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ALERT

FTC Investigation Is a Claim Triggering Reporting Requirements

January 24, 2012

The United States District Court for the Northern District of Ohio, applying Ohio law, has held that a policyholder's duty to provide notice of a claim first arose when it received a formal Federal Trade Commission (FTC) investigation order. *Employer's Fire Insurance Co. v. Promedica Health System, Inc.*, 2011 WL 6937488 (N.D. Ohio 2011). Because the policyholder did not report the claim until 17 days after the deadline by which notice could be provided under the policy's terms, the court ruled that there was no coverage for the claim.

The policyholder, a not-for-profit healthcare service operator, held two successive policies of Directors, Officers and Organizers insurance. The first policy period was from September 29, 2009 through September 29, 2010 (09/10) and the second from September 29, 2010 through September 29, 2011 (10/11). The policies required that "as a condition precedent to any right of coverage," the policyholder must give notice "as soon as practicable after it first becomes aware of [a claim], and in no event later than . . . 90 days after the end of the Policy Period; or . . . 90 days after the end of the extended Reporting Period."

In May 2010, the policyholder entered into an agreement to acquire a hospital. On July 15, 2010 the FTC sent a letter to the policyholder advising it that the FTC would be "conducting a non-public preliminary investigation to determine whether the acquisition may be anticompetitive and in violation of [antitrust laws]." On August 6, 2010 the FTC investigation transitioned to "full-phase" and requested that the policyholder delay the acquisition. On August 9, 2010 the FTC formally ordered the policyholder to turn over documents and on August 10, 2010, the FTC demanded a Hold Separate Agreement (HSA) requiring the policyholder to maintain the hospital as an

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independent entity for 60 days following the acquisition. On August 18, 2010 the policyholder agreed to the HSA.

The policyholder provided notice to the insurer on January 13, 2011 under its 10/11 policy. On March 29, 2011 the FTC obtained a preliminary injunction barring the acquisition in federal court. On May 10, 2011 the insurer denied coverage under the 10/11 policy, stating that the claim "was first made on or about August 9, 2010 when the FTC issued a resolution authorizing the commencement of a formal investigation." The insurer also denied coverage under the 09/10 policy because the policyholder failed to comply with that policy's notice requirements, as the January 2011 notice was more than ninety days after the expiration of the policy's extended Reporting Period.

The court first observed that "if [the insurer] is correct, then the Claim first arose during the 09/10 Policy, and [the policyholder's] notice on January 13, 2011, was seventeen days late." Included in the policy's definition of Claim is "an administrative or regulatory proceeding . . . for monetary, non-monetary or injunctive relief commenced by . . . the filing of a formal investigative order, or similar document . . . for injunctive relief . . . against the insured . . . for a Wrongful Act." The policyholder argued that the August activities of the FTC failed to meet the requirements of the definition of a Claim with respect to "Wrongful Act" and "injunctive relief," stating that only the January 2011 federal court filings could satisfy all of the requirements of a Claim under the Policy. The court rejected this argument holding that "[w]hen the FTC conducted a formal investigation, ordered compulsory process, and entered into an HSA with [the policyholder], it did so pursuant to the allegation that the acquisition was unlawful," and so satisfied the "Wrongful Act" requirement.

The court also held that the "formal investigative order" satisfied the "injunctive relief" requirement of the definition of claim because that was the ultimate relief that could be sought. The court rejected the policyholder's contention that as of August 2010, the "FTC viewed relief as something it may seek in the future, but not something that it was seeking" at that time. In addition, the court held that, in any event, the August 2010 HSA was a form of injunctive relief because it had "the practical effect, and purpose, of a temporary restraining order on [the policyholder's] completing the acquisition."

Accordingly, the court found that the definition of claim was not ambiguous and, that there was no coverage under the 10/11 policy, as the claim arising from the FTC investigation was first made prior to the 10/11 policy period. With respect to the 09/10 policy, the court likewise found that there was no coverage because the claim was not reported to the insurer until January 2011, 17 days after the last date by which notice could be reported under the 09/10 policy.