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George K. Baum & Co. v. Twin City Fire Ins. Co.

United States Court of Appeals, Eighth Circuit - July 16, 2014 - F.3d - 2014 WL 3445713

George K. Baum & Company (Baum) sold or underwrote various municipal bonds, representing the interest on the bonds was tax exempt. The IRS later determined the bonds were not tax exempt. Baum timely notified its insurer, Twin City Fire Insurance Company (Twin City), of the potential for related civil liability, and Twin City agreed the IRS investigation was a claim under the policy. Years later, several lawsuits (Derivatives Litigation) were filed, and Baum waited almost two years to notify Twin City.

Twin City disclaimed coverage "because the the Derivatives Litigation was not timely reported." Baum responded that untimely notice is no defense under applicable Missouri law unless the insurer suffers prejudice, and Twin City was not prejudiced. Twin City maintained that New York law, requiring no showing of prejudice, controlled this dispute.

The District Court decided Missouri law applied, and Twin City conceded it suffered no prejudice from Baum's delay. Resolving a secondary dispute, the District Court also found Baum was liable for a $3 million self-insured retention, rather than the lower $1 million retention Baum believed should apply. Both parties appealed.

The Court of Appeals held that:

- New York law governed case;
- Timely notice provision in policy was inapplicable to liabilities arising from same underlying conduct as earlier, timely notified claim;
- Insurer waived untimely notice defense; and
- Same $3 million self-insured retention under policy that applied to liability to Internal Revenue Service (IRS) for selling or underwriting various municipal bonds, representing that interest on bonds was tax exempt, also had to apply to related derivatives litigation.

Language of policy plainly applied $3 million retention to any claim which "in any manner relat[es] to [insured's] activities as an underwriter or seller of municipal bonds" and only reason insurer had to cover derivatives litigation at all was that litigation arose out of same underlying wrongful acts giving rise to IRS liability.

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