

Loss of Jury Verdict Does Not Automatically Create Foreseeable Claim

February 2004

A federal district court in Maine, applying Maine law, held that the prior knowledge exclusion in a legal malpractice policy did not exclude coverage for a legal malpractice claim, even though the insured law firm lost a substantial verdict at a trial during a prior policy period. *Westport Ins. Corp. v. Lilley*, No. 03-36-P-K (D. Me. Nov. 13, 2003).

An insurer issued three annual claims-made professional liability policies to a law firm from 2000-2003. Each policy excluded coverage for "any act, error, omission [or] circumstances...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] circumstance...might be the basis of a claim."

During the 2000-2001 policy period, the law firm represented a client in a medical malpractice claim against a physician and a hospital after the client's husband had died from post-operative infection. At trial, a jury awarded the client a verdict of approximately \$1.5 million. However, the jury also found that the client's husband had been comparatively negligent and reduced the award to \$32,000. The attorneys from the law firm did not request that the jury be polled after it returned the verdict; however, at a later stage of the case, the attorneys questioned whether the jurors had intended to reduce the amount by \$32,000 instead of to \$32,000. In part because of questions about the jury's handling of the verdict form, the trial court ordered a new trial, which took place during the 2001-2002 policy period and resulted in a verdict for the defense.

In May 2002, after an adverse ruling in the new trial, the client informed the law firm that it would file suit for legal malpractice, and the law firm provided notice of the potential claim to its insurer. The insurer filed this action seeking a declaratory judgment that it had no duty to defend or indemnify, arguing that the claim was excluded since the law firm knew prior to the effective date of the 2002-2003 policy that an error in the jury verdict form had occurred and therefore could have foreseen that a claim could result.

After first finding the language of the prior notice exclusion to be unambiguous, the court considered when the law firm could have reasonably foreseen that its client would pursue a claim for legal malpractice. The court noted that the test had both an objective component—what a reasonable attorney would foresee—and a subjective component—what the attorney knew. The court held that the claim was not foreseeable, noting that medical malpractice cases always involve difficult issues and the outcomes vary dramatically. The court

explained that under the insurer's approach, "any trial attorney who loses a substantial jury verdict, whether representing plaintiff or defendant, should put his carrier on notice that the client may ultimately seek compensation from the lawyer." The court acknowledged that it was possible that, had the jurors been polled, the jurors would have explained that the award was only to be reduced by \$32,000, rather than changed to \$32,000, and the original verdict might have been unchanged. However, the court concluded that the "touchstone here is reasonableness, not conceivability" and explained that while it was conceivable that a claim would result before the inception of the policy, the law firm did not have "constructive knowledge of an impending claims prior to the policy period."

For more information, please contact us at 202.719.7130.