

Dishonesty Exclusion Bars Coverage; Insured Cannot Invoke Fifth Amendment to Avoid Notice Obligations to Insurer under Lawyer's Liability Policy

October 2001

The United States District Court for the Southern District of New York has ruled that a claim arising out of an attorney's alleged participation in a fraudulent scheme is barred by the dishonesty exclusion in a lawyer's liability policy and by its requirement of immediate notice of a claim. *Chicago Ins. Co. v. Robert P. Borsody*, No.00-4837, 2001 U.S. Dist. LEXIS 15317 (S.D.N.Y. Sept. 27, 2001).

The policyholder attorney sought coverage for a lawsuit alleging that the attorney colluded with others to defraud insurance companies by circumventing a state statute that requires a multi-disciplinary health practice to be owned and operated by a licensed physician. The applicable policy provided coverage for "claims... arising out of any negligent act, error, omission... in the rendering of or failure to render Professional Services." The policy, however, also specifically excluded coverage for claims arising out of any "dishonest, fraudulent, criminal or malicious act... at the direction of, or with the knowledge of the Insured."

The court was unpersuaded by the attorney's arguments that coverage existed because the alleged fraudulent conduct "arose out of" or occurred in the performance of legal services. Instead, the court noted that the attorney was charged in the underlying action with violating sections of the New Jersey insurance fraud act and in fact, the charges "[arose] out of alleged fraudulent, dishonest or criminal misconduct, and as such are barred from coverage by [the fraud] exclusion." The court further noted that there were no allegations of negligence, and there was no evidence that the insurer had knowledge of negligent-as opposed to intentional-conduct on the part of the insured.

Additionally, the court denied coverage for a cross-claim against the insured by a co-defendant in the underlying action on the grounds that "insurance policy provisions mandating immediate notice set forth an ironbound requirement" and that the policyholder's delay of 40 days in notifying the insurer of the cross-claim constituted untimely notice. Although the attorney sought to attribute this delay to his counsel's effort to research the effect of the exercise of a Fifth Amendment privilege on filing an answer in the underlying case, the court found that "an insured cannot use the Fifth Amendment to avoid his policy cooperation obligations."

It further noted that even if the insurer previously received a notice of a potential claim, the insured was still obligated to provide immediate notice of the actual cross-claim. Citing the fraud exclusion in the policy and the notice of claim requirement, the court granted the insurer's motion for summary judgment.