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Steven Urgo, Esq.
urgos@whiteandwilliams.com

Eastern District Upholds Retroactive Date in E&O Policy

No offence, but most words in insurance policies can be, well...dull. Words like “claim, suit, and offence” do not conjure up visions worthy of Jules Vern. But then you have “RETROACTIVE DATE.” While still probably not worthy of a screenplay, at least it makes me think of Mr. Peabody and Sherman jumping into their Way-back Machine – which is actually the name of a pretty cool website (www.archive.org) where you can find web pages from years past.

In its own version of a way back machine, an insured in *A.P. Pino & Assoc. v. Utica Mut. Ins. Co.*, No. 11-3962, 2012 WL 2567093 (E.D.Pa Jul. 3, 2012), asked the U.S. District Court for the Eastern District of Pennsylvania to rewrite history and provide full prior acts coverage despite the fact that the policy included a Retroactive Date. The policy in question was an insurance broker’s E&O policy, and the underlying suit for which the insured sought coverage involved acts that allegedly took place prior to the Retroactive Date.

While Utica typically provided prior acts coverage, it declined to do so unless an insured provided evidence of prior coverage during the application process. Here, the insured failed to do so, and the policy was assigned a Retroactive Date.

The insured tried three arguments to avoid application of the Retroactive Date: (i) the insured – yes an insurance broker – failed to read the policy (he even contended he would not have understood it had he read it); (ii) application would frustrate the insured’s reasonable expectations; and (iii) the policy should be reformed due to mutual or unilateral mistakes. The court rejected each of these arguments.

First, the court found that failure to read or understand a policy provision does not negate the provision if the policy wording is clear and unambiguous. As to application of the Retroactive Date, the court had no trouble finding that it was clear and unambiguous. The language as to the Retroactive Date was set forth in the policy’s Declarations, which stated in applicable part:

The policy, subject to its terms and conditions, provides full prior acts coverage if no Retroactive Date is entered in the Declarations. If a Retroactive Date is entered in the Declarations, the policy will not apply to loss from “wrongful acts” which took place before the Retroactive Date.

Id. at * 2.

Secondly, the court reiterated Pennsylvania’s long-standing rule that the reasonable expectations doctrine “generally applies only to unsophisticated non-commercial insureds, and only to protect such insureds from ‘policy terms not readily apparent and from insurer deception.’” *Id.* at * 5. (citation omitted). While not commenting on the insured’s level of sophistication – or lack thereof – the court found that the insured lacked any reasonable expectation of coverage. While the insured contended that it had advised Utica that the insured desired full prior acts coverage, the insured never provided the required evidence of prior insurance, and the insured had signed off on various proposals and applications that clearly indicated the Retroactive Date.

Finally, the insured contended that Utica mistakenly treated the insured as a new business entity. Under Pennsylvania law, to reform a policy by mutual mistake, the proponent must demonstrate evidence of the mutual mistake by “clear, precise and convincing” evidence. *Id.* at * 6. (citation omitted). The evidence demonstrated, however, that Utica did not treat the insured as a new business entity due to a mistake. Rather, it treated the insured as such due to the insured’s failure to provide evidence of prior insurance. Alternatively, the court found no evidence of a unilateral mistake that would warrant reformation because the insured could not demonstrate the requisite element of fraud on Utica’s part, or that Utica was aware that the insured mistakenly believed that it had full prior acts coverage.

While the court’s upholding of the Retroactive Date may seem rather straight forward, Retroactive Dates serve a very important purpose by limiting coverage for prior acts, while reducing premiums for insureds – even those that choose not to read their policies. Mr. Peabody would likely sum up the opinion as “always cover your tail before accepting a date.” Oh, Mister Peabody!!

A copy of the opinion can be found [here](#).



Steven D. Urgo | Member NY, NJ and PA Bars

1650 Market Street | One Liberty Place, Suite 1800 | Philadelphia, PA 19103-7395

Direct 215.864.7185 | Fax 215.789.7624

urgos@whiteandwilliams.com | whiteandwilliams.com

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