wiley

NEWSLETTER

Claims Made After Policy Period Involving Different Wrongful Acts Not Related; No Duty to Defend Based on Untimely Notice, Failure to Request Defense and Lack of Damages

April 2012

Applying California law, the California Court of Appeal has held, in an unpublished opinion, that an insured cannot rely on "related claims" language in a professional liability policy to obtain coverage for claims made after the expiration of the policy and further that, regardless, the claims involved different and unrelated wrongful acts. *NovaPro Risk Solutions, L.P. v. TIG Ins. Co.*, 2012 WL 913243 (Cal. Ct. App. Mar. 16, 2012). The court also held that the insurer had no duty to defend because the insured did not provide timely notice of the claims against it, did not request a defense and did not suffer damages because the insured was completely defended by an insurer for a subsequent policy period.

A third-party administrator that handled claims for property and casualty insurance companies (P&Cs) was insured under consecutive claims-made professional liability policies issued by different insurers. In 2001, the administrator provided notice to its insurer (the first insurer) of a potential claim against it by one P&C arising out of a default judgment against the P&C's insured due to a filing error by an administrator file clerk (the 2001 claim). The potential claim ripened into an actual claim in 2002, and the first insurer entered into a settlement agreement with the P&C that released the administrator from liability for future related claims. Thereafter, in 2005, the same P&C, along with other plaintiffs, filed suit against the administrator alleging that it had mishandled numerous claims under a particular insurance services program (the 2005 claims). The administrator's insurer for that policy period (the second insurer) provided the administrator with a defense, but filed a declaratory judgment action against the administrator. The administrator filed a cross-complaint against the first insurer, asserting that the 2005 claims related back to the 2001 claim.

Relying on the case *HomesteadInsurance. Co. v. American Empire Surplus Lines Ins. Co.*, 44 Cal. App. 4th 1297 (1996), the court held that the administrator could not rely on the first policy's "related claims" language, which provided that "[a]ll Claims made by the same person and arising out of the same error, omission or negligent act or series of errors, omissions or negligent acts will be deemed to have been made at the time the first of those Claims is made against any Insured," to bring the 2005 claims within the first policy period. The court further held that, even if the related claims language could be construed to create coverage, the 2001 and

2005 claims arose out of different and unrelated wrongful acts. The court explained that the gravamen of the 2005 claims was the administrator's alleged understaffing and inadequate training-which purportedly resulted in the negligent practices of numerous claims adjusters in hundreds of claims-whereas the 2001 claim arose out of a single default judgment due to a clerical filing error. According to the court, the only factual nexus between the 2001 and 2005 claims was that the same P&C was the claimant in the former and one of the plaintiffs in the latter.

The court also held that the first insurer did not have a duty to defend the 2005 claims because the administrator did not provide the first insurer with notice of the 2005 claims until 2008, did not request a defense and did not suffer damages because the second insurer provided it with a complete defense. With respect to the issue of notice, the court held that the first insurer did not waive the right to assert untimely notice as a defense to coverage by merely failing to cite that defense when it denied the claim.