

The following typical claim scenario is a general guide and does not represent a complete analysis of the issues covered. It is intended to highlight matters that may be of interest to insureds, but insureds should always seek specific guidance on particular matters.

Typical FPL Claim Scenarios: Scenario #1*

The following is based upon an actual claim against a professional fiduciary (hereinafter, “the Insured”). It involved two interrelated claims against an Insured - in each instance, the Insured was sued both as an individual, and in his capacity as guardian for an individual (“Ms. Elder”) in connection with the sale of Ms. Elder’s residential real property. Firstly, a State-funded Medicaid provider (“Medicaid”) wrote to the Insured seeking recovery of \$200,000 allegedly owed to it in connection with certain medical care costs incurred of Ms. Elder (Medicaid also later Petitioned the applicable jurisdiction’s Probate and Family Court). Secondly, the purchasers of Ms. Elder’s house (“Mr. & Mrs. Buyer”) filed a Complaint in the jurisdiction’s Superior Court alleging that the Insured improperly/fraudulently and/or negligently failed to disclose a \$200,000 lien, which had been placed on the property by Medicaid shortly before closing of the sale of Ms. Elder’s house.

Background

On April 1, 2007, the Insured, acting as guardian for Ms. Elder, entered into a contract for the sale of Ms. Elder’s home. On April 15, 2007, the Insured received an obscure, vaguely-worded, Notice of Intent to Place a Lien on Ms. Elder’s home. The Insured never received confirmation that a lien was actually placed on Ms. Elder’s home. However, unbeknownst to the Insured, a lien for \$200,000 was placed on Ms. Elder’s home by Medicaid shortly before the June 1, 2007 closing date. The lien was discovered shortly after the closing.

Under the law of the applicable jurisdiction, it is generally the buyer’s responsibility to examine title prior to closing. However, by letter sent to the Insured on September 15, 2007, the Buyers’ attorney alleged that the April 15, 2007 Notice of Intent to place a lien by Medicaid put the Insured on ‘record notice’ and created a duty to enquire further, such that the Insured was responsible for repaying Medicaid 100% of the \$200,000 lien. Ms. Elder’s estate was already wound up, and there was \$0 remaining in the estate.

Notification/Coverage

The Insured’s insurance policy was effective September 1, 2007 - September 1, 2008 and contained a “retroactive date” of January 1, 2007. The Insured immediately forwarded the September 15, 2007 letter to his broker, who in turn forwarded it to the carrier. The Insured similarly promptly forwarded the Petition and Complaint (filed January 30, 2008 and February 28, 2008 respectively) to the carrier within days of receipt.

Following a coverage investigation, it was determined that there was no evidence that the Insured had knowledge of a potential claim before the policy inception date of September 1, 2007. Based upon the particular facts and a review of the April 15, 2007 Notice of Intent to Place a Lien, it was evident that there was no way that a reasonable insured would have foreseen a claim. In this particular case, the Insured’s policy included a definition of the term claim as “a demand received by any Insured for money or services including the service of suit or institution of arbitration proceedings against the Insured.”

Claim Resolution

Because the allegations concerned activities that occurred after the Policy's January 1, 2007 retroactive date and were otherwise covered as "arising out of the Insured's activities as a fiduciary," the Insured was covered for defense of the claims and for any resulting indemnity payments.

Defense counsel was appointed for the Insured and the claim was ultimately settled. The Insured paid his \$5,000 deductible. Defense counsel was able to obtain \$120,000 from the Buyer's insurance coverage. The Insured's insurers paid the \$50,000 balance of the lien (Medicaid accepted \$175,000 in settlement of its \$200,000 claim).

Lessons to Be Learned

Here, arguably, the Insured could have done more "due diligence" upon receipt of the Notice of Intent to Place a Lien – he could have called Medicaid and attempted to resolve the matter earlier, while there was still money in Ms. Elder's estate. Similarly, greater efforts to determine that there were no outstanding liabilities could arguably have been made prior to winding up the estate. However, it is difficult to protect against all claims and, as noted, the Insured had strong arguments as to why he was under no duty to enquire as to the lien, as a matter of law.

The main lesson to be learned from this claim scenario is that insureds should report all claims and potential claims to their carriers as soon as possible. There are distinctions between "claims" and "circumstances." Because a particular communication may not be a "claim" does not mean that it need not be reported to an insurer. Even if you are right and the communication in question is not a "claim," most policies require policyholders to report promptly both: (1) the making of a claim; and (2) occurrences or circumstances likely to result in a claim. Here, the Insured made the right call with respect to the Notice of Intent, but had the Notice been worded differently such that the Insured should reasonably have foreseen a claim, coverage may have been denied had the Insured not forwarded the same to his carrier. Similarly, had the Insured not promptly forwarded the letter demanding repayment, the resulting litigation may not have been covered. If in doubt err on the side of caution and provide prompt notice to insurers. If unsure, insureds should always seek specific guidance on particular matters – either from a broker or another trusted insurance professional.

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