wiley

NEWSLETTER

No Coverage for Lawyer Malpractice Claim Where Circumstances and Potential Claim Disclosed in Policy Application

August 2008

The United States District Court for the District of New Jersey, applying New Jersey law, has held that a legal malpractice claim that a lawyer acknowledged in the policy application was excluded from coverage under a lawyers' professional liability insurance policy. *Blum v. Travelers Indem. Co.*, WL 2557538 (D.N.J. June 23, 2008).

The lawyer represented a jewelry business in a number of matters. When one of the business's three shareholders wanted to sell his shares to another of the shareholders, the lawyer represented the purchaser of the shares. The shareholder not involved in the share purchase transaction filed an action against the two other shareholders and the jewelry business, alleging that the failure to provide him with notice of the transaction violated the business's operating agreement. In that lawsuit, counsel for the plaintiff forwarded to the lawyer an expert report stating that the lawyer violated the New Jersey Rules of Professional Conduct by simultaneously representing the company and the share-purchasing shareholder in the stock transaction.

After receiving the expert report, the lawyer completed and submitted an application to the insurer for professional liability coverage. The application asked whether the lawyer knew of "any incident, act, error, or omission that could result in a claim or suit against the firm. . . ." The lawyer responded "yes" to this question and completed a Supplemental Claim Form in which he described the circumstances of the jewelry business shareholder transaction. The Supplemental Claim Form stated that "[a]ny claims or incidents disclosed in the application or to which any member of the Firm has knowledge prior to the effective date of this application will not be afforded coverage under any policy" subsequently issued by the insurer. In addition, the policy issued to the lawyer provided that the policy does not apply to "claims":

Arising out of any error, omission, negligent act, or "personal injury" occurring prior to the inception date of this policy if any insured prior to the inception date knew or could have reasonably foreseen that such error, omission, negligent act or "personal injury" might be expected to be the basis of a "claim" or "suit."

After issuance of the policy, the shareholder who had challenged the share purchase transaction brought a legal malpractice action against the lawyer. The insurer denied coverage based on language in the application and Supplemental Claim Form and the above-referenced prior knowledge exclusion. The lawyer then brought a declaratory judgment action seeking coverage for the malpractice action.

The court granted the insurer's motion for summary judgment, holding that "[t]he Policy unambiguously declares that the potential claims set forth in the Supplemental Claim Form shall not receive coverage." The court held that the "legal malpractice suit against [the lawyer] is a direct outgrowth of the potential claim described" in the Supplemental Claim Form, "and thus coverage, under the Policy, cannot be established." Lastly, the court rejected the lawyer's assertion that the application and the Supplemental Claim Form do not constitute part of the insurance contract. To support that contention, the lawyer pointed to deposition testimony from a witness who did not know whether the application was in fact annexed to the policy. The court held that the testimony did not create a genuine issue of material fact in light of the clear language in the application and Supplemental Claim Form, which "assuredly put [the lawyer] on notice that the information provided therein w[as] incorporated as part of the Policy."