wiley

ALERT

General Reservation of Rights Preserves No-Voluntary Payments Defense

July 26, 2011

The United States District Court for the Central District of California has held that an insurer did not waive its right to rely on a no-voluntary payments clause as a defense to coverage, even though the insurer did not explicitly cite the clause in its initial coverage letter. *Dietz Int'l Pub. Adjusters of Cal., Inc. v. Evanston Ins. Co.*, 2011 WL 2684941 (C.D. Cal. June 29, 2011). The court held that reserving "all rights, including the right to assert and rely upon additional coverage defenses as they may be discovered or ascertained," effectively preserves the right to rely on additional coverage defenses.

In 2006, the policyholding insurance adjuster discovered that one of its employees was embezzling company funds. As a result, it faced dozens of claims from clients, paying out $2 million to settle 49 claims between March 14, 2006 and August 25, 2008. The insured did not advise its insurer of the settlement payments prior to resolving the claims. On June 17, 2009, the insured tendered a demand to its insurer for amounts it spent on the settlements. This was the insurer's first notice of the claims. The insurer denied coverage, stating that the demand was for money the insured lost as a result of embezzlement, and not claims made by third-parties against which the policy was intended to protect. The denial letter contained a blanket reservation of "all rights," including the right to rely upon additional coverage defenses.

In the coverage litigation that followed, the insurer raised as a defense to coverage the policy's no-voluntary payments clause, which provided that the insured "shall not, except at [its] own cost, make any payment, admit any liability, settle any claims, assume any obligation or incur any expense without the written consent of [the

Practice Areas

D&O and Financial Institution Liability

E&O for Lawyers, Accountants and Other Professionals

Insurance

Professional Liability Defense

insurer].” The court rejected the insured’s waiver argument, holding that waiver requires an insurer intentionally to relinquish its right to deny coverage, which the insurer did not do here. In particular, the court noted the insurer’s explicit reservation of the right to rely on all provisions in the policy that may apply. The court also pointed out that the insured adduced no evidence that it detrimentally relied on the fact that it believed the no-voluntary payments provision had been waived.

Next, the court held that the no-voluntary payments clause applied to bar coverage because the insured had settled the claims without seeking the insurer’s consent and indeed, without notifying the insurer of the existence of the claims. In so holding, the court rejected the insured’s argument that a showing of prejudice was required to support the defense to coverage.

The court also rejected the insured’s argument that the settlement payments were not in fact “voluntary.” California recognizes an exception to no-voluntary payments clauses where an insured makes payments prior to tendering claims on the basis of economic necessity or other extraordinary circumstances. Despite the insured’s plea that it faced “a pressing need to pay its clients, many of whom faced catastrophic losses,” the court refused to recognize economic necessity as an excuse. The court went on to state that an insured’s ignorance of potential insurance coverage does not constitute an extraordinary circumstance. The court held the payments were voluntary as a matter of law.