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NEWSLETTER

No Coverage for Breach of Express Contract

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A federal district court, applying Pennsylvania law, has held that an insurer was not obligated to defend its insured under an E&O policy for the insured's breach of an express contract. *Miziker Entm't Group, Ltd., et al. v. Clarendon Nat'l Ins. Co. et al.*, No. 01-3219, 2002 U.S. Dist. LEXIS 19391 (E.D. Pa. Oct. 1, 2002).

The insured, an entertainment company, contracted with the Delaware River Port Authority to produce a "sound and light" show on the Delaware River to celebrate the new millennium. The show was cancelled when subcontractors hired by the entertainment company failed to build proper barges to support the show. The Port Authority then sued the entertainment company, alleging breach of contract, breach of the implied covenant of good faith and fair dealing and negligence. The insurer initially agreed, under a reservation of rights, to undertake the investigation and defense of the claims against the entertainment company, and provided the company with defense counsel rates, requested that the company file an answer to the complaint and provided the insured "General Litigation Guidelines." Three days after providing this information, however, the insurer informed the company that insurance coverage was not available because the underlying claim involved the breach of an express contract. The entertainment company subsequently instituted a coverage action, relying on a policy provision obligating the insurer to pay damages for claims against the insured for "[b]reach of contract limited to those which are implied in fact or in law, resulting from the alleged submission of program, musical or literary material used by the Insured in the Insured Production; committed... by the Insured... in connection with the creation, production, distribution, exhibition, broadcasting, advertising or publicizing the Insured Production." The entertainment company argued that its contracts with the subcontractors were implied in law and in fact for the Port Authority's benefit.

The court, in rejecting the company's argument, first noted that the intent of the relevant provision was to insure against unauthorized uses of another's intellectual property in the entertainment field. The court distinguished such intellectual property violations from the present case, noting that the allegations against the entertainment company did not involve the unauthorized use of "program, musical or literary material," but instead concerned allegations against the insured for breach of an express contract.

The court also held that, in any event, there was no implied contract. The court summarily rejected the argument that there was an implied contract as to an affiliate of the entertainment company that was not a party to the contract with the Port Authority because the affiliate was not a named insured under the policy. The court further rejected the argument that the entertainment company's contracts with the subcontractors were implied in law and fact for the Port Authority's benefit, reasoning that an implied contract cannot exist

where an express contract exists on the same subject. The court also held that the entertainment company did not have a reasonable expectation of coverage for its activities in creating the show, reiterating that Pennsylvania law rejects an insured's reasonable expectations argument where policy terms are clear and unambiguous. Finally, the court concluded that the insurer was not estopped from denying a duty to defend based on the insurer's initial claims-handling actions, which included a letter detailing attorney rates and requesting that the insured file an answer. The court reasoned that the company had failed to offer any evidence of detrimental reliance on the insurer's initial position.

For more information, please contact one of WRF's Professional Liability Attorneys at 202.719.7130