Interplay of Extended Reporting Period And Subsequent Claims-Made Policy

Levy & Dubovich, et al. v. Travelers Casualty and Surety Company of America
2016 WL 1244018 (N.D. Ind. 3/30/16)

The U.S. District Court for the Northern District of Indiana recently addressed an important issue for claims-made insurers – the applicable coverage when an insured obtains a new insurance policy running simultaneously with a prior policy's extended reporting period ("ERP"). The court's decision provides important guidance on the meaning of "similar" coverage, as used in common ERP provisions, and whether an ERP applies in that situation.

In *Levy & Dubovich v. Travelers Casualty and Surety Company of America*, the insured law firm sought coverage from its former claims-made professional liability insurer, Travelers, for a client's legal malpractice counterclaim against the firm. The counterclaim was filed within 60 days after the non-renewed claims-made policy's expiration. The firm therefore asserted that the claim was timely because it was made within the policy's 60-day automatic ERP.

Travelers disclaimed coverage for the counterclaim because it was not a claim first made within the claims-made policy period. Travelers asserted that no ERP applied because the firm purchased another professional liability insurance policy that began on the same date the Travelers policy expired. And the Travelers policy provided that the ERP ended at the earlier of (a) 60 days from policy expiration, or (b) the effective date of any other policy "that provides similar coverage for Professional Services…". The firm contended, though, that the ERP applied because the subsequent professional liability policy did not provide "similar" coverage.

The subsequent Hanover Insurance professional liability policy excluded coverage for suits arising out of fee claims, and the client's counterclaim was in response to the firm's suit for unpaid fees. The law firm contended that the Hanover policy did not provide "similar" coverage because that policy excluded coverage for the particular claim, while the Travelers policy did not. But in this case of first impression under Indiana law, the court disagreed, granted summary judgment in Travelers' favor, and declared that Travelers had no duty to defend or indemnify the law firm against its client's counterclaim.

The court rejected the notion that policies must provide *identical* coverage in order for the coverage to be viewed as "similar." The court noted that "similar" coverage means coverage obtained by the named insured that has characteristics in common with the original policy, but that may not be *identical* in terms of its coverage or exclusions. The court further stated that "[t]o hold otherwise, would render the use of the term 'similar' in the policy meaningless." So despite the existence of exclusions, or other terms that may result in some differences between policies, the coverage may be "similar" when both policies are professional liability policies covering the same general risk. Here, both policies provided coverage for professional liabilities undertaken by the law firm in the course of its legal practice.

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Comment:

While this issue is not often litigated, and the body of case law examining the interplay of extended reporting periods and subsequent policies is rather limited, it is nevertheless an issue that often confronts professional liability insurers and insureds. Whenever presented with a claim made during an extended reporting period, insurers should fully investigate the existence of other insurance that the insured obtained. The insurer and the insured should closely examine the two policies to determine whether they are "similar," and if so, the extended reporting period under the earlier policy may not apply.

If you have any questions about this Update, please contact the author listed below or the Aronberg Goldgehn attorney with whom you normally consult:

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To view a copy of the court's opinion, please **CLICK HERE.**