policyholder here provided notice during the policy period. In so holding, the court relied on decisions from other jurisdictions declining to apply the notice-prejudice rule in such situations. The court stated that "[o]ne persuasive rationale for these decisions is that where the contract language is clear and unambiguous, it should be enforced according to its plain terms as agreed by the parties."

No Coverage Where Insurer Only Receives Notice of "Potential Claim" During Extended Reporting Period
In an unreported decision, the United States Court of Appeals for the Eleventh Circuit, applying Florida law, has held that a letter sent by an attorney to a legal malpractice insurer, which apprised the insurer that one of the attorney's clients had expressed some concerns about prior legal representation, did not provide the insurer with notice of a "claim" under the terms of the policy. *Clarendon Nat'l Ins. Co. v. Muller*, 2007 WL 1662058 (11th Cir. June 8, 2007). The court found that the letter, which was transmitted to the insurer during the extended reporting period of the policy, only constituted notice of a "potential claim" because it did not indicate that any present "demand . . . for money or services" had been made. The court then stated that the plain language of the policy only provided coverage for "actual claims," rather than potential claims, reported during the extended reporting period, and accordingly concluded that no coverage was available under the

policy.

In-Vitro Fertilization Services Fall Within "Professional Services" Exclusion in General Liability Policy

The United States District Court for the District of Colorado, applying Colorado law, has held that an insurer did not owe a duty to defend or indemnify under a general liability policy to a reproductive medicine center or one of its doctors with regard to a lawsuit alleging damages related to in-vitro fertilization services, because all of the factual allegations in the underlying complaint fell within the policy's "professional services" exclusion. *Am. Economy Ins. Co. v. Schoolcraft*, 2007 WL 1655352 (D. Colo. June 5, 2007).

The insured medicine center and doctor were sued by parents who alleged that the insureds failed to properly screen them and their egg donor for cystic fibrosis, resulting in the birth of a child who suffered from the disease. The insured had both general and professional liability insurance. The general liability insurer denied coverage on the grounds that the policy excluded coverage for injury "due to rendering or failure to render any professional service," including "[m]edical, surgical . . . services[,] treatment, advice or instruction." With respect to the parents' causes of action for professional negligence, uninformed consent, and non-disclosure, the court found that the underlying factual allegations "clearly related" to injury caused by the rendering of a "professional service." With respect to the causes of action for negligent misrepresentation and violation of the state's consumer protection act, the court found that these causes of action involved "the application of a professional standard of health care" under Colorado law, rendering them related to the provision of a "professional service" and therefore subject to the exclusion.

District Court Holds Late Notice Bars Coverage Under Claims-Made Policy

The United States District Court for the District of Puerto Rico has held that a claims-made employment practices liability policy does not afford coverage when the insured failed to give notice of a claim during the policy period. *Aguila v. Den Caribbean, Inc.*, 2007 WL 1536710 (D.P.R. May 25, 2007).

The relevant policy period was May 15, 2001, to May 15, 2002. An employee of the insured company filed a discrimination charge with the EEOC on August 3, 2001, which constituted a "claim" under the policy. The company did not give notice of the charge at that time to the insurer. The EEOC issued a Notice of Right to Sue on August 5, 2004, and the employee filed a discrimination action in federal court on November 4, 2004. The employer forwarded the complaint to the insurer on January 20, 2006. The policy's notice provision, which the court held was unambiguous, required, as a condition precedent to coverage, that the insured provide written notice to the insurer of any claim first made during the policy period "as soon as practicable and either (1) . . . during the Policy Period; or (2) within 30 days after the end of the Policy Period . . . ." In a direct action between the employee and the insurer, the court granted the insurer summary judgment, holding that there were no issues of material fact regarding when notice was first provided and that the insured had failed to provide timely notice, thus barring coverage as a matter of law.