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NEWSLETTER

Other Decisions of Note

August 2005

Court Dismisses E&O Insurer's Complaint for Lack of Personal Jurisdiction

In an unreported decision, a New York federal district court has dismissed a complaint filed by an E&O insurer based on a lack of personal jurisdiction. *Nutmeg Ins. Co. v. Iowa Mut. Ins. Co.*, 2005 WL 1529523 (S.D.N.Y. June 29, 2005). The complaint sought a declaratory judgment concerning certain coverage issues. The court noted that the policyholder was not licensed to do business in New York and did not do business in New York. In addition, all negotiations concerning the policy took place outside of New York. The court explained that, although the E&O insurer issued the policy in New York, "if New York state is merely the place in which a contract was unilaterally executed in its final form—after all of the material terms of the contract had previously been negotiated by nonresident parties in other states—it would be unfair and prejudicial to subject a party to the contract to New York jurisdiction, since in those circumstances the party had not established any purposeful contact with the state or availed itself of the benefit of its laws."

District Court in Georgia Applies Broad Definition of "Arising From" to Exclude Coverage for Alleged Medical Malpractice Following an Illegal Operation

The United States District Court for the Middle District of Georgia has granted an insurer's motion for summary judgment, holding that, under Georgia law's broad interpretation of the term "arising from," a series of allegedly negligent acts were sufficiently connected to an initial, excluded medical procedure to bar coverage for all the alleged acts under a medical malpractice policy. *Professional Underwriters Liability Ins. Co. v. George R. Vito, D.P.M., et al.*, 2005 WL 1630522 (M.D. Ga. July 11, 2005). This coverage dispute concerned a malpractice suit brought against a surgeon who had performed an illegal leg-lengthening operation, which necessitated two follow-up operations. The policy contained an endorsement excluding coverage for claims arising from the rendering of professional services that "are outside the scope of the [insured's] license to practice podiatry." The parties agreed that the illegal operation clearly fell within the endorsement's scope, and the court concluded that, contrary to the insured's assertion, the fact that the insurer knew that the insured was performing these illegal operations did not serve to waive the insurer's rights to rely on the exclusion. The court then turned to the question of whether the remaining malpractice allegations, including those against the medical facilities for negligent credentialing and respondeat superior, all "arose from" the initial procedure. The court concluded that under the broad interpretation of "arising from" provided by Georgia law, all of the remaining claims were a consequence of the initial operation. Accordingly, the court held that all claims were excluded under the policy.

Federal Court in California Holds No Duty to Defend Fee Dispute Under Legal Malpractice Policy

The United States District Court for the Eastern District of California granted an insurer's motion for summary judgment, holding that, under a lawyer's professional liability policy, an insurer had no duty to defend where the underlying claim "indisputably is not one for legal malpractice." *Harbison v. Am. Motorists Ins. Co.*, 2005 WL 1676897 (E.D. Cal. July 12, 2005). The policy defined a "claim" as any demand received "arising out of your acts, errors or omissions in providing professional services." "Professional services" was defined as services performed "[f]or a client in your capacity as a lawyer." The underlying dispute arose from a fee arrangement between two attorneys representing the same client. The insured, one of the two attorneys, was asked to participate in the contingent fee case by the primary attorney. The client subsequently fired the primary attorney and retained the insured to be the client's sole representative in the matter. The fired attorney then filed suit against the insured for *quantum meruit* and breach of contract. The insured tendered the suit to the insurer, which denied coverage, and the insured then commenced this action. The court concluded that, since the underlying suit was "nothing more than a fee dispute between two lawyers," it did not arise out of the provision of professional services and therefore is not covered under the policy.

Court Finds Insurer's Withdrawal of Defense Improper Where It Failed to Timely Invoke Policy Exclusions of Replacement Policy

In an unreported decision, a New Jersey state court has ordered a professional liability insurer to provide defense for its policyholder in a civil tort action, determining that the insurer was estopped from relying upon the terms of a replacement policy to justify the withdrawal because, prior to the attempted withdrawal, the insurer had provided a defense for three years without citing to the replacement policy. *Eisenstein v. MIIX Ins. Co.*, 2005 WL 1639385 (N.J. Super. Ct. Law Div. July 13, 2005). The policyholder, a physician, purchased professional liability insurance from the insurer. After the physician was sued for sexually assaulting a patient, he tendered the case to the insurer. The insurer agreed to defend, subject to a reservation of rights letter that cited to various provisions of the policy form. Three years after issuing its initial reservation of rights, it denied coverage and stated that it had been using the "incorrect policy form." The court held that the insurer was estopped from denying the physician a defense based on the alternative policy form.

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