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NEWSLETTER

No Coverage for Claim Based on Prior Acts that Insured Could Reasonably Foresee Would Result in Claim

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In an unreported decision, the United States Court of Appeals for the Third Circuit has held that a 1999 claims-made legal malpractice policy did not afford coverage for claims based on a 1995 lawsuit where the insured attorneys could reasonably have foreseen that a claim might be brought as a result of the attorney's handling of the matter. *Westport Ins. Corp. v. Mirsky*, 2003 WL 23002528 (3rd Cir. Dec. 23, 2003).

In 1995, two attorneys represented a plaintiff in a medical malpractice suit. In that suit, the plaintiff was precluded from presenting expert testimony as a sanction for the insured attorneys' discovery violations. As a result, the suit was dismissed on summary judgment for lack of evidence.

In February and July of 1999, an insurer issued two professional liability claims-made policies to the attorneys. Both policies excluded from coverage "any Claim based upon, arising out of, attributable to, or directly or indirectly resulting from...any act, error, omission, circumstance or Personal Injury occurring prior to the effective date of this Policy if any Insured at the effective date knew or should have reasonably foreseen that such act, error, omission circumstance or Personal Injury might be the basis of a claim." In November 1999, the plaintiff in the 1995 lawsuit notified the attorneys that she was suing them for malpractice. The attorneys notified the insurer, which filed a declaratory judgment action based on the prior knowledge exclusion of the policy. The Third Circuit held that the prior knowledge exclusion precluded coverage because the defendant attorneys "should have reasonably known" of the plaintiffs malpractice claim in 1998, prior to the inception of the policy.

For more information, please contact us at 202.719.7130.