
“Insured Versus Insured” Exclusion Applies in Dispute

BY DAN CRISP

In *Biltmore Assoc., LLC v. Twin City Fire Ins. Co.*, the Ninth Circuit Court of Appeals upheld the applicability of the “insured vs. insured” exclusion under certain D&O policies, where the insured company filed claims as a debtor in possession against former directors and officers of the company. Visitalk.com, Inc., which had filed for Chapter 11 bankruptcy protection, asserted claims as debtor in possession against four of its former directors and officers for breach of fiduciary duties. Visitalk’s professional liability insurers denied coverage, citing the “insured versus insured” exclusion. The exclusion at issue bars coverage for claims against the directors and officers “brought or maintained by or on behalf of an Insured in any capacity.”

Following the denial of coverage, Visitalk assigned its claims to the creditors’ trustee, then settled with the directors and officers for a confession of judgment and an assignment of claims, and the trust then filed suit against the insurer on the basis of these claims.

The district court dismissed the case for failure to state a claim. On appeal, the Ninth Circuit affirmed the dismissal, but on different grounds, instead basing its affirmance on the applicability of the exclusion. The court cited the purpose of the exclusion generally of curbing potential collusion and other moral hazard arising from the relationship between insureds. The court found the exclusion applicable because a post-bankruptcy debtor in possession acts in the same capacity as the pre-bankruptcy debtor.

While directors and officers should certainly be cautioned, the practical effect of the decision may be a dampening of bankruptcy adversary litigation, with high-policy-limit coverage off the table in many circumstances.



*Directors and officers
should be cautioned*

“Claims-Made” Strictly Construed By Kentucky Appellate Court

BY JONATHAN STERLING

In *AIG Domestic Claims v. Tussey*, the Court of Appeals of Kentucky adopted the majority rule that failure to notify an insurer of a claim under a claims-made policy within the policy period will defeat coverage. The case concerned two errors and omissions policies issued by National Union Fire Insurance Company (a subsidiary of AIG) to a county board of education. The policy periods were July 1, 2005 to July 1, 2006, and July 1, 2006 to July 1, 2007. In February 2006, a teacher commenced a gender discrimination case against the board. However, the board did not make a claim under the first National Union policy until April 2007. A claim was made under the second policy in January 2008. National Union denied both claims, asserting that the policies were “claims-made-and-reported” policies which required claims to be reported within the policy period to be covered.

The board and the teacher brought suit against National Union and AIG, asserting that the policies covered the claims. The trial court granted summary judgment to the board and the teacher on this issue, denying AIG’s and National Union’s summary judgment motions. AIG and National Union appealed and the Court of Appeals reversed the trial court. The Court of Appeals found the claims-made provision to be unambiguous and held that a claim would be excluded if made outside the policy period, even if the policy was continuously renewed. The court pointed to the fact that claims-made policies are less expensive than occurrence-based policies, which can create long “tails” of potential future liability. To find coverage, the court said to give the insured a benefit for which they did not bargain.