Jim's Perspective…

Gage County Story Continues

As you may have read, the Nebraska Supreme Court recently issued an opinion in a lawsuit filed by Gage County against Employers Mutual Casualty Company (EMC) in which Gage County asserted that EMC had coverage for the $28.1 million Beatrice Six jury verdict. The sole question before the Court was whether the "professional services" exclusion of the Commercial General Liability insurance policy (CGL) applied to bar coverage for all of the wrongful conviction claims brought against Gage County in the Beatrice Six litigation. The issue is whether the acts of the Gage County Sheriff's Office constitute a "professional service" which is excluded under the policy.

EMC had three policies that were in effect at the time of convictions. There was a CGL that provided primary liability coverage on an occurrence basis. There was an E & O policy in effect at that time that provided claims made coverage, and an Umbrella policy that applied as excess coverage to these two policies. The CGL has an aggregate limit of $2 million.

At the trial court level, EMC argued that Nebraska case law related to interpretation of professional liability policies should be applied to provide a definition of professional service, which, if used, would uphold application of the professional services exclusion in the CGL. Gage County argued that the Court should look to case law involving application of the statute of limitations for a professional negligence claim. Surprisingly, the Court decided that it did not need to consider any case law to answer the question of whether the professional services exclusion applied because *the plain language* of the EMC policies answers the question of whether the professional services exclusion applies.

The Court noted that in situations involving the interplay between various primary and excess coverages, courts should examine the overall pattern of insurance and construe all of the applicable policies as a whole. The CGL policy, E & O policy, and Umbrella policy provide an interrelated pattern of insurance. On appeal, both parties agreed with this statement that the policies are interrelated and must be considered together. When the Court looked at the interrelated pattern of the policies, the court found that the *plain language* of the CGL and Umbrella provided coverage for these claims. The terms of the policies were clear and unambiguous according to the Court. The E & O policy provided no coverage since it operated on a claims made basis.

The CGL did not define professional services for purposes of its exclusion. The E & O and Umbrella policies did define what professions fell within the professional services exclusion. In part the professional services exclusion was defined to apply to doctors, lawyers, accountants, architects and engineers. The Umbrella also had an Occupations Liability Exclusion. Law enforcement *is listed* as one of five occupations that are excluded along with travel agents, publishers, printers, and broadcasters. Based on this policy language, the Court reasoned as follows:

> Under both the E & O policy and the Umbrella policy, law enforcement clearly does not qualify as a professional service; it is not listed in the exclusive list of professions

> in the E & O policy, and it is listed as an "occupation" rather than a profession in the Umbrella policy. The fact that the Umbrella policy lists law enforcement as an occupation rather than a profession is a particularly compelling indication of the parties' understanding. It indicates that the parties understood professions and occupations to have separate meanings and include different types of acts or services. It also indicates that they understood law enforcement not to be a profession. Had the parties understood law enforcement to be a profession, it would have been unnecessary to separately list law enforcement as an excluded occupation.

In addition to not listing law enforcement as a professional service, the CGL defined "personal injury" to include injury arising from false arrest, detention or imprisonment, or malicious prosecution. All of this is typically understood to constitute acts performed by law enforcement.

This case was referred back to District Court to determine the extent of EMC's liability under the CGL. Since the Supreme Court had to resolve only one question, whether the professional services exclusion applies to this case, technically the trial court will still have to enter an order setting forth EMC's insurance contract obligations towards Gage County. It appears that the Umbrella will likely provide coverage too despite the occupations exclusion which references law enforcement. The Court said, "Provisions within the umbrella policy suggest that there may be coverage available under that policy if EMC is found to be responsible under the CGL policy." Not sure how all of that would work

While the EMC coverage case returns to Lancaster County District Court, it should be noted that there is still pending in District Court a coverage case against the county risk pool, NIRMA. The Gage County wrongful conviction saga rages on. The lawsuit brought by the Beatrice Six is based upon language found in the Civil Rights Act of 1964. Back then, no one knew about how this risk exposure would change with the development of DNA testing. If you Google "wrongful conviction under the Civil Rights Act of 1964" you will see there is an entire industry out there that is now focused on this type of litigation. It is doubly attractive to attorneys because the Civil Rights Act law provides for recovery of attorneys' fees for a successful plaintiff.

Finally, how do you rate for this type of exposure? It occurred a little over thirty years' ago. It is an example of why there is much more claims made coverage than occurrence coverage. It is why tail coverage to protect a client against claims that occurred years ago is expensive.

James B Dobler

Jim Dobler, CPCU
PIA Legislative Coordinator
Questions or Comments? Please email jbdobler@outlook.com