

Claims-Made-and-Reported Policy Affords Coverage for Claim First Reported During Later Policy Period Where Renewal Policy Afforded "Continuous" Coverage

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In a decision designated not to be published, the Kentucky Court of Appeals has held that a claim made during the policy period of a claims-made-and-reported policy but reported during the policy period of a later renewal policy was covered because the renewal policy provided continuous coverage to the insured. *AIG Domestic Claims, Inc. v. Tussey*, 2010 WL 3603844 (Ky. Ct. App. Sept. 17, 2010).

The insurer issued an errors and omissions policy to a school board for the claims-made-and-reported period of July 1, 2005 to July 1, 2006 and issued a renewal policy to the insured for the claims-made-and-reported period of July 1, 2006 to July 1, 2007. The policies provided that the insurer "agrees to pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay as Damages resulting from any Claim first made against the insured and reported to the company during the Policy Period" A teacher filed a lawsuit against the school board in February 2006, and the school board filed its answer in April 2006. However, the school board did not report this claim to its insurer until April 2007. The insurer denied coverage for the lawsuit on the grounds that each policy afforded coverage only for claims made and reported during the policy period. Coverage litigation ensued, and the underlying court granted summary judgment in favor of the insured.

The appellate court rejected the insurer's argument that extending coverage for a claim made but not reported during the policy period, as required under the policy language, would give the insured "a benefit for which it did not bargain." The court concluded instead that "when the [insured] renewed its claim-based policy at the precise time the earlier policy expired, its coverage was continuous" and that "[i]t is difficult to fathom that a claim accruing during the two policy periods would not be covered by either policy." In reaching this conclusion, the court relied in part on the policy provision entitled "Discovery Period," which stated that if the insurer or the insured canceled or refused to renew the policy, the insured would have the right, upon payment of additional premium, to a twelve-month period following the cancellation or non-renewal in which to give written notice of any claim made during the extended reporting period. The insured had argued that, based on the Discovery Period provision, "renewal [of the policy] implie[d] an extended reporting period

where coverage remains continuous."

The court noted that, on appeal, the parties disputed whether the insured's fourteen-month delay in giving notice of the lawsuit was unreasonable and whether such notice was timely. The court declined to address this issue, however, because it had not been raised before or addressed by the underlying court. The court therefore affirmed the lower court's grant of summary judgment in favor the insured.

The dissent opined that "this Court is giving the insured that for which they did not bargain, and is breaking rank with the overwhelming majority of jurisdictions," and that the ruling was "directly contrary to the positions taken by our own circuit and our own district courts."