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ALERT

Independent Contractor Exclusion Bars Coverage

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The United States District Court for the District of Maryland, applying Maryland law, has held that an insurer did not owe a duty to defend or indemnify its insured for claims made by an independent contractor against the policyholder because the independent contractor exclusion unambiguously barred coverage for such claims. *CATO Institute v. Cont'l Cas. Co., et al.*, 2011 WL 3626784 (D. Md. Aug. 16, 2011).

The policyholder was sued by a former independent contractor who alleged that the policyholder "unlawfully took ownership of and exercised rights in certain intellectual property and proprietary matter" found on a website that the independent contractor developed pursuant to its contractual relationship with the policyholder. Two policies of insurance were in place at the time the claim was made against the policyholder. Both insurers denied coverage and disclaimed a duty to defend. The policyholder settled with the claimant and then sued the insurers seeking $775,000 in damages and a declaration that the insurers were obligated to defend and indemnify the prior lawsuit.

One of the insurers moved to dismiss and argued that it had no duty to defend or indemnify the underlying action because the "independent contractor exclusion" barred coverage and there were no potentially covered claims alleged in the underlying complaint. The "independent contractor exclusion" barred coverage for any claim brought by an independent contractor that "arises directly or indirectly from or involves in any way disputes over the ownership of . . . use of or exercise of rights in [any] communicative or informational content . . . including content disseminated electronically and/or digitally when authorized or controlled by the

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Insured (e.g. via websites, chat rooms, bulletin boards, databases and blogs)."

The policyholder did not dispute that the claimant was an "independent contractor," but argued without explanation that "the ambiguous nature of the exclusion would require discovery as to the parties' intent, as well as the exclusion's drafting history" and that "for this reason alone, [the insurer's] motion to dismiss must fail." The court disagreed, finding that "arising out of" language in an insurance policy is unambiguous and is broadly construed.

The policyholder further argued that a duty to defend arose because at least some of the causes of action did not arise directly or indirectly out of disputes over the ownership of the material on the website. Specifically, the policy holder noted that two counts of the complaint alleged that the policyholder had interfered tortiously with the independent contractor's business and contractual relationships. The court opined that these counts fell within the independent contractor exclusion because both counts alleged that the tortious interference was accomplished by, among other things, the policyholder obtaining and using information from the independent contractor's website. Accordingly, the court concluded that "no potential exists that the underlying claims are covered by the policy and any potential rejoinder [the policyholder] may have to [the insurer's] affirmative defense is foreclosed." The court thus granted the insurer's motion to dismiss.