Seventh Circuit Rejects Broad Interpretation of "Claim" Under Claims-Made Professional Liability Policy

In *Market Street Bancshares, Inc.* v. *Federal Insurance Co.*, 2020 WL 3396303 (7th Cir. June 19, 2020), the Court of Appeals for the Seventh Circuit grappled with whether a damages argument asserted for the first time in a thirteen-year-old litigation constituted a new "claim" that triggered an insurer's duty to defend under a later claims-made policy. Concluding that the damages argument was not itself a "claim" but merely part of an earlier-made claim (the civil action as a whole, commenced by the service of the complaint), the Court found that the insurer had no duty to defend and affirmed an order granting it summary judgment.

I. Claims Made Policies vs. Occurrence Policies

In contrast to "occurrence" policies, which are triggered by covered *injury or damages* taking place during the policy period, claims-made policies are — as the name suggests — triggered by covered *claims* first asserted against the insured during the policy period, regardless of when the underlying injury or damages occurred. *National Union Fire Insurance Co. of Pittsburgh* v. *Baker & McKenzie*, 997 F.2d 305, 306 (7th Cir. 1993). By providing a fixed date after which an insurer is not subject to liability, claims-made policies allow the insurer to more accurately identify its exposure and charge its insureds lower premiums. *Id*. at 306 (premiums charged to policyholders for claims-made policies are less expensive than occurrence policies because the insurers are not exposed to "indefinite future liability").

II. Background on the *Market Street Bancshares* Decision

In 2003, Terry and Robert Newman filed a third-party complaint in Illinois state court against People's National Bank ("People's"), the insured, in connection with a failed business deal. *Market Street Bancshares*, 2020 WL 3396303 at *1. People's had entered into several contracts with the Newmans about the sale of their business, including a so-called "Pledge Agreement" that obligated People's to notify the Newmans if a default occurred by the business's purchaser. *Id*. The purchaser ultimately defaulted, triggering various obligations that People's failed to fulfill. *Id*.

Thirteen years after the Newmans filed their original complaint and shortly after the state court found People's liable on various counts, the case proceeded to trial on damages, where the Newmans presented evidence of damages based on the Pledge Agreement. *Id*. at *2. This was the first time in the litigation's history that the Newman's addressed the Pledge Agreement; they did not mention it in their complaint or otherwise during the liability phase. *Id*. Nevertheless, the trial court awarded damages based on the Pledge Agreement. *Id*.

The 2016 damages trial began during the policy period of a claims-made professional liability policy that People's had entered into with Federal Insurance ("Chubb") in 2014. *Id*. Under the policy, which spanned April 15, 2014 to April 15, 2017, Chubb agreed to defend and indemnify People's against "Loss on account of any ***Claim*** first made against [People's] during the Policy Period" (emphasis added). *Id.* The policy's definition of "Claim" included "***a written demand for monetary or non-monetary relief, including injunctive relief***" and "***a civil proceeding commenced by the service of a complaint***." *Id*. at *4.

People's sought coverage from Chubb for the claimed damages under the Pledge Agreement. *Id*. at *2. Chubb denied coverage, and People's sued Chubb, seeking a declaration that Chubb owed it a duty to defend and

indemnify.[1] *Id.* The district court determined that any arguments made during the bench trial on damages did not give rise to a new "claim" for purposes of coverage and granted Chubb summary judgment. *Id.*

On appeal, People's maintained that the Newman's damages assertion based on the Pledge Agreement was a "claim" that gave rise to Chubb's duty to defend. *Id.* at *4. Though People's conceded that the Newmans' 2003 complaint initiated a "claim" under the policy ("a civil proceeding commenced by the service of a complaint . . . including any appeal therefrom") and that the damages phase was part of the civil action begun in 2003, People's contended that because the Newmans' damages argument was not based on the facts and legal theories presented in the Newmans' operative complaint, the damages argument was a "written demand for monetary relief" and was a new "claim" in itself. *Id.* at *4.

III. The Seventh Circuit's Decision

Rejecting People's argument, the Seventh Circuit concluded that, under the policy, a "claim" taking the form of "a civil proceeding commenced by the service of a complaint" spans the entire civil action. *Id.* It, therefore, affirmed the district court's grant of summary judgment to Chubb. *Id.* at *6.

As the Court explained, its reading is consistent with the purpose of claims-made policies, which is to "allow the insurance company to easily identify its risk, which in turn may offer insureds more-available and less-expensive policies." *Id.* at *6 (citation and internal quotation marks omitted). "Just as giving 'proceeding' a narrow meaning would muddy the insurer's risk exposure, so too would the scenario of overlapping claims. If an argument in the damages phase of a lawsuit could be both part of a 'claim' begun by a complaint and itself a 'claim,' the insurer's risk exposure would be significantly more difficult to calculate." *Id.*

IV. Implications

The *Market Street Bancshare* decision is in accord with and reinforces several decisions nationwide concerning the definition of a "claim" under a claims-made policy. *See Essex Insurance Co.* v. *Blue Moon Lofts Condominium Ass*ociation, 927 F.3d 1007, 1010-11 (7th Cir. 2019) (claim was first made against insured in 2002 when insured was served with lawsuit, notwithstanding that the claimant later sought to enforce the judgment in 2012, during the policy period); *BioChemics, Inc.* v. *AXIS Reinsurance Co.*, 924 F.3d 633, 646 (1st Cir. 2019) (underlying lawsuit constituted a single claim even though the specific conduct giving rise to the putative new claim under the policy occurred five months after the lawsuit was filed); *National Union Fire Insurance Co. of Pittsburgh, PA* v. *Willis*, 296 F.3d 336, 342 (5th Cir. 2002) (civil proceeding commenced by service of the initial complaint is a single "claim" notwithstanding later amendment of complaint to assert additional legal basis for relief); *see also Community Foundation for Jewish Education* v. *Federal Insurance Co.*, 16 F. App'x 462, 466 (7th Cir. 2001) (rejecting notion that an amended pleading constitutes a new "claim" in a claims-made policy).

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[1] Later, in the underlying action, the appellate court vacated the Pledge Agreement damages, finding that the award did not comport with due process because it went beyond the scope of the legal theories and facts advanced in the operative complaint. *Id.* at *2, 5. Thereafter, People's only sought to recover from Chubb losses incurred in connection with defending against the Newmans' argument for Pledge Agreement damages. *Id.* at *2.

If you have any questions about the issues addressed in this memorandum, or if you would like a copy of any of the materials mentioned in it, please do not hesitate to call or email Joel Kurtzberg at 212.701.3120 or jkurtzberg@cahill.com; Thorn Rosenthal at 212.701.3823 or trosenthal@cahill.com; Connor Carroll at 212.701.3841 or ccaroll@cahill.com; or email publications@cahill.com.