

## No Duty to Defend Where Alleged Wrongful Acts Occurred Before Retroactive Date

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A New Hampshire federal court, applying Pennsylvania law, has granted a professional liability insurer's motion for summary judgment, holding that the insurer has no duty to defend an underlying suit because the alleged wrongful conduct took place prior to the policy's retroactive date. *Cincinnati Ins. Co. v. Fab Tech., Inc.*, 2005 WL 1492377 (D.N.H. June 24, 2005).

The policyholder was a subcontractor who contracted with a general contractor to design and fabricate parts of a building addition. The addition later collapsed, giving rise to the underlying claim under the insured's architects and engineers professional liability policy. The policy covered "wrongful acts" that took place during the policy period or "prior to the policy period but on or after the retroactive date."

After receiving notice of the collapse, the insurer denied coverage because the work occurred before the policy's retroactive date. Later, the insurer/subrogees of a tenant in the building and the general contractor sued the subcontractor for strict liability, negligence, negligent misrepresentation and breach of warranties. The policyholder did not inform the professional liability insurer in writing of the suit, but notified its CGL insurer, who defended under a reservation of rights. Subsequently, the CGL insurer filed suit against the professional liability insurer, seeking a declaration that the professional liability insurer was required to defend and seeking reimbursement of defense costs.

The court held that there was no duty to defend under the professional liability policy because there was no alleged wrongful conduct during the policy period. As the court explained, under Pennsylvania law, an insurer's duty to defend is "fixed solely by the allegations in the underlying complaint." The court rejected the CGL insurer's argument that, because the complaint did not specify when the work was performed, there was the potential for coverage under the professional liability policy until a court determined that the alleged wrongful conduct was outside the policy period. Instead, the court found that the writ of summons in the underlying action incorporated by reference the contract between the owner and the general contractor, which required the completion of all work before the policy's retroactive date. Although the court recognized that the duty to defend is broad, the court explained that it "is not so broad that it is obligated to defend against claims alleging injuries that fall outside the policy's coverage." Additionally, the court rejected the "novel proposition" that the duty to defend exists until a court determines coverage. Because there was no alleged wrongful act during the policy period, the court held that there was no duty to defend.

For more information, please contact us at 202.719.7130