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INSURANCE LAW UPDATE (ILU)

9th Circuit considers 'relatedness' of professional liability claims

PRACTICAL POLICYHOLDER ADVICE

Insurers often attempt to limit coverage under "claims-made" policies by asserting that different claims are related and, thus, should be treated as a single claim subject to a single policy and a single per-claim limit of liability. In a fully briefed case pending before the 9th U.S. Circuit Court of Appeals, the court will consider exactly this question in the context of multiple lawsuits involving numerous real estate investment transactions spanning several years. The court's decision will provide much needed guidance as to the amount of coverage available where policyholders face multiple claims involving similar subject matter.

By Jennifer S. Senior and Jan A. Larson

In a fully briefed case pending before the 9th Circuit, *Liberty Insurance Underwriters, Inc. v. Davies Lemmis Raphaely Law Corp.*, 16-55711 (9th Cir.), the parties dispute whether seven underlying lawsuits that involve 23 separate real estate transactions spanning six years constitute a single "related" claim under a series of professional liability insurance policies. The district court's ruling that the lawsuits should be treated as a single claim resulted in limiting the insureds' coverage to the per-claim limit of liability of one of the three triggered policies. As a growing number of cases consider the "relatedness" of claims spanning multiple periods, the 9th Circuit's decision on appeal could be an important case in limiting the overly broad application of this coverage-limiting language.

In the district court, the professional liability insurer sought a declaratory judgment that the per-claim limit of liability under one of the three triggered policies capped coverage for seven pending civil lawsuits that had been filed over a three-year period. *Liberty Ins. Underwriters, Inc. v. Davies Lemmis Raphaely Law Corp.*, 162 F. Supp. 3d 1068 (C.D. Cal. 2016). The insureds in this case included a transactional real estate firm, as well as lawyers at the firm, who had served as counsel to a real estate broker and its principal in facilitating real estate investment partnerships. The seven underlying lawsuits involved 23 separate transactions over a six-year period. Eight of the transactions involved investment partnership deals for limited partnership investors, and the remaining 15 involved both limited partnership and tenant-in-common investors. The underlying plaintiffs alleged that the defendants made false representations that the sellers would pay all commissions relating to the transactions, notwithstanding that the purchase price of the property had been marked up to include a commission payment. They further alleged that the insureds participated in drafting the offering memoranda and other documents with knowledge of the alleged misrepresentations.

The insurer had issued three successive professional liability policies that each had a \$1 million per-claim limit of liability, plus \$250,000 of claim expenses not subject to the limit, and a \$2 million aggregate limit. Based on the following policy

language, the parties disputed whether the underlying actions should be treated as a single claim and, therefore, capped by the per-claim limit of only one of the three triggered policies: "Claims alleging, based upon, arising out of or attributable to the same or related wrongful acts shall be treated as a single claim regardless of whether made against one or more than one of you. All such claims, whenever made, shall be considered first made during the policy period or any extended reporting period in which the earliest claim arising out of such wrongful acts was first made, and all such claims shall be subject to the same limits of liability."

The district court held that, based on the California Supreme Court's seminal decision in *Bay Cities Paving & Grading, Inc. v. Lawyers' Mutual Insurance Co.*, 5 Cal. 4th 854 (1993), the term "related" is not ambiguous, is not limited to causally related acts, and includes both logical and causal connections, but does not encompass every conceivable logical relationship. The district court stated that, "[a]t some point, a relationship between two claims, though perhaps 'logical,' might be so attenuated or unusual that an objectively reasonable insured could not have expected they would be treated as a single claim under the policy."

Applying *Bay Cities*, and considering other cases in California and federal courts across the country, the district court held that the underlying claims arose from a single course of conduct and, thus, constituted "related" claims for purposes of the per-claim limit. The district court found that the underlying lawsuits alleged a unified policy on the part of the defendants of making affirmative misrepresentations to investors to induce them to invest in commercial real estate acquisitions facilitated by the broker, and that all of the lawsuits involved similar or identical acts of wrongdoing that were part of a course of conduct aimed at the same goal. Specifically, the district court noted that the lawsuits all uniformly relied on written memoranda and documents prepared by the insureds that contained alleged misleading statements and omissions regarding inflated purchase prices and hidden commissions. The district court also considered the insureds' court filings in the underlying actions, in which the insureds stated that they considered the underlying actions to be "virtually identical."

In the subsequent appeal to the 9th Circuit, the insureds contend that, under *Bay Cities*, a "primary rights" analysis applies, focusing on whether the alleged wrongful acts are causally or logically related to a particular claimant's injury. Applying this analysis, the insureds argue that the underlying lawsuits are separate and unrelated because the multiple underlying investors brought seven separate lawsuits, based on 23 separate transactions spanning six years, and alleged unique misrepresentations about different forms of investment vehicles in connection with different properties and investment objectives. Additionally, the insureds argue that the court erred in ruling on the coverage issues based on unproven allegations, as the potential outcomes in each action will not necessarily be the same. The insureds further argue that the policies require the insurer to defend the claims until there is a "final adjudication" of liability. The insureds also request that the 9th Circuit consider certifying the question to the California Supreme Court to clarify the law for future coverage disputes.

While the case involves California law and professional liability policies, the 9th Circuit's decision is likely to become a significant guidepost in "claims-made" coverage disputes nationwide as insurers increasingly assert relatedness provisions to limit coverage.

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