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Seven Things About Professional Liability Coverage, Part 7: Some Exclusions

By Andrew B. Downs

This is the last post in a seven part series from the Federation of Defense & Corporate Counsel's (FDCC) Blog on issues arising under professional liability policies. The aim of this series is to provide sufficient background information to allow the defense attorney to identify relevant issues frequently raised by professional liability policies and to formulate a plan for addressing them. This is not a treatise on how different jurisdictions view professional liability issues. For that, the reader should review the DRI's 2012 publication *Professional Liability Insurance: A Compendium of State Law*. There are, of course, other issues of importance not discussed here.

Some Exclusions

Most professional liability policies contain exclusions intended to exclude uninsurable risks as well as risks typically covered by Commercial General Liability policies and other policies the insured should acquire. In addition to the restitution exclusion discussed in Part 6, two other exclusions of particular interest are the dishonest, fraudulent and criminal conduct exclusion and the insured versus insured exclusion. This post will focus on those exclusions, instead of being a comprehensive review of all common exclusions.

What makes the dishonest, fraudulent and criminal conduct exclusion in a professional liability policy different from its counterparts in other types of policies is that many professional liability policies contain an express promise by the insurer to continue to fund the defense until there is an admission or adjudication of dishonest, fraudulent or criminal conduct on the part of the insured. The insurer, however, retains a right to reimbursement of all defense costs when such an admission or adjudication occurs.

The insured versus insured exclusion eliminates coverage for claims in which the claimant is also an insured, or is a trustee, receiver, assignee or other party who has succeeded to the rights of an insured. This exclusion has been the subject of significant litigation, particularly in bank failure cases where receivers, such as the FDIC are pursuing professional liability claims against former officers, directors or employees of the bank. It also arises in other circumstances where there is a bankruptcy or receivership and claims are then made against former managers of the business. *See*, *Hyde v. Fidelity & Deposit Co. of Maryland*, 23 F.Supp.2d 630 (D. Md. 1998) (receiver of Bank as plaintiff); *TIG Specialty Insurance Co. v. Koken*, 855 A.2d 900 (Comm. Pa. 2004) (Insurance Commissioner as liquidator was successor of insured/liquidated company).

These are only two of the exclusions often found in professional liability policies. Both present both opportunities and pitfalls for counsel. An attorney representing a claimant may elect to plead the case differently to reduce the risk the dishonest, fraudulent, etc. exclusion may apply. The attorney for the

professional liability insurer must be aware of whether the exclusion contains a provision obligating the insurer to fund the defense until the alleged dishonesty or similar conduct is adjudicated adversely to the insured.

Just as reading the policy is essential, so is reading the published cases. There is a large body of law addressing the insured vs. insured exclusion. Many of those cases, however, turn on the specific, and at times unique, language of the particular policies and on the specific status of the parties to the underlying action.