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NEWSLETTER

Notice of Claim To Independent Insurance Agent Not Adequate

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The United States District Court for the Southern District of Georgia has granted summary judgment in favor of a professional liability insurer, concluding that the insureds did not provide sufficient evidence that they gave notice of the underlying malpractice claim to the insurer during its claims-made policy period and that notice to an independent insurance agency did not constitute notice to the insurer. *Fleming, Ingram & Floyd, P.C. v. Clarendon National Ins. Co.*, 2009 WL 5166256 (S.D. Ga. Dec. 29, 2009).

Under Georgia law, notice to an insurer within its policy period is the "essence" of a claims-made policy. Accordingly, the court determined that to survive summary judgment the insureds were required to present evidence establishing an issue of material fact as to whether notice of the underlying claim was reported to the insurer during its policy period. The insureds contended that the insurer had been put on notice based on two notices sent to insurance agents.

First, notice of a potential malpractice claim against the insured law firm and attorneys was given to the managing general agent for a prior insurer after the cancellation of that insurer's policy. The insureds argued that this notice put the later-period insurer on notice of the eventual malpractice claim either directly or through a surplus lines broker acting as the insurer's agent. The court rejected this argument, finding no evidence that the letter, which was not addressed to the later-period insurer, was ever communicated to that insurer.

The insureds also argued that their timely notice of the underlying claim to the independent insurance agent through which they obtained the later-period policies constituted notice to the insurer. The court determined that no evidence supported the insureds' position, noting that independent insurance agents are generally agents of the insured under Georgia law. Here, there was no evidence that the insurer ever held out the independent agency as its agent or that the independent agency customarily accepted premiums and notices of claims on the insurer's behalf, which facts could potentially establish an agency relationship. Instead, the court noted that the relevant policies provided that the insurer would only be obligated to provide coverage for a claim if "[t]he claim is first made against the insured *and reported to the Company* during the Policy Period" (emphasis added in opinion). Because the insureds did not produce sufficient evidence to create a genuine dispute as to the existence of an agency relationship between the insurer and the independent agency, notice to the agency could not be imputed to the insurer. The court therefore held that the insurer as a

matter of law had no coverage obligation for the underlying claim because the insureds had not met the notice condition precedent to coverage under the claims-made policies at issue.