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ALERT

# Conspiracy Does Not Occur "Solely" in the Rendering of "Professional Services"

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The Indiana Court of Appeals, applying Indiana law, has affirmed a trial court's judgment in favor of reinsurers, holding that lawsuits alleging that a health insurer conspired with managed-care organizations to deny, delay and diminish payments to doctors did not arise "solely" in the rendering of "Professional Services" and was not covered under the health care insurer's professional liability policies. *Wellpoint, Inc. v. Nat'l Union Fire Ins. Co.*, 2011 WL 2893095 (Ind. Ct. App. June 19, 2013).

The insured, a health care insurance provider, was sued by several plaintiffs asserting violations of the Racketeer Influence and Corrupt Organizations Act (RICO), among other causes of action, in connection with an alleged scheme by the insured and managed care providers to delay and deny payments to doctors. The health care insurer issued primary and excess E&O policies to itself, for which it then obtained reinsurers from several reinsurers.

The reinsurers denied coverage for the RICO litigation on the basis that the claims did not fall within the scope of coverage of the relevant insuring agreement, which extended to loss for wrongful acts occurring "solely in the rendering of or failure to render Professional Services." "Professional Services" were defined as "services rendered or required to be rendered solely in the conduct of the Insured's claims handling or adjusting."

The court concluded that the wrongful acts alleged in the RICO litigation were not professional services in the form of claims handling or adjusting. According to the court, the underlying lawsuits did not simply allege that the insured improperly denied claims. Rather, they alleged an unlawful agreement or conspiracy to deny,

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diminish and delay payments to doctors. Alleged wrongful conduct included the insured's participation in a managed care enterprise and its involvement in trade associations and industry groups that disseminated unified information and exchanged upper-level employees in order to facilitate unified action. Unlawful agreements and conspiracies are not claims handling activities, the court reasoned. Even if some professional services were implicated, the court held, the underlying actions did not arise "solely" out of the rendering or failure to render such services.

The court reasoned further that "the policy language is not ambiguous, and that 'solely' means solely [and] implies 'exclusively' or 'entirely.'" Accordingly, the court rejected the insured's argument that coverage was "not negated for ... wrongful acts that did occur in the performance of claims handling." That argument, the court held, is inconsistent with the meaning of "solely" as "exclusively" or "entirely." The court therefore affirmed the trial court's decision that the reinsurers' policies did not provide coverage for the underlying litigation.