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NEWSLETTER

Other Decisions of Note

December 2005

Exclusion Inapplicable to Claim for Failure to Procure Pollution Coverage

The Superior Court of New Jersey has held that the absolute pollution exclusion in a professional liability policy issued to an insurance broker does not apply to a professional negligence claim alleging that the broker failed to obtain insurance covering lead exposure for a client. *Jackson v. Atlantic*, 2005 WL 2757134 (N. J. Super. Ct. Oct. 26, 2005). The pollution exclusion in the policy applied to all claims by the insured broker indirectly relating to pollution, but the court held that this derivative claim of professional negligence was "merely attenuated" rather than indirect. The court reasoned that it was unreasonable to expect the policyholder to read the pollution exclusion as applying to a claim for professional negligence, especially when the insured was not the person accused of doing the polluting.

Court Rejects Argument That Typographical Error Converts Claims-Made Policy into Occurrence-Based Policy

A Massachusetts federal district court, applying Massachusetts law, has held that a notice provision in an excess policy should be read as a supplementing the complimentary notice provision in the underlying policy. *Controlled Risk Ins. Co. v. Federal Ins. Co.*, 2005 WL 2746652 (D. Mass Oct. 25, 2005). The primary policy was claims-made and required that notice of a claim be provided "as soon as practicable, but no later than fifteen (15) days after the policy expiration." However, the excess policy contained a provision stating that the insured must give prompt notice "of any notice given or additional or return premiums charged or paid in connection with any Underlying Insurance." The insureds argued that the inclusion of an "or" gave the phrase "any notice given" independent significance, rendering the policy occurrence-based rather than claims-made. The court held that it was clear that this interpretation was based on a typographical error erroneously inserting "or" instead of "of" in the "or additional" phrase and rejected the plaintiff's argument. In doing so, the court noted that "[i]t would be highly irregular for an excess insurer to write a notice provision granting an insured broader coverage under the excess policy than the coverage provided by the primary insurer in the underlying policy."

Overcharging Clients Not Interior Design Service for Purposes of E&O Policy

In an unpublished decision, the California Court of Appeal, applying California law, has held that an interior decorator's overcharging of her clients, whether by negligence or breach of contract, is not covered by an E&O policy because pricing is an administrative task that does not require design expertise. *Wittmack v. Chubb Group of Ins. Cos.*, 2005 WL 2633071 (Cal. Ct. App. Oct. 14, 2005). The insurer issued to an interior designer an E&O policy providing coverage for damages resulting from "a negligent act, error or omission . . .

in the performance of or failure to perform professional services for others as an interior designer." The interior designer was named in a lawsuit alleging that she breached a contract with her clients by charging more than the agreed upon markup on goods. The court agreed with the insurer that the policy did not afford coverage, explaining that billing is an administrative task and thus not covered by the policy.

Insurer Acted in Bad Faith by Linking Settlement With Corporate Policyholder to That of Policyholder Physician

A New Jersey appellate court held that an insurer acted in bad faith when it refused to settle a personal injury claim within policy limits against its corporate policyholder because it could not also reach a settlement agreement for the policyholder physician who had a separate limit of liability available. *Princeton Ins. Co. v. Qureshi*, 882 A.2d 993 (Oct. 6, 2005). The court explained that when a verdict in excess of policy limits against a policyholder is probable, "the boundaries of good faith become more compressed in favor of the insured." The court rejected the argument that when interests of a corporation and an individual are at stake, the interests of the corporation can be subordinated to those of the individual. Instead, the court held that when multiple insureds are exposed to liability from the same limited coverage pool, separate counsel should be appointed to ensure each insured's interest in settlement is protected.

For more information, please contact us at 202.719.7130