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Client Alert

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Court Finds Notice Of Potential Claims Legally Sufficient Under Insurance Policy

A "claims-made" insurance policy generally provides coverage for losses arising out of claims made against an insured during the insurance policy period. Many claims-made policies also permit an insured to submit to its insurer a "notice of circumstances" — a notice of acts or activities in which the insured was engaged that it expects might lead to potential future claims against it — and thereby bring those later-filed claims within the current coverage, even if the claims are not actually made against the insured until after the expiration of the policy period.

In a recent decision (Index No. 600674/06, Motion Sequence No. 4), Justice Charles E. Ramos of the Supreme Court of New York, Commercial Division, held that a notice of circumstances (the "Notice") that plaintiff JPMorgan Chase & Co. ("JPMC") had submitted to defendant Twin City Fire Insurance Company ("Twin City") detailing potential claims that might be brought against it concerning Enron Corporation, Inc. ("Enron") was sufficient to bring subsequent Enron-related claims into the insurance coverage in place at the time the Notice was sent.

Background Facts

JPMC's banker's professional liability insurance policy provided that JPMC could submit notice of a "Wrongful Act," defined to include any "act, error or omission," which may lead to a future claim in order to obtain coverage for such claims under its current insurance program. In late November 2001, Enron was publicly imploding. Anticipating that Enron investors and others might allege that JPMC had engaged in activities in connection with Enron that had caused them loss, JPMC submitted to its insurers a Notice that, on its face, as the Court found, properly identified JPMC's "acts" regarding Enron — *i.e.* "lending," "various SWAPS transactions" and "purchaser of gas/energy" — and listed the various claims it expected potential plaintiffs might assert based on those acts. Three days later, Enron filed for bankruptcy and less than five months later, JPMC was sued by Enron shareholders alleging precisely the claims JPMC predicted. Twin City refused to indemnify JPMC for its losses arising out of its settlement of various Enron shareholder lawsuits on the grounds, among others, that it did not receive sufficient notice of the Enron circumstances.

The Opinion

After reviewing the contents of JPMC's Notice and the terms of the relevant policy, the Court found that the Notice "provided Twin City with all of the information required by the notice provision . . . by alerting Twin City that JPMC became aware of acts, errors or omissions that it believed constituted Wrongful Acts under the policy that would likely lead to a claim . . ." (Opinion p. 7). The Court also flatly rejected Twin City's suggestion that the insured must have actual knowledge of wrongdoing in order to satisfy the policy's requirements. Accordingly, the Court found that JPMC's disclaimer in the Notice that it "has no actual knowledge of such acts" — *i.e.* JPMC's disclaimer that it would not admit to liability and would contest any claims — as well as the deposition testimony of the drafter of the Notice that he "was unaware of specific wrongful acts when he drafted the Notice," did not "undermine the sufficiency of the notice to trigger coverage." (Opinion p. 8.)

In addition, the Court held that Twin City waived any objection to JPMC's Notice by failing to raise any purported deficiencies in the Notice, other than issuing a boilerplate reservation of rights. The Court held: "If an insurer is aware that the insured is attempting to put it on notice of a potential future claim, but the insurer fails to advise the insured that the notice is deficient because the requisite specifics have not been provided, the insurer will not be permitted to subsequently deny coverage based upon the absence of such specifics." (Opinion p. 11.)

Proskauer Rose LLP represented JPMC with respect to this motion. The Court's decision highlights the importance of considering when to submit a notice of claim or notice of circumstances under a "claims-made" insurance policy, how to draft such notices to comply with relevant policy terms, and whether and how the insurer has responded or corresponded with respect to any notice.

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For information on Justice Ramos' decision or regarding other legal issues in the insurance industry, please contact:

John H. Gross
212.969.3145 – jgross@proskauer.com

Michelle Migdon
212.969.3537 – mmigdon@proskauer.com