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NEWSLETTER

No Coverage For Foreseeable Legal Malpractice Claim Based On Prior Knowledge Exclusion

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A federal district court, applying Pennsylvania law, has held that the prior acts exclusion in a claims-made legal malpractice policy barred coverage for a malpractice claim against an attorney that arose out of conduct before the policy period that the attorney had a basis to believe constituted legal malpractice. *Mirarchi v. Westport Ins. Corp.*, No. 99-44331, 2003 WL 1918975 (E.D. Pa. Apr. 21, 2003). The court also held that the policyholder's subjective beliefs as to whether a suit would be brought or has merit were irrelevant to an analysis of whether the claim was foreseeable.

On August 10, 1998, an attorney purchased a claims-made professional liability insurance policy. In the application, the attorney stated that he was unaware of "any circumstance, act, error, omission or personal injury which might be expected to be the basis of a legal malpractice claim or suit that has not previously been reported to the firm's insurance carrier." On March 4, 1999, during the policy period, the attorney was sued for professional malpractice for services rendered between 1994 and 1996 on behalf of an estate. The complaint alleged that the attorney had improperly caused the estate, rather than a beneficiary, to assume responsibility for the payment of certain mortgages and taxes. The insurer denied coverage based on a provision in the policy that excluded coverage for "[a]ny act, error, or 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, circumstance or Personal Injury might be the basis of a Claim." The insurer relied on a deposition of the attorney that was taken on June 2, 1998 in a lawsuit between the estate and the beneficiaries in which the attorney stated that he was aware of "an act, error, omission or circumstance" that triggered the exclusion provision.

The district court ruled in favor of the insurer and concluded that the malpractice claim was "reasonably foreseeable." Since the Pennsylvania Supreme Court had not directly addressed the meaning of the phrase "reasonably foreseeable" in the context of a professional liability insurance policy, the district court relied on a two-step analysis used by the Third Circuit:

First, it must be shown that the insured knew of certain facts. Second, in order to determine whether the knowledge actually possessed by the insured was sufficient to create a "basis to believe," it must be determined that a reasonable lawyer in possession of such facts would have had a basis to believe that the insured had breached a professional duty. That the insured denies recognizing such a basis on grounds of ignorance of the law, oversight, psychological difficulties, or other personal reasons is immaterial.

Selko v. Home Ins. Co., 139 F.3d 146, 152 (3d Cir. 1998).

Applying the test here, the court first concluded that the attorney was aware of a number of critical facts, including that a lawsuit had arisen over the payment of the mortgage, that one of the parties blamed him for what had happened and that "he did not comply with Pennsylvania law" in his handling of the matter. The court then determined that a reasonable attorney knowing these facts that the attorney possessed would have had a basis to believe that he had breached a professional duty.

The court rejected the attorney's argument that the suit against him was not foreseeable because he had been acting at his client's direction and therefore had a subjective belief that his client would not sue him. The court explained that his "subjective belief" was irrelevant to the Third Circuit's "objective analysis." The court also rejected the attorney's argument that a claim was not foreseeable because he believed that any claim against him would be barred by the statute of limitations. Relying on the Third Circuit decision in *Coregis Insurance Co. v. Baratta & Fenerty, Ltd.*, 264 F.3d 302, 307 (3d Cir. 2001), the court explained that "a subjective belief that a malpractice action would not have merit, or a belief that the statute of limitations may have run, is not sufficient to avoid application of the exclusion."

For more information, please contact one of WRF's Professional Liability Attorneys at 202.719.7130