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Do You Know Where Your Policies Are?

"The potential impact of this latest decision is significant, particularly in the case of long-tail cases, such as the product liability case involved here."

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Paper, paper everywhere. Can't we get rid of some of this? Which corporate documents must be retained and for how long?

It's a common client question. Based on a recent decision by the Connecticut Supreme Court, *Security Insurance Co. of Hartford v. Lumbermens Mutual Casualty Co. et al*, (available at http://www.jud.state.ct.us/external/supapp/Cases/ AROcr/CR264/264cr106.pdf), it appears the answer relative to a client's insurance policies should be FOREVER.

In the July 11, 2003 unanimous ruling, the court ruled that in situations where a policyholder is unable to provide proof of insurance or is self-insured, they are liable for a proportionate share of defense costs for the time period this represents. The situation is primarily applicable to long-tail liability cases, such as general liability, products liability, worker's compensation and umbrella/excess liability coverage. This would be true particularly in those cases where multiple insurance policies are triggered due to the gradual and progressive nature of the injury.

The case involved ACMAT Corporation, a construction and renovation company. In 1996, ACMAT was sued by a group of more than 100 plaintiffs alleging asbestos-related bodily injuries. While ACMAT claimed it had continuously maintained liability insurance, it was unable to produce evidence of insurance throughout the entire period.

Four insurers had agreed to participate in the defense. One was Security Insurance Co., who sued ACMAT and Lumbermens Mutual, with whom ACMAT had reached a settlement. Security claimed that ACMAT should be responsible for a share of defense costs equal to the time for which they could not prove insurance. The trial court ruled in favor of Security, holding ACMAT to a 50.18 percent share. Previously, insurers tended to pick up defense costs even for the unidentifiable or self-insured periods.

The ACMAT appeal was based on the claim that the lower court had improperly failed to apply the joint and several liability method of allocating defense costs. Additionally, ACMAT claimed that a pro rata share should not be applicable in their case because they were never absent coverage.

The Connecticut justices said: "[w]ere we to adopt [the insured's] position on defense costs [an insured] which had insurance coverage for only one year out of 20 would be entitled to a complete defense of all asbestos actions the same as [an insured] which had coverage for 20 years out of 20. Neither logic nor precedent support such a result."

The Connecticut case seems to be following a trend in other states. Specifically, the Connecticut decision relied upon *United States Fidelity & Guaranty Co v. Treadwell Corp.*, 58 F.Sup.2d 77, 83 n.4 (S.D.N.Y. 1999) for the proposition that, "...there was no distinction between an insured who has chosen to forgo insurance for a certain period of time and an insured that cannot identify its claimed insurers for a certain time period."

Further, the Connecticut court strongly relied on two other cases and cited a 1994 New Jersey Supreme Court case, *Owens-Illinois, Inc. v. United Ins. Co.*, 138 N.J. 437 (1994) and *Ins. Co. of North America v. Forty-Eight Insulations, Inc.*, 633 F.2d 1212 (6th Cir. 1980), clarified, 657 F.2d 814 (6th Cir) cert denied, 454 U.S. 1109, 102 S. Ct. 686, 70 L. Ed 2d 650 (1981). The Connecticut high court said: "Neither the insurers nor the insured could reasonably have expected that the insurers would be liable for losses incurring in periods outside of their respective policy coverage periods."

The potential impact of this latest decision is significant, particularly in the case of long-tail cases, such as the product liability case involved here. And while it is persuasive authority only for us in Wisconsin, the case serves as a common-sense reminder when it comes to the risk management processes of you and your clients. Our company recommends a proactive approach, advising our clients to keep tabs on all policies, and if past insurance policies are not currently archived, they need to put forth the effort to obtain certified duplicate copies of past contracts.

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