

## 9th Circuit: Excess insurer off the hook in \$800 million disk drive suit

A technology company's excess insurer had no duty to defend its policyholder in a decade-long intellectual property lawsuit because the tech firm never exhausted its primary insurers' policy limits, a federal appeals court has ruled.

**National Union Fire Insurance Co. et al. v. Seagate Technology Inc., Nos. 10-17194 and 10-17215, 2012 WL 169703 (9th Cir. Jan. 20, 2012).**

The underlying lawsuit requested \$800 million in damages, far more than Seagate Technology's primary insurers' policy limits, which totaled \$6 million, the 9th U.S. Circuit Court of Appeals said.

Seagate first had to exhaust those policies to trigger its excess insurer's coverage duties, the appeals court found.

Therefore, the appellate panel dismissed all claims against Seagate's excess insurer American International Underwriters Insurance Co. even though Seagate's primary insurers denied their defense responsibilities.

**Philip H. Thompson**, a partner at insurance coverage and litigation firm **Nelsen, Thompson, Pegue & Thornton**, said the decision "reflects the state of the law in California and is otherwise fair in light of the purpose of primary and excess coverage."

He cautioned, however, that "the case is not meaningful on the issue of an excess insurer's duty to defend because it contains no analysis."

Thompson, who practices in California, was not involved in the lawsuit.

### THE UNDERLYING LAWSUIT

Convolve Inc. and the Massachusetts Institute of Technology sued Seagate and Compaq Computers in 2000. The lawsuit said Compaq computers came equipped with Seagate's disk drives that allegedly infringed patented technology owned by Convolve and developed by MIT.

The underlying complaint included counts against Seagate and Compaq for breach of contract, tortious interference with contract, fraud, trade secret misappropriation, patent infringement and bad faith. It asked for more than \$800 million in damages.

Seagate sought coverage from its primary insurers National Union Fire Insurance Co.



"The case is not meaningful on the issue of an excess insurer's duty to defend because it contains no analysis," attorney Philip H. Thompson of Nelsen, Thompson, Pegue & Thornton said.

and American International Specialty Lines Co., as well as excess carrier American International Underwriters.

The three insurers filed a declaratory judgment action in the U.S. District Court for the Northern District of California.

The primary insurer denied that the Convolve lawsuit fell within their commercial liability or technology liability policies. AIU denied that its umbrella policy covered the Convolve action, but the excess insurer had agreed to defend Seagate pending the outcome of the coverage lawsuit.

Seagate countered that the insurers breached their contracts because the policies covered the allegation that Seagate had disparaged Convolve's technology.

U.S. District Judge James Ware found that AISLIC had no duty to defend Seagate because its technology policy offered no coverage for Convolve's action.

But he said National Union's commercial general liability policy potentially covered the Convolve lawsuit and, therefore, the insurer had a duty to defend Seagate.

Additionally, AIU had a duty to defend Seagate because Convolve's complaint asked for \$800 million in damages and National Union's policy only provided \$1 million in coverage, he ruled.

Seagate filed an initial appeal with the 9th Circuit, arguing that Judge Ware incorrectly decided that AISLIC's technology policy did not cover the Convolve action.

In 2007 the appellate panel reversed Judge Ware, ruling that Convolve's trade libel allegation potentially fell within AISLIC's technology policy.

Responding to the appellate court's decision, Judge Ware issued an order Sept. 2, 2010, declaring that AISLIC breached its duty to defend Seagate in the underlying action and owed \$3 million in defense fees. All parties appealed.

The 9th Circuit's recent decision affirmed that both primary insurance policies potentially covered the Convolve lawsuit and that, given the broad scope of the duty to defend, National Union and AISLIC breached their duties. On the other hand, it found AIU never had a duty to defend Seagate.

"The District Court erred in concluding that AIU owed a duty to defend to Seagate, because it is a secondary insurer and the primary insurers' (National and AISLIC) policy limits have not been exhausted," the panel wrote.

Therefore, it dismissed Seagate's allegations against the excess insurer. **WJ**

#### Attorneys:

**Appellee (National Union):** Laura A. Brady and William T. Corbett Jr., Drinker Biddle & Reath, Florham Park, N.J.; Michael P. Pulliam, Drinker Biddle & Reath, San Francisco

**Appellee (AIU):** Archie S. Robinson, Robinson & Wood, San Jose, Calif.

**Appellant (Seagate):** Robert E. Freitas, Freitas Tseng Baik & Kaufman, Redwood Shores, Calif.; Daniel J. Weinberg, Orrick Herrington & Sutcliffe, Menlo Park, Calif.

#### Related Court Document:

Opinion: 2012 WL 169703

**See Document Section B (P. 33) for the opinion.**

**Scan this code with your QR reader to see the insurers' 2004 complaint on Westlaw.**

