

Insurance Issues in Bankruptcy:

Issue Spotting for the Coverage Lawyer

2021 Annual Meeting

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AMERICAN COLLEGE
OF COVERAGE COUNSEL

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Introduction

- Speaker introductions
- Discussion overview

Case Study No. 1 - Facts

- Law firm partners advise clients to invest in investment securities through companies in which the lawyers had alleged ownership interest
- Lawyers also allegedly provided legal services to the companies
- Former clients begin filing suits against lawyers to rescind their securities and investment interests and to recover consideration paid for the securities
- Receiver is appointed for the companies and asserts a claim against lawyers
- Insurer agrees to defend under reservation of rights

Case Study No. 1 - Issues

- What contractual, procedural, and statutory protections are available to the lawyers and their malpractice insurer?

Case Study No. 2 - Facts

- Not-for-profit with the purported goal of combating childhood obesity promised to repay school districts for fitness equipment sold by separate for-profit company
- Reimbursement money was supposed to come from government grants but allegedly flowed from the for-profit company, creating a Ponzi scheme in which one district was paid with money from another. Not-for-profit files for Chapter 11 bankruptcy
- DOJ brings an indictment against not-for-profit CEO, CFO, and one director. Trustee files suit against these individuals, as well as all other Ds and Os, as well as the accounting firm that advised the not-for-profit. Ds and Os all demand separate counsel
- Not-for-profit only has \$5M in D&O insurance
- Some insureds want to settle; others will agree only to “nuisance value” settlement

Case Study No. 2 - Issues

- How should defense cost demand be addressed?
- Who should attend mediation of Trustee's claims?
- How are interests of various insureds addressed in negotiating a settlement?
- Can settlement be crafted to ensure finality as to co-defendant accounting firm?
- What are other considerations given competing demands by insureds?

Case Study No. 3 - Facts

- Claimant sues insured for breach of contract, fraud, and misrepresentation arising out of contract to provide coronavirus tracking software system. Primary E&O insurer agrees to defend under reservation of rights
- Insured then files for Chapter 11 bankruptcy and ultimately files a Liquidation Plan
- Claimant files motion to lift the bankruptcy stay
- Insured proposes mediation. Defense counsel says claim value is within the primary policy. The claimant has made a demand for \$29 million, just within the total limits of the E&O tower

Case Study No. 3 - Issues

- What are the bankruptcy procedural considerations for timing of the mediation?
- What is significance of the fact that this is a liquidation rather than reorganization?

Case Study No. 4 - Facts

- Engineering and consulting company provides geotechnical engineering professional services
- Engineering firm encounters tough financial times; meets with E&O insurer about its inability to pay the \$100,000 self-insured retention for three pending, unrelated claims
- One claim clearly presents exposure in excess of the SIR; one is a close call; one is a small claim that will be resolved within the SIR
- All three claims are being defended by the same defense counsel, who has not been paid for several months

Case Study No. 4 - Issues

- How do the engineering firm and insurer address the inability to pay defense costs?
- Must the carrier drop down and advance defense costs within the SIR?

Questions?