TRAUB LIEBERMAN

INSURANCE LAW BLOG

March 7, 2019

Michigan Court Addresses Claim Reporting Obligations Under E&O Policy

BY: Brian C. Bassett

In *Illinois National Ins. Co. v. AlixPartners, LLP*, 2019 WL 939018 (Mich. App. Ct. Feb. 26, 2019), a Michigan appellate court addressed an insured's obligation to report a claim under a professional liability policy in order to satisfy the policy's claims made and reported requirements.

Illinois National Insurance Company ("Illinois National") sued to recoup the payment of an arbitration award on AlixPartners LLP's ("AlixPartners") behalf in February 2013. After making the payment, Illinois National asserted that it should not have paid because the claim was not covered under any of the professional liability policies it issued to AlixPartners.

The award pertained to a claim made by Kingsbridge Capital ("Kingsbridge"), an investment advisor firm headquarted in London, against AlixPartners. Kingsbridge entered into a consulting agreement with AlixPartners whereby AlixPartners was to provide Kingsbridge with support during its acquisition of Marklin, a model train company headquartered in Germany. AlixPartners issued a due diligence report and in reliance on this report, Kingsbridge purchased 100% of Marklin's equity as well as a large portion of its debt. Kingsbridge relied on the potential turnaround discussed in the report. Soon after, AlixPartners entered into a separate agreement with the newly acquired Marklin to provide it with management services to aid its turnaround.

However, Marklin did not perform as AlixPartners had projected and in December 2007, Marklin's board Chairman blamed the multi-million Euro loss on AlixPartners' inadequate management. Marklin sent a letter in March 2008, and a subsequent letter the following month, requesting that AlixPartners return part of its fees. Kingsbridge's counsel then requested statements and figures from AlixPartners. In July 2009, upon receipt of the documents, Kingsbridge's counsel sent a draft arbitration complaint to AlixPartners, alleging that AlixPartners was responsible for Kingsbridge's investment losses on the Marklin acquisition. The draft complaint alleged AlixPartners' breach of duties in preparing the due diligences for Kingsbridge and did not address any deficiencies in AlixPartners' performance as Marklin's consultant. In October 2011, an arbitration panel found in favor of Kingsbridge and Illinois National agreed to fund the multi-million dollar arbitration award subject to a reservation of rights.

After payment of Kingsbridge's award, Illinois National continued to investigate the matter and determined that the Kingsbridge claim was not covered under the policy then in effect ("Policy 2") nor under the Tail Policy ("Policy 1"), due to the policies' "claims first made and reported" language. The language provided:

"We shall pay on your behalf those amounts, in excess of the retention, you are legally obligated to pay as damages resulting from a claim first made against you and reported to us during the policy period or Extended Reporting Period (if applicable) for your wrongful act in rendering or failing to render professional services for others, but only if such wrongful act first occurs on or after the retroactive date and prior to the end of the policy period."

Illinois National argued that “claims first made and reported” policies only covered claims that were both made against AlixPartners and reported by AlixPartners to Illinois National during the policy period or an ERP. Illinois National concluded that the Kingsbridge and the Marklin claims were one in the same claim because they both stemmed from the same wrongful act, i.e. AlixPartner’s due diligence concerning the Marklin acquisition. From this conclusion, Illinois National asserted that the Kingsbridge claim was first made in December 2007 or at the latest March 2008, but not reported to Illinois National until the notification of the arbitration complaint in 2009. Illinois National, applying the “claims first made and reported” language of the policy, argued that the Kingsbridge claim was not covered because it was not reported to Illinois National when it was first made in December 2007 or March 2008.

In June 2014, Illinois National filed an action against AlixPartners seeking reimbursement of the arbitration claim it paid. Both parties moved for summary disposition. AlixPartners argued that the Kingsbridge claim was covered under Policy 2 because it was first made and reported during the policy period for Policy 2. AlixPartners further argued that the Kingsbridge and Marklin claims were distinct from each other as the Marklin claim involved a fee dispute, which AlixPartners asserted were excluded from coverage and it thus had no duty to volunteer this information when it was not requested in the policy renewal application. In 2017, the trial court issued a written opinion and order finding for AlixPartners and denying Illinois National’s claims. The Court agreed with AlixPartners’ arguments and Illinois National appealed.

The cornerstone of Illinois National’s argument was the assertion that the claims made in December 2007 and in the March and April 2008 letters were the same as those made in the Kingsbridge arbitration complaint. However, Kingsbridge’s claim was centered on AlixPartners’ advice on the Marklin acquisition, while Marklin’s claim concerned the consulting firm’s alleged mismanagement of Marklin. The Kingsbridge arbitration complaint clearly referred to issues specific to the AlixPartners’ contract with Kingsbridge in the same way that the March and April 2008 letters referred to matters unique to the AlixPartners’ agreement with Marklin. Accordingly, the failure to report the 2008 letters was not fatal to AlixPartners’ claim for coverage.

Illinois National further argued that it was entitled to reformation based on unilateral mistake where AlixPartners was aware of a possible claim in the March 2008 letter and withheld that information from Illinois National, to its detriment, while negotiating the terms of Policy 2. Illinois National claimed that a duty to report arose from the language in the March 2008 insurance quote for Policy 2 stating:

“This quote is strictly conditioned upon no material change in the risk occurring between the date of this letter and the inception date of the proposed policy.”

However, The Appellate Court concurred with the trial court’s determination that AlixPartners had no responsibility to report the Marklin claims because of the contract’s exclusionary language regarding fee disputes. Plainly read, the March and April 2008 letters were a claim regarding a dispute of the fees due under the Marklin agreement that AlixPartners was not required to report to Illinois National because the policies excluded coverage for fee disputes. The Michigan Supreme Court held in *Federal Land Bank of St. Paul v. Edwards*that an insured is not required to disclose information not requested by its insurer. The Appellate Court also concurred with the trial court that none of the questions in the renewal application requested information regarding any situations that may have resulted in a claim against AlixPartners. Illinois National’s failure to show that AlixPartners was required to disclose the March 2008 fee dispute defeated its claim of concealment. The trial court’s decision to deny Illinois National reformation of the terms of Policy 2 was thus not erroneous. Accordingly, the Appellate Court affirmed the decision of the trial court, finding that the Kingsbridge claim was covered under the policy and Illinois National cannot recover the sums it paid on AlixPartner’s behalf.