

ALERT

# No Coverage for Claim First Made Prior to Policy Period and Because Insureds Had Knowledge of Wrongful Act Prior to Policy's Inception

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The United States District Court for the District of New Hampshire, applying New Hampshire law, has held that there is no coverage under a professional liability errors and omissions policy where the claim was first made prior to the policy period and the insured had knowledge of the wrongful act prior to the inception date of the policy. *Mut. Real Estate Holdings, LLC v. Houston Cas. Co.*, 2011 WL 3902774 (D.N.H. Sept. 6, 2011).

The insurer issued a claims made professional liability errors and omissions policy to a real estate company for the August 31, 2009 to August 31, 2010 period. The policy's insuring agreement afforded specified coverage for claims made against the insured for wrongful acts, provided that "(1) the Claim is first made against the Insured and reported to the Company, in writing, during the Policy Period," and "(2) the Insured has no knowledge of such Wrongful Act prior to the Inception Date of this Policy." In a letter dated July 8, 2009, former clients informed one of the company's real estate agents that they believed she had misrepresented the condition of the property they had purchased, asked the agent to advise them of any applicable liability insurance, and asked the agent to inform the company of the issues raised (the "July 8 Letter"). Within a week, the company and agent denied liability. On August 14, 2009, the clients filed a complaint against the agent with the New Hampshire Real Estate Commission. The agent received a copy of the complaint on or before August 30, 2009. Thereafter, by letter dated October 30, 2009, the clients requested that the company and agent waive formal

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service of a writ of summons. The company then notified the insurer of the pending suit on November 4, 2009. The insurer denied coverage on the basis that the company had knowledge of the alleged wrongful acts prior to the inception date of the policy. The company filed a declaratory judgment action in the New Hampshire Superior Court, which the insurer removed to federal court.

The court granted summary judgment in favor of the insurer on two bases. First, the court held that coverage was not triggered because the claim was first made prior to the policy period. The court explained that the term "claim," which the policy defined in relevant part as "a written demand received by an Insured," included the July 8 Letter, which identified (1) alleged wrongdoing, (2) monetary damages, and (3) insurance as a source of compensation. The court rejected the company's argument that the July 8 letter was not a Claim because it was not "legitimate" or "valid," explaining that the policy did not expressly limit the term "Claim" in that manner, and further that such an interpretation would be unreasonable. Thus, the court held that counsel's subjective beliefs as to the merits of the July 8 Letter were irrelevant. The court also noted that the company offered no explanation as to how the allegedly non-meritorious claims presented in the July 8 Letter became meritorious when later presented in the writ of summons.

Second, the court held, for similar reasons, that coverage was not triggered under clause two of the insuring agreement because the company had knowledge of the wrongful act - the agent's allegedly fraudulent conduct - prior to the inception date of the policy. In so holding, the court rejected the argument that the definition of "wrongful act" encompassed only acts that were in fact negligent, noting that the policy unambiguously defined "wrongful act" as "any actual *or alleged* negligent act, error or omission or breach of duty committed *or alleged to have been committed*."