

Insurance Coverage Update

Re-Filed Suit, Prior Suit and Prior Demand Letter Are Single Claim Under Claims Made Policy

The U.S. District Court for the Northern District of Illinois recently rejected an insured's attempt to obtain coverage for an underlying suit originally filed before the claims made policy period, re-filed during the policy period, and arising out of a demand letter preceding both suits. In granting judgment on the pleadings for the insurer, which was represented by Aronberg Goldgehn in the case, the court also found that the policy's retroactive date provision and "prior/pending proceeding" exclusion barred coverage, as well. *Navigators Specialty Ins. Co. v. B.D. McClure and Associates, Ltd.*, No. 19 C 3972 (ND Ill., October 6, 2020).

In 2015, the insured insurance agency was sued for allegedly breaching an insurance producer agreement by failing to report an underlying personal injury claim. The plaintiff in that suit later voluntarily dismissed it, then filed suit again in 2018, asserting the same claims as it alleged in the 2015 suit. The insured submitted the 2018 suit to its errors and omissions insurer under a claims made policy in effect at the time the 2018 suit was filed, and the E&O insurer disclaimed coverage.

In the resulting declaratory judgment action, the court determined that the matter constituted a claim first made before the inception of the insurer's claims made policy period. The court relied on the policy's terms providing that all claims involving the same wrongful act would be considered a single claim, and deemed made when the first claim was made. The court explained that the insured received a written demand for payment in connection with the underlying claim in December 2013, and the demand

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was repeated in the 2015 suit and the 2018 suit. The claim was, therefore, first made long before the claims made policy period.

The court also agreed with the insurer that application of the policy's retroactive date provisions further supported a finding of no coverage. To be covered, the policy required that the wrongful acts or "related wrongful acts" that are the subject of the claim were committed on or subsequent to the retroactive date specified in the policy's declarations. The insured's alleged failure to report an underlying claim clearly took place before that retroactive date.

Finally, the court noted that, even if the wrongful act had occurred and the claim had been made within the appropriate periods, coverage would be excluded under a "prior and/or pending proceeding" exclusion. That exclusion provided that the insurer would not be liable in connection with any claim based upon, arising out of, relating to, or in any way involving any prior and/or pending proceeding involving any insured, and which was known to the insured, or any fact, circumstance, or situation underlying or alleged in the proceeding. The 2018 suit was certainly related to the prior 2015 suit, as it was a re-filing of the voluntarily dismissed 2015 suit, and both included the same claims and allegations. The court applied the "prior/pending proceeding" exclusion under those circumstances.

Comment

The *McClure* decision represents a straightforward approach to the several coverage issues that arise when new suits are filed, but involve the same claims or allegations previously raised in either pre-litigation demand letters or prior suits. The "claim first made", retroactive date and "prior/pending" issues require careful attention and consideration by both insureds, when initially receiving and reporting demand letters or suits, and insurers, when ultimately receiving notice of claims.

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