

Bond Case Briefs

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INSURANCE - KANSAS

Breck & Young Advisors, Inc. v. Lloyds of London Syndicate **2003**

United States Court of Appeals, Tenth Circuit - May 13, 2013 - F.3d - 2013 WL 1943338

Insured filed action in diversity, seeking declaratory relief and damages for insurer's failure to defend and pay sufficient indemnity under professional liability insurance policy with regard to claims brought in arbitration before National Association of Securities Dealers alleging that agents of insured mismanaged and unlawfully "churned" investment accounts of its clients. The district court granted summary judgment for insured. Insurer appealed.

The court of appeals held that:

- Arbitrations were connected by common facts, circumstances, decisions, and policies, and thus claims in subsequent arbitration related back under "interrelated wrongful acts" provision; and
- Insured had been prejudiced by actions that insurer took in course of receiving underlying claim.

Under New York law, an insurer bears the burden to establish a claim falls within the scope of a policy exclusion. To negate coverage, exclusions must be stated in clear and unmistakable language, subject to no other reasonable interpretation, and applicable in the particular case.

The insurance policy contained two provisions indicating insurer was not responsible for indemnifying or defending insured for claims made during the policy period which are interrelated with claims made prior to the policy period.

After settling multiple claims, insured sued insurer. Specifically, the parties disputed whether the twenty-six claims constituted interrelated wrongful acts under the insurance policy. Insured argued the claims were logically interrelated by a common factual nexus. Insurer argued there was not a sufficient factual nexus between the claims, emphasizing differences in the investors, investment products, issuers, representatives, and recoveries sought in each claim. At issue was whether or not insured was responsible for a \$50k retention for one case, or all twenty-six.

Insurer also suggested an alternative position, that if each of the twenty-six claims were found to have arisen from interrelated wrongful acts, then all of the those claims would relate back to claims made in prior arbitrations. Because those earlier arbitrations occurred outside of the policy period, insurer argued, no coverage for any of the claims would exist. The district court found a sufficient factual nexus between each of the cases and sided with insurer in its related-back defense.

However, under New York law, where an insurer defends an action on behalf of an insured, with knowledge of a defense to the coverage of the policy, it thereafter is estopped from asserting that the policy does not cover the claim. Insured argued that, regardless of the how the policy is interpreted, insurer is precluded from denying coverage due to the actions it took in the course of receiving the twenty-six arbitrations. Specifically, insured argued that insurer had either waived its right to assert the relation-back defense or should be estopped from denying coverage under New York law. The district court sided with insured on this issue.

