

Attorney's Pre-Policy Breach of Professional Duty Gave Rise to Reasonably Foreseeable Basis for a Claim

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The United States Court of Appeals for the Third Circuit has affirmed the applicability of an exclusion in a lawyer's liability policy for claims arising out of facts and circumstances that an attorney reasonably could have foreseen might give rise to a claim. *Coregis Ins. Co. v. Baratta & Fenerty, Ltd., et al.*, Nos. 99-1740, 00-1175 (3d Cir. Aug. 29, 2001).

The insured lawyer sought coverage under his professional liability policy for a legal malpractice suit that arose out of his handling of a medical malpractice action. The applicable policy contained an exclusion that barred coverage for any claims arising out of acts, errors or omissions "occurring prior to the effective date of the policy" if any policyholder "knew or could have reasonably foreseen that such act, error [or] omission . . . might be expected to be the basis of a claim."

In December 1978, as a result of a delay in medical treatment, the attorney's client allegedly suffered severe injuries. In January 1979, he consulted with the attorney about the possibility of filing a medical malpractice case against various parties, including Sacred Heart and St. Mary's Hospitals. The attorney advised the client that he should file a case against Sacred Heart Hospital but not against St. Mary's Hospital. More than ten years later, in September 1991, the court dismissed the client's suit for lack of activity. Subsequent efforts to reinstate the case were denied. In January 1995, the client sent a letter to the lawyer expressing his dissatisfaction with the handling of his case, asserting, inter alia, that the attorney had "dragged [the medical malpractice] case on since 1979" and had "constantly brushed off inquiries for a case status report." The client ultimately sued the attorney in November 1996.

The relevant policy was issued for the period from May 6, 1996 to May 6, 1997. It barred coverage for claims arising out of facts or omissions occurring prior to the policy's inception if any insured reasonably could have foreseen that such acts or omissions might be expected to be the basis for a claim. The insurer denied coverage based on this exclusion.

The lawyer did not dispute that the underlying claim arose out of acts occurring prior to the policy's effective date, but disputed that he reasonably could have foreseen that such acts might be expected to be the basis of a claim. In support of his position, the lawyer asserted that the malpractice action was time-barred under the state's statute of limitations and thus it was unforeseeable that there would be an expectation of a claim.

In holding for the insurer, the court held that "a reasonable attorney in [the policyholder's] position would have realized that [he] had breached a professional duty by failing to prosecute [the underlying case], and that consequently, there might be a basis for a claim." Further, the court found that "when an attorney has a basis to believe he has breached a professional duty, he cannot assume that the claim will not be brought because he subjectively believes it is time barred or lacks merit."

The attorney also argued that the court should set aside the lower court's ruling against him based on newly discovered evidence. The lawyer pointed to two 1998 medical reports that suggested that the client was not damaged by the lawyer's failure to keep the medical malpractice action active; rather, the client was damaged by the lawyer's failure to include St. Mary's Hospital as a defendant. According to the lawyer, there was no basis to believe this error would give rise to a claim. The court found that these reports did not undermine the district court's determination, but rather reinforced its "belief that [the policyholder] should have known [before the commencement of the policy period] that he had breached a professional duty in his handling of this case that provided the basis for a claim..." The court therefore affirmed the lower court's grant of summary judgment for the insurer based on the exclusion.