Court Dismisses Claim for Coverage but Allows Breach of Contract Action Against Insurance Company to Proceed

By David G. Tomeo, Esq. and Joseph G. Harraka, Jr., Esq.

The United States District Court for the District of New Jersey recently ruled that an insurance company was not liable for coverage under the Prior and Pending Litigation and Interrelated Wrongful Acts exclusions set forth in a "claims made" insurance policy, but refused to dismiss a breach of contract claim against the company predicated on acts taken by the insurer following notice of the claim. In the process, the Court reaffirmed long-standing New Jersey law that it is the transmittal of notice of the claim to the insurance company which invokes coverage under a "claims made" insurance policy.

In *Regal-Pinnacle Integrations Industries, Inc. v. Philadelphia Indemnity Insurance Company*, 2013 WL 1737236 (April 22, 2013), the company issued a commercial lines "claims made" insurance policy to plaintiff with a policy period of October 1, 2008, to October 1, 2009. On February 13, 2009, plaintiff was named in an employment liability suit filed by a former employee. Shortly thereafter, and within the policy period, plaintiff provided notice of the suit to the insurance company.

The factual record is not entirely clear; however, it appears that various discussions took place between plaintiff and the insurance company as to coverage. Although an agreement for coverage of the employment liability suit was not reached, the parties discussed reimbursement of settlement and defense costs by the insurance company. Eventually, plaintiff settled with the former employee and looked to the carrier to contribute or reimburse it for its defense and related costs, but the insurance company refused to do so, prompting the action to be filed by plaintiff. After the action was filed, the insurance company moved to dismiss both the declaratory judgment and breach of contract counts of the complaint; the Court granted the motion as to the DJ count, but refused to dismiss the contract claim.

The District of New Jersey ruled that the insurance company was not obligated under the policy as the underlying employment discrimination suit was substantially similar to an administrative claim brought by the employee in April 2007 (well before the inception of the subject insurance policy) thus invoking both the Prior and Pending Litigation and Interrelated Wrongful Acts exclusions in the policy:

> "it is apparent to the Court that there is substantial overlap between Hunter's administrative action and her subsequent civil suit filed in New Jersey state court. The Court need look no further than the complaints filed in both actions to determine that Hunter's civil suit arose from and was based upon the same set of factual allegations and claims made in her earlier administrative action."

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In the course of the opinion, the Court affirmed the law – settled at least since 1985 in New Jersey - that timely notice is the predicate for claims made policy coverage:

> "It is well-recognized in New Jersey that under a claims made policy, the event that invokes coverage is transmittal of notice of the claim to the insurance carrier"

It cited the New Jersey Supreme Court's decision in *Zuckerman v. Nat'l Union Fire Ins. Co.*, 100 N.J. 304 (1985).

The Court refused to dismiss the breach of contract claim, however, finding that the parties' discussions and negotiations gave rise to a viable contract cause of action. According to the District of New Jersey,

> "one could plausibly determine that the parties modified the Policy's terms by a subsequent oral agreement-regardless of the fact that the Policy purported to only permit written modifications – when PIIC repeatedly represented to RPI that it would partially Indemnify it for Hunter's civil suit."

In reaffirming the vitality of long-standing New Jersey precedent on the importance of timely notice in the claims made setting, and favorably interpreting both the Prior and Pending Litigation and Interrelated Wrongful Acts exclusions, Regal-Pinnacle has much to offer insurance companies. However, the case comes with a cautionary tale: discussions with an insured, however well intended, can and will possibly lead to contract liability. The lesson is that any discussions with an insured by an insurance company where coverage is in doubt must be clear, certain, and definite – and in a writing with the usual disclaimers, including an express admonition that nothing said amends the policy or creates a separate, new contract between the parties. Failure to do may leave an insurance company with the dubious honor of "winning the battle but losing the war."

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