

In-Court Acknowledgement of Potential Legal Malpractice Claim Supports Denial of Coverage under Professional Liability Policy

September 2006

The United States District Court for the Eastern District of New York, applying New York law, has held that an attorney's in-court acknowledgement, prior to issuance of a professional liability policy to the attorney's firm, that a legal malpractice claim might be brought against her supported a denial of coverage under an exclusion for claims reasonably foreseeable to the insured prior to inception of the policy. *Coregis Ins. Co. v. Lewis, Johs, Avallone, Aviles and Kaufman, LLP*, 2006 WL 2134782 (E.D.N.Y. July 28, 2006).

The attorney represented a doctor in a medical malpractice action. An expert witness testifying on behalf of the doctor was discovered to have inadvertently testified regarding a tissue sample from a patient other than the plaintiff. Neither the attorney nor the expert discovered the mistake prior to trial. In arguing for a mistrial, the attorney represented to the court that if an excess verdict were entered against the doctor, the doctor might file a malpractice suit against the attorney and her firm. The expert's testimony was excluded, and the jury returned a verdict in excess of the doctor's malpractice insurance limits of liability.

While post-trial motions were pending, the attorney's firm applied for a professional liability policy from the insurer. The firm answered in the negative an application question asking whether the firm was aware of any circumstance that could result in a claim against the firm. The insurer issued the policy, which included an exclusion for "any claim arising out of any act, error, omission or personal injury occurring prior to the effective date of this policy if any insured at the effective date knew or could have reasonably foreseen that such act, error, omission or personal injury might be expected to be the basis of a claim or suit." Following issuance of the policy, the doctor brought a malpractice action against the attorney and her firm. The attorney tendered defense of the action to the insurer.

The insurer sought a declaration that it was not obligated to defend the attorney or firm based on the above exclusion or, alternatively, that it was entitled to rescind the policy for misrepresentations in the application. On summary judgment, the court concluded that coverage was barred under the unambiguous terms of the exclusion because the attorney's in-court statements confirmed her knowledge of a potential legal malpractice claim. The court rejected the attorney's argument that the statement was merely courtroom "rhetoric" and that she did not subjectively believe the doctor would sue her firm. The court concluded that the attorney's

subjective belief as to whether the doctor would file suit was irrelevant because the exclusion required an objective inquiry. Having held that the exclusion barred coverage, the court ruled that the insurer's rescission claim was moot.

The court also rejected the attorney's argument that the insurer waived its right to rely on the exclusion by renewing the policy and accepting premiums for two years, and by failing timely to disclaim coverage for the malpractice claim against the attorney. The court noted that, under New York law, coverage may not be obtained by waiver where an exclusion makes clear that coverage does not exist.

The court similarly rejected the attorney's argument that the insurer was equitably estopped from denying coverage since it appointed defense counsel for the attorney, holding that: (1) because there was no conflict of interest between the insurer and attorney, the attorney had no right to appoint her own defense counsel, (2) the insurer did not violate the attorney-client privilege between the attorney and her defense counsel by basing its coverage decision, in part, on a report by the defense counsel because the insurer's use of the report was permitted under the "common interest rule" and (3) the insurer's reservation of rights was timely where it issued that reservation three months after appointing defense counsel, despite the fact that the attorney notified the insurer of circumstances that could give rise to a claim more than a year earlier. With respect to the last point, the court noted that the insurer's duty to defend did not arise when it received a notice of a potential claim, but only upon being notified of an actual claim.