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NEWSLETTER

Calculation of Profits Not "Administration" of Benefits Program

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The United States Court of Appeals for the Ninth Circuit, in an unpublished decision applying Montana law, has held that a general liability insurer has no duty to defend a policyholder against lawsuits alleging that it improperly calculated profits as part of its profit-sharing plan because the allegations in the lawsuits related to "discretionary" acts not covered under the "employee benefits program" endorsement to the policy. *Travelers Cas. & Sur. Co. v. Wausau Underwriters Ins. Co.*, 2005 WL 977853 (9th Cir. Apr. 28, 2005).

Several employees filed lawsuits against an aluminum company seeking portions of profits that the company allegedly withheld. The company tendered defense of the lawsuits to its fiduciary liability carrier and general liability carrier. The company's general liability policy contained an endorsement covering liability arising out of the "administration" of the company's "employee benefits program." After the general liability carrier denied coverage, the company and the fiduciary liability insurer brought separate coverage actions against the general liability insurer.

In affirming the district court's decision, the Ninth Circuit held that the liability carrier owed no duty to defend or indemnify the company. Although the court noted that the profit-sharing plan was specifically defined as an "employee benefits program" under the general liability policy, the court concluded the policy's definition of "administration" only "contemplates administrative and ministerial actions . . . [and] does not include discretionary, decision-making activities." According to the court, the wrongful acts alleged (i.e., the calculation of profits) involved discretionary acts by the company and therefore the general liability policy provided no coverage.

For more information, please contact us at 202.719.7130.