

No Coverage for Legal Malpractice Action under Prior Acts and Knowledge Exclusion

November/December 2002

A federal district court, applying Pennsylvania law, denied coverage under claims-made professional liability policies for a legal malpractice action because, under an objective standard, the insureds knew or could have reasonably foreseen that prior circumstances might be the basis of a legal malpractice claim against them. *Westport Ins. Corp. v. Mirsky*, No. 00-4367, 2002 U.S. Dist. LEXIS 16967 (E.D. Pa. Sept. 10, 2002).

Beginning in 1995, lawyer one purchased successive one-year claims-made professional liability policies from the insurer. Beginning in 1995, lawyer two purchased successive one-year claims-made professional liability policies from the same insurer that included an endorsement that defined lawyer one as an independent contractor who was deemed an "Insured" under lawyer two's policy. Both policies excluded coverage for acts occurring prior to the inception date of the policy if the Insured "knew or could have reasonably foreseen that such act, error, omission, circumstance or Personal Injury might be the basis of a claim." Both lawyers sought coverage from the insurer after they were sued for legal malpractice in December 1999. The legal malpractice suit arose from the handling of a medical malpractice suit by the two lawyers that was dismissed in September 1998 because of the lawyers' failure to comply with discovery orders by the court. The insurer disclaimed coverage based on the prior knowledge exclusion because the lawyers did not report the claim until November 1999 and brought an action for declaratory judgment.

The court ruled in favor of the insurer. It initially noted that "[r]enewal of 'claims made' policies does not create a single policy period for purposes of reporting." Accordingly, the relevant policy was the policy issued in 1999. The court then applied an objective, "reasonable person" standard to determine whether the lawyers had prior knowledge of the likelihood of a claim. It concluded that, under that standard, the lawyers would have realized in September 1998, when the court in the underlying action dismissed the case because of the lawyers' conduct, that they had committed an act, error, or omission that might be the basis of a claim. The court concluded that no coverage was available under lawyer one's policy because the malpractice occurred prior to the 1999 policy and the lawyer could reasonably have foreseen the claim prior to the policy since he had handled the case and had knowledge of the dismissal. The court also concluded that no coverage was available under lawyer two's policy because (1) lawyer one, who had knowledge of the foreseeable claim prior to the 1999 policy was acting as an independent contractor for lawyer two and therefore was as an "Insured" under lawyer two's policy, and (2) even if lawyer one had not been acting as an independent contractor, lawyer two also had personal knowledge of the potential claim because he was also involved in

the underlying case.

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