

ALERT

# Amended Complaint Unrelated to Original Complaint in Same Proceeding Because the Original Complaint Did Not Constitute a Claim

August 30, 2011

The United States District Court for the Western District of Michigan, applying Michigan law, has held that an amended complaint filed during a claims-made policy period constituted a claim, but determined that the claim did not relate back to the original complaint filed before the claims-made policy period because the original complaint was not a claim as defined by the policy. *Michigan Millers Mut. Ins. Co. v. Fid. & Dep. Co. of Maryland*, 2011 WL 3585262 (W.D. Mich. Aug. 15, 2011). The court also determined that the policyholder tendered the claim arising from the amended complaint during the reporting period and did not make a misrepresentation in its application for insurance by failing to disclose the original complaint. In addition, the court held that the insurer was obligated to advance defense costs prior to final disposition of the claim even though the policyholder, an insurance company, had not recovered the full amount of its reinsurance.

A farmhouse explosion caused the death of five individuals. The families of the decedents brought suit against the owner and managers of the farmhouse, who tendered the suit to their agribusiness insurer. The managers were named or qualified as insureds under the agribusiness policy, but the owner of the property was not. The agribusiness insurer provided a defense to the managers but not the owner of the farmhouse. In 2004, the owner and managers sued the agribusiness insurer alleging breach of contract for failure to defend the owner as an insured, bad faith for failure to defend the owner as an insured, and reformation to add the owner as an insured under the agribusiness policy. In 2007, after the

## Practice Areas

- D&O and Financial Institution Liability
- E&O for Lawyers, Accountants and Other Professionals
- Insurance
- Professional Liability Defense

settlement of the suits with the families of the decedents, the owner and managers amended their claim, adding an excess insurer as a plaintiff, and alleging negligent defense of the managers and failure to settle within policy limits. The agribusiness insurer tendered the 2007 amended complaint and the excess insurer's complaint to its professional liability carrier. The professional liability carrier denied coverage for the amended complaint and excess insurer's complaint on the grounds that they alleged related wrongful acts to the original complaint filed in 2004 and therefore constituted a claim made before the inception of its policy.

The court held that the amended complaint and the excess insurer's complaint were claims first made during the professional liability carrier's claims-made policy period because the original complaint against the agribusiness insurer did not constitute a "claim" under the professional liability policy. The professional liability policy defined "claim" as a "civil proceeding" against the insured "for a wrongful act . . . concerning any actual or alleged performance of or failure to perform any professional service." "Professional service" was defined, in relevant part, as "claims handling and adjusting."

First, the court held that the amended complaint and the excess insurer's complaint constituted "claims" because they alleged wrongful conduct by the agribusiness insurer in the defense of the suit by the decedents' families and failure to settle that suit in good faith. The court rejected the professional liability insurer's contention that the amended complaint and excess insurer's complaint were not claims because they did not commence a civil proceeding. The court opined that the definition of claim did not require the commencement of a civil proceeding.

Second, the court held that the two suits filed during the policy period did not relate back to the original complaint filed in 2004 because the original complaint did not constitute a "claim." The court held that the original complaint did not allege a wrongful act regarding a professional service. Instead, the original complaint focused entirely on the failure of the agribusiness insurer to recognize the owner as an insured under the agribusiness policy, which solely involved alleged errors in the underwriting of the policy rather than claims handling practices. In addition, the court held that, even if the original complaint were a claim, the excess insurer's complaint did not arise from the same or series of related facts or circumstances because the original complaint involved whether the owner was an insured under the agribusiness policy and the excess insurer's complaint involved the agribusiness insurer's purported bad faith handling of the suits by the decedents' families.

The court then determined that the agribusiness insurer tendered the amended complaint within the reporting period of the claims-made policy. Although the agribusiness insurer did not tender the actual amended complaint to the professional liability insurer, the agribusiness insurer did tender written notice of the amended complaint during the policy period.

The court also held that the failure to disclose the original complaint in the application for the professional liability policy did not exclude coverage for the amended complaint and the excess insurer's complaint. The court opined that the application requested information regarding claims that "would fall within the scope of the proposed insurance." Because the original complaint was not a claim covered by the professional liability

policy, the court reasoned that the agribusiness insurer was not required to disclose the original complaint on the application. The court also noted that the agribusiness insurer was not required to disclose the original complaint or the potential for the amended complaint and excess insurer's complaint because the application only required disclosure of threatened securities claims against directors and officers.

Finally, the court addressed the professional liability insurer's contention that its obligation to advance defense costs for the two suits was not triggered because defense costs were payable by the agribusiness insurer's reinsurance and the professional liability insurance was excess of reinsurance under the policy's other insurance clause, which provided that the professional liability policy was excess of other insurance and reinsurance. However, the reinsurer's obligation to pay for defense costs did not arise until the agribusiness insurer was required to pay damages to an insured. The court held that the other insurance clause "may have to operate, at least in part, as a reimbursement scheme rather than an outright excess insurance provision" because of the incongruity regarding when the professional liability insurer's and the reinsurer's obligations to pay defense costs were triggered. The court therefore held that, notwithstanding the other insurance clause, the professional liability insurer was obligated to advance defense costs.