

Subsequent Related Claims Made After Inception of Reinsurance Policy Not Excluded From Coverage

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The Indiana Court of Appeals, applying Indiana law, has reversed a trial court's judgment in favor of a reinsurer, holding that claims made after the inception of a claims made reinsurance policy that are related to prior claims made before the policy's inception are not excluded from coverage under the applicable policy language in the reinsurer's policy. *Wellpoint, Inc. v. Nat'l Union Fire Ins. Co.*, 2011 WL 2893095 (Ind. Ct. App. July 20, 2011).

The insured, an insurance provider, was sued in 1999 by a group of physicians for allegedly improperly delaying or denying reimbursement for medical services. The insured reported this claim to its primary insurer. In 2000, one of the insured's excess reinsurers became insolvent prior to the end of the policy period, and the insured obtained a separate excess reinsurance policy under the same terms as the previous excess reinsurer for a policy period beginning in July 2000. In 2001 and 2002, the insured was again sued by numerous claimants in suits alleging similar allegations as the 1999 action concerning the delaying and denial of reimbursement for medical services. The insured sought coverage under its new excess reinsurance policy.

The claims-made excess reinsurance policy at issue provided in the Limit of Liability provision that:

If additional claims are subsequently made which arise out of the same Wrongful Act or series of continuous, repeated or interrelated Wrongful Acts as Claims already made and reported to the Insurer, all such Claims, whenever made, shall be considered first made within the Policy Period . . . in which the earliest Claim[] arising out of such Wrongful Act or series of continuous, repeated or interrelated Wrongful Acts was first made and reported to the Insurer, and all such claims shall be subject to one such limit of liability.

The Notice/Claim Reporting provision of the excess reinsurance policy provided, in relevant part, that:

If written notice of a Claim has been given pursuant to Clause 8(a) above, then a Claim which is subsequently made against the Insureds and reported to the Insurer alleging, arising out of, based upon or attributable to the facts alleged in the Claim for which such notice has been given, or alleging any Wrongful Act which is the same as or related to any Wrongful Act alleged in the Claim of which such notice has been given, shall be

considered made at the time such notice was given.

The excess reinsurer denied coverage for the 2001 and 2002 claims on the basis that the claims related back to the 1999 claim made prior to its policy period. The trial court held in favor of the excess reinsurer, and the insured appealed the ruling.

The Indiana intermediate appellate court reversed the trial court's holding. The court stated that the Limit of Liability provision "is designed to cap the insurer's liability for multiple claims based on the same or interrelated wrongful acts by its insured" and that, in return, the "insured may benefit by receiving coverage for claims made beyond the expiration of the policy." The court held that the Limit of Liability provision "is prospective in nature and contemplates (a) initial coverage between an insured and insurer, (b) a first claim made and reported to that insurer during that coverage period, and (c) subsequent claims made and reported to that insurer down the road." Here, where the 1999 claim was made prior to the inception of the excess reinsurer's policy, the court held that coverage was not precluded because the Limit of Liability provision "is not intended to exclude coverage retrospectively based on claims preceding an insurer's relationship with the insured." The court noted that the parties could have drafted the policy to have a "retrospective, exclusionary effect" but had declined to do so.

In addressing the Notice/Claim Reporting provision, the court stated that there was "no basis to read [that provision] to exclude coverage retrospectively based on notice of claims preceding the inception of coverage." The court indicated that the excess reinsurer was "attempting to superimpose the so-called 'prior notice exclusion'" onto the Notice/Claim Reporting provision and that because the excess reinsurer's policy "was not in effect at the time of [the 1999 suit], notice of [the 1999 suit] to [the excess reinsurer] could not be provided pursuant to [the Notice/Claim Reporting provision]. Accordingly, [the Notice/Claim Reporting provision] takes no effect."