

Pending and Prior Litigation Exclusion Bars Coverage for Professional Liability Claim

January 2009

The United States District Court for the Central District of California has held that a pending and prior litigation exclusion is unambiguous on its face and bars coverage for a professional liability lawsuit filed against an insurance broker. *Hilb Rogal & Hobbs Ins. Servs. of Cal., Inc. v. Indian Harbor Ins. Co.*, No. 07-7104-JFW (C.D. Cal. Nov. 5, 2008).

In 2001, the insurance broker obtained a liability insurance policy for the insured that did not include workers' compensation coverage. A fire occurred at the insured's place of business in July 2001 and resulted in injury to an employee. On January 16, 2002, the injured employee filed suit against the insured (the "*Mann Action*"). If the insured had workers' compensation coverage, the *Mann Action* would not have been permitted to proceed. In February 2004, the jury awarded the injured employee more than \$11 million. On July 5, 2005, the insured filed suit against the broker for negligence in failing to obtain workers' compensation insurance for the insured (the "*Williams Action*").

The insurance broker was insured under a professional liability insurance policy that included a pending and prior litigation exclusion barring coverage for claims "based on, arising out of, directly or indirectly resulting from, in consequence of, or in any way involving" matters pending on or before July 1, 2004. The broker provided initial notice of the *Williams Action* to its insurer by bordereau report, which was permitted under the policy if the broker reasonably believed a claim would not exceed \$400,000. The broker continued to provide updates through the trial in the *Williams Action* in July 2007, when a verdict of nearly \$6 million was rendered against the broker. The insurer denied coverage for the *Williams Action*, and the broker filed suit.

The court granted the insurer's motion for summary judgment and concluded that the pending and prior litigation exclusion was unambiguous and barred coverage for the *Williams Action*. The court reasoned that, but for the failure of the broker to obtain workers' compensation coverage for the insured, the *Mann Action* would not have proceeded. Moreover, but for the adverse judgment against the insured in the *Mann Action*, there would have been no basis for the *Williams Action*. Accordingly, the court concluded that the *Williams Action* was "arising out of" "directly or indirectly resulting from," "in consequence of," or "in any way involving" the *Mann Action*.

The court also rejected the broker's argument that the insurer had waived its right to deny or was estopped from denying coverage because it failed to deny coverage until after the trial in the *Williams* Action. The court opined that coverage cannot be created by waiver or estoppel. The court further noted that, even if estoppel were to apply, the broker had not proffered evidence sufficient to establish that it was prejudiced by the insurer's delay in denying coverage. The court rejected the broker's argument that it "might" have proceeded differently with respect to settlement of the *Williams* Action if it had known the claim would not be covered as too speculative to establish prejudice.

The court also concluded that, because there was no coverage under the policy, HRH's bad-faith claim must fail under both California and New York law.