E&O Insurance Coverage Practice Regarding Lawyers, Accountants and Other Professionals

Wiley Rein has a full-service insurance coverage practice focused on professional liability policies issued to lawyers, accountants, architects, engineers, insurance agents, real estate brokers, and other professionals. Insurers regularly retain us to handle their most important and complex errors and omissions (E&O) coverage matters on a national basis.

Wiley Rein plays many roles for its professional liability insurance clients. As coverage counsel, we advise insurers as to their rights and obligations under E&O policies and assists clients in communicating their coverage positions clearly and precisely to the insureds. The firm also advises insurers regarding their options for handling significant coverage issues, including when and how to negotiate, litigate, and raise legitimate coverage defenses without creating extra-contractual exposure.

As strategic counsel, Wiley Rein provides its insurer clients with advice regarding the merits of underlying malpractice claims against insured professionals and strategies for settlement or claim resolution. In this role, the firm avoids duplicating work already undertaken by defense counsel but at the same time recognizes that carriers sometimes need an independent analysis of the merits of a claim by experienced counsel who represent the interests of the carrier, not those of the insured.

In both its coverage counsel and strategic counsel roles, Wiley Rein often represents carriers at settlement conferences and mediations. These assignments frequently involve E&O matters in which the firm has been involved for some time. In other cases, carriers retain the firm for the first time shortly before a settlement conference or mediation in order to take advantage of the firm’s experience and expertise both in the relevant substantive issues and in the art of negotiation.

We also provides underwriting and policy-drafting advice and assistance to its insurer clients, and assists carriers by providing risk management advice for their insureds. In this regard, Wiley Rein attorneys have assisted clients in drafting policy forms and endorsements for a wide range of professional liability policies, including policies for lawyers, accountants, architects and engineers, insurance agents, real estate brokers, and miscellaneous professional liability and technology professionals.

Finally, when high-stakes litigation is necessary, carriers routinely rely on Wiley Rein to represent their interests in E&O coverage and “bad faith” litigation throughout the country. Many of these cases are resolved by cost-effective settlements. Others require litigation to reach a conclusion, including cases in which we has successfully represented carriers in jury and bench trials and on appeal. Recent results include the following publicly reported cases:

- Obtained summary judgment determining that insurer had no duty to defend an SEC enforcement action brought against its insured lawyer. The court held that the remedy of disgorgement in SEC actions constitutes a “penalty” and so does not fall within the policy’s definition of “damages,” and that as a result
the SEC enforcement action did not seek any potentially covered damages. The court held that the insurer did have a duty to defend a related securities class action notwithstanding the policy's investment exclusion, but rejected the insured’s argument that the duty to defend the class action also obligated the insurer to defend the SEC enforcement action because the two lawsuits were related claims and so deemed a single claim. The court held that policy's related claim provisions applied to determinations of when a claim was deemed made and the applicable limits of liability and deductible, but did not require the insurer to defend an otherwise uncovered lawsuit because it was related to a covered lawsuit. Marcus v. Allied World Ins. Co., No. 2:18-cv-253-DBH, 2019 WL 1810954, (D. Me. Apr. 23, 2019).

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- Obtained judgment as a matter of law determining that an underlying lawsuit arising out of an attorney-client fee dispute did not seek any covered “damages” within the meaning of the subject lawyers professional liability policy. Continental Casualty Co. v. Laurence V. Parnoff, et al., Case No. 3:17-cv-769 (MPS) (D. Conn. Sept. 12, 2018).

- Obtained summary judgment determining that an underlying corruption investigation into insured lawyer did not seek any covered “damages” within the meaning of the subject lawyers professional liability policy, such that insurer did not owe a duty to defend. Andry Law Group, LLC v. CNA Fin. Corp., 2018 WL 3642003 (E. D. La. Aug. 1, 2018).

- Obtained summary judgment determining that all claims against insured engineering firm arising from the design of two bridges that collapsed during construction constituted “related claims” and were therefore subject to a single per claim limit of liability. Stewart Engineering v. Continental Cas. Co., 2018 WL 1403612, No. 5:15-CV-377-D (E.D.N.C. Mar. 20, 2018).

- Obtained dismissal of complaint filed by insured engineering firm alleging counts for breach of contract and “bad faith.” The court held that a claims-made-and-reported policy unambiguously does not apply where the insured failed to notify the insurer of a claim before the policy’s reporting deadline. The court also rejected the firm’s arguments based on the “reasonable expectations” doctrine. Southwest Energy Systems LLC v. Underwriters at Lloyd’s, London, Case No. 2017-015010 (Ariz. Super. Ct., Maricopa Cnty. Mar. 15, 2018).

- Obtained dismissal of complaint filed by life insurance agent alleging counts for breach of contract, “bad faith,” and violation of the California Unfair Competition Law. The court held that the underlying disciplinary proceeding brought against the insured by the California Insurance Commissioner was subject to the policy’s “Regulatory Action Endorsement,” which unambiguously provided a $25,000 maximum sublimit of liability for defense and indemnity coverage for all “claims” brought by governmental officials or agencies. Alan Lucien Cerf v. Cont’l Cas. Co., No. 2:17-cv-07993-DSF-SS (C.D. Cal. Mar. 13, 2018).

- Obtained summary judgment for professional liability insurer that eleven claims against insured pharmacy and pharmacist arising from repackaging of two similar drugs into single-dose syringes for ocular injections on different dates constituted “related claims” under errors and omissions policies because the drugs were “negligently repackaged by the same individual at the same pharmacy for the same doctor over a relatively short period of time.” On appeal, the Eleventh Circuit affirmed, holding that all claims were logically connected because each syringe was prepared in the same location, by a single technician supervised by the same pharmacist, and the technician “used the same process to prepare all the syringes, repeating the same violations of health and safety regulations.” Cas. Co. of Reading, Pa. v. Belcher, 2017 WL 372094 (S.D. Fla. Jan. 26, 2017), aff’d 2017 WL 4276057 (11th Cir. Sept. 27, 2017).

- In a 2016 jury trial, obtained a verdict of “NO!” in response to the question whether the insurer had unreasonably delayed thereby waiving its right to rescind an accountants professional liability policy.

- Successfully opposed a motion to stay a coverage action in Missouri pending resolution of state court liquidation proceedings against the insured. After Wiley Rein’s client initiated the coverage action in federal court, a state court issued a liquidation order against one of the insureds. The court denied the insureds’ motion to stay the action, holding that the coverage action and the state liquidation proceedings were not parallel proceedings and that allowing the coverage action to proceed would not affect the liquidation proceedings. *Allied World Surplus Lines Ins. Co. v. Galen Ins. Co*, et al., 4:17CV1185JCH, 2017 WL 3503473 (E. D. Mo. Aug. 16, 2017).

- Obtained summary judgment for insurer on grounds that insured’s notice of circumstances that purported to give notice of a potential claim was untimely and insufficient to provide notice of an actual claim. In so ruling, the court held that an email from the DOJ that “stated [a] settlement offer of $610 million and requested a counterproposal from” the insured was a written demand for monetary relief, and thus a “Claim,” that should have been reported to the insurers. *First Horizon Nat’l Corp. v. Houston Cas. Co*, No. 15-cv-2235-SHL-dkv (W.D. Tenn. June 23, 2017).


- Obtained dismissal of insured’s class action allegations asserted on behalf of all insureds who had submitted claims to the insurer that the insurer had declined to defend, and prevailed on motion to strike the class. *American Chems. & Equip., Inc. v. Cont’l Cas. Co., et al.*, No. 6:15-cv-00299-MHH, 2017 WL 2405102 (N.D. Ala. June 2, 2017).

- Obtained summary judgment determining that insurer had no duty to defend or indemnify the insured under an accountants professional liability policy because the insured had knowledge of acts or omissions that could give rise to a claim before the inception of the policy and because the claim did not implicate “professional services,” as no remuneration inured to the benefit of the named insured for the accountant’s work in soliciting investments. On appeal, the Ninth Circuit affirmed in an unpublished memorandum opinion, holding that the claim fell outside the policy’s definition of covered “professional services,” without reaching the other coverage issues. *Cont’l Cas. Co. v. Kool Radiators, Inc.*, No. 2:13-cv-02379, 2015 WL 11120680 (D. Ariz. Apr. 20, 2015), aff’d, 15-16023, 2017 WL 1457031 (9th Cir. April 25, 2017).

- Obtained summary judgment for excess insurer that it had no duty to defend an insured hospital because, although the insured had provided notice of circumstances that might lead to a claim, it had failed to notify the excess insurer of the actual claim or a subsequent settlement offer. The court also determined that the excess insurer was not barred from denying coverage by estoppel or waiver. *Kennedy Univ. Hosp. v. Darwin Nat’l Assurance Co.*, No. 16-2494 (RBK/JS), 2017 WL 1352208 (D.N.J. Apr. 7, 2017).

- Obtained summary judgment determining that a “quality of services” exclusion in a technology errors and omissions policy barred coverage for a lawsuit arising out of the insured online auction service’s alleged misrepresentations concerning the safety and reliability of its auctions. *Equipmentfacts, LLC v. Beazley Ins.*

- Additional recent results of publicly reported cases are outlined here.

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