

## Legal Malpractice Insurer Precluded from Denying Coverage Based on Late Notice

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The U.S. District Court for the Northern District of New York, applying New York law, has held that an insured's failure to give timely notice of a "negligent act, error, [or] omission" that subsequently gave rise to a claim under a legal malpractice policy did not preclude coverage based on late notice because the insured had a "good faith belief" that the underlying events did not form the basis for a malpractice claim. *Cade & Sanders, P.C. v. Chicago Ins. Co.*, 2004 WL 1922042 (N.D.N.Y. Aug. 25, 2004).

In the underlying action, the claimants contacted their nephew, an attorney at the insured law firm, asking his law firm to replace their current counsel in a pending complex personal injury lawsuit. The firm agreed to accept that representation with the understanding that another attorney at the nephew's firm would serve as trial counsel. The case was to be tried one month from the appointment of the firm as counsel. As a result of the change in counsel, prior commitments of the new trial attorney and the firm's decision to retain a new accident reconstruction expert, the firm sought a continuance of the trial. The court denied the request. At that point, the firm recommended new trial counsel at a separate firm.

Subsequently, problems arose in connection with the newly retained expert. The expert visited the accident scene, but could not draft a report in time for trial. On the eve of trial, the nephew contacted the expert and prepared an expert disclosure based on their conversation. Defense counsel objected to the late disclosure and moved to preclude the expert's testimony. The defense's argument was based on a previous ruling by the trial judge that all expert disclosures be served one month prior to trial. The plaintiffs' new trial counsel argued that he was unaware of any expert disclosure deadlines or any civil procedure rules requiring disclosure by a certain date. The judge precluded the testimony of the expert and the plaintiffs lost at trial. The judgment was affirmed on appeal.

Three years after the initial verdict, the former plaintiffs advised the law firm that they intended to file a malpractice lawsuit. The firm then notified its legal malpractice insurer, which reserved its rights to deny coverage. The former plaintiffs ultimately filed the malpractice suit, for which the insurer denied coverage, citing the insured firm's failure to comply with the policy's notice provisions. The notice provision of the policy provided that "[u]pon the insured becoming aware of any negligent act, error, or omission...in the rendering or failure to render Professional Services which could reasonably be expected to be the basis of a Claim covered hereby, written notice shall be given by the Insured, or its representatives to the Company together

with the fullest information obtainable as soon as practicable."

The firm initially argued that the insurer was required to show prejudice before denying coverage based on late notice. The court rejected this argument, holding that an insured's failure to provide timely notice of a claim to its insurer is a complete defense to coverage under New York law. Establishing that late notice was a viable basis for denying coverage, the court then considered whether it was reasonable for the firm to believe that the preclusion of its expert witness could potentially give rise to a legal malpractice claim.

The court found that the facts demonstrated that the preclusion of the expert would not suggest to a reasonable person the possibility of a malpractice claim. In doing so, the court found that the firm's decision to retain a new expert was a matter of "professional judgment" made by "seasoned litigators," which the court would not second-guess. The court also noted that the firm was unaware of the trial judge's expert disclosure deadline, and pointed out that the rules of civil procedure provided the trial judge wide latitude regarding the timeliness of expert disclosure. The court therefore credited the firm's argument that given that it was appointed just one month prior to trial and made diligent efforts to retain an expert and make the required disclosure, it fully expected that the court would allow the expert's testimony. Further, the court noted that the fact of an adverse judgment did not in itself suggest to a reasonable person the possibility of a claim, citing the fact that the underlying plaintiffs had been shown to be negligent in the personal injury trial, and further noting that there were "too many variables" in litigation to render every unfavorable verdict the basis for malpractice. Accordingly, the court found that the firm had a good faith belief in their non-liability for malpractice, and thus the law firm's failure to give earlier notice did not bar coverage for its claim.

For more information, please contact us at 202.719.7130.