

# Prior Pendency of Informal Administrative Proceedings Did Not Afford Insurer a Basis To Deny Coverage for Subsequent Lawsuit

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The United States Court of Appeals for the Eighth Circuit, applying Minnesota law, has held that a disability discrimination lawsuit filed against the insured university was a claim first made during an educators' professional liability policy even though the subject of the lawsuit also was the subject of three administrative complaints filed prior to the policy's inception. *Capella Univ., Inc. v. Executive Risk Spec. Ins. Co.*, 2010 WL 3271238 (8th Cir. Aug. 20, 2010).

In April 2004, the insured, an Internet-based educational institution, modified its online platform, leading to a student's complaint that the change discriminated against students with disabilities. When the university refused to grant the student's requested accommodations, the student posted comments in an online discussion room that the university considered inappropriate. The university eventually suspended the student, who in turn filed three complaints against the university with the United States Department of Education, Office of Civil Rights (the OCR). All three complaints were dismissed administratively when the student filed a disability discrimination lawsuit against the university in July 2005. The insured university argued that the student's July 2005 lawsuit was covered by a claims-made educators' professional liability policy issued by the insurer for the May 9, 2005 through May 9, 2006 policy period. The insurer denied coverage.

The insurer contended that the policy, which defined "Claim" to include "a formal administrative or regulatory proceeding commenced by the filing of a notice of charges, formal investigative order or similar document," did not provide coverage because the lawsuit was not a claim first made during the policy period. The insurer argued that because the OCR proceedings were formal administrative proceedings and, thus, Claims under the policy, the subsequent related lawsuit could not be deemed a Claim first made during the policy period. In addition, the insurer argued that, even if the Claim was first made during the policy period, the duty to defend was negated by the policy's exclusion for "Loss on account of any Claim based upon, arising from, or in consequence of" a formal administrative proceeding pending on or prior to May 9, 2005.

In rejecting both of the insurer's arguments, the court concluded that the OCR proceedings were preliminary investigations that did not constitute formal administrative proceedings. To support its conclusion, the court noted that the OCR proceedings were not extensively regulated, implicated few consequences for the

university and were not a necessary predicate to the student's lawsuit. More specifically, the court noted that the university was not entitled to notice of the OCR complaints and could not respond to the substance of the complaints. Nor could the OCR subpoena documents or witnesses for testimony. Moreover, the court explained that written admissions by the university and written decisions by the OCR were not required, making it unlikely that such writings would be later used against the university in other proceedings. Although recognizing that OCR proceedings could eventually become formal, the court concluded that the prospect of future formal proceedings was insufficient to constitute a "Claim."

Determining that the student's July 2005 lawsuit was a Claim first made during the policy period and that it was not excluded as based upon, arising from, or in consequence of prior or pending formal administrative proceedings, the court held that the insurer had breached its duty to defend.