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Brokers in Pursuit of Professional Liability Coverage

By Andrew S. Boris
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It happens quite often.

An insured is sued and a question is raised as to whether there is insurance coverage for the claim. The insured states that "it thought it had coverage," and if it does not have coverage, "it is the agent's or broker's fault for not getting the coverage."

A case in New Jersey recently presented a very similar fact pattern and discussed the broker's attempts to secure coverage from its professional liability carrier when there were allegations of professional negligence. *Jackson v. Atlantic, et al.*, No. A-1526-04T5F, 2005 WL 2757134 (N.J. Super A.D. Oct. 26, 2005).

In *Jackson*, tenants of a rental property alleged that they were exposed to lead paint at the rental location and sued the landlord for damages to compensate them for their claimed injuries. The landlord's broker had procured insurance for the landlord, but the policy in question contained a total pollution exclusion.

In turn, after the landlord was sued, the insurer denied coverage for the underlying lead paint action. In response, the landlord filed an action against the broker asserting that the landlord had specifically requested the broker obtain insurance coverage for lead paint exposure (which it had allegedly failed to do).

The broker forwarded the action filed by the landlord to its professional liability insurer. In response, the professional liability insurer informed the broker that there was no coverage under the policy in question for the submitted claim. Citing an absolute pollution exclusion contained in the professional liability policy, the professional liability insurer refused to defend or indemnify the broker. The insurer stated that because the allegations of negligence advanced against the broker flowed from the underlying litigation concerning alleged lead paint poisoning, the absolute pollution exclusion precluded coverage for the landlord's third-party action against the broker. After presenting the arguments in court, the trial court ordered the professional liability insurer defend and indemnify the broker as well as reimburse the broker's attorneys' fees.

Since the underlying action between the tenant and landlord involved the potential application of a pollution exclusion, the insurer maintained that it was not required to defend or indemnify the broker, as the professional liability policy in question also contained an absolute pollution exclusion (similar to the exclusion contained in the policy issued to the landlord). The appellate court noted that the issue of whether a professional liability policy covered the alleged professional negligence of the insured for failure to obtain a policy including lead exposure, in a case where the underlying case involves lead exposure, was a case of first impression for the New Jersey courts.

The appellate court affirmed the trial court's decision in favor of the broker, finding that the exclusion did not preclude coverage for the professional negligence action. The court specifically noted that the policy in

question covered professional negligence for wrongful acts resulting from errors and omissions of the insured from services rendered as an insurance broker.

In turn, the proper question presented was whether there was an issue involving professional negligence, as opposed to whether there was some form of dispute involving pollution that may involve the application of the pollution exclusion. The insurer argued that the exclusion in the policy specifically addressed the coverage question because it included language that excluded coverage for ? any litigation or administrative procedure in which an Insured may be involved as a party; arising directly, indirectly, or in concurrence or in any sequence out of actual, alleged or threatened existence, discharge, dispersal, release or escape of "pollutants"?

The court dismissed the concept that the "indirect" language contained in the pollution exclusion somehow supported the potential applicability of the pollution exclusion to the allegations of professional negligence. Finding that the origin of the pollution was irrelevant, the court focused on the claim in controversy, which involved professional negligence and not pollution stemming from the broker's premises or acts. The court further noted that the broker's (as the insured) reasonable expectations of coverage would also support a finding of coverage in this circumstance. Thus, the court summarily dismissed the insurer's arguments.

The opinion offered by this New Jersey appellate court is very instructive. When examining the pleadings involved in the underlying direct coverage action, it becomes obvious that the central theme is that exposure to lead paint allegedly resulted in bodily injuries. This court was able to discern that the claim being advanced against the broker involved allegations of professional negligence apart from the underlying facts that involved pollution.

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