

# Insurer Has Duty to Defend Attorney Where Notice of One of Four Allegations in Complaint Was Untimely

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In an unreported decision, a federal district court, applying New York law, has held that an insurer has a duty to defend an insured under a claims-made legal malpractice policy where notice of one of the four allegations in the complaint was untimely because the insurer had received timely notice of the other allegations. *Fein v. Chicago Ins. Co.*, 2003 WL 21688239 (S.D.N.Y. July 18, 2003).

The insurer issued a claims-made legal malpractice policy to an attorney. The policy required notification to the insured "[u]pon the Insured becoming aware of any negligent act, error, omission, or Personal Injury in the rendering of or failure to render Professional Services which could reasonably be expected to be the basis of a Claim covered hereby."

The underlying plaintiff had retained the attorney in 1995 to represent its interests in connection with a default judgment that had previously been entered against it in a slip and fall case as well as in a declaratory judgment action filed against it and its insurer seeking to collect on the default judgment. The attorney did not move to vacate the default judgment until late 1999, more than four and a half years after he had been retained. The underlying plaintiff subsequently hired new counsel and settled the slip and fall case. The underlying plaintiff alleged that the attorney had failed to vacate the default judgment in a timely fashion. The complaint also alleged that the attorney had failed to pursue vigorously a cross claim for coverage against the underlying plaintiff's insurer, failed to file a notice of claim in the 1998 rehabilitation proceeding involving the underlying plaintiff's insurer, and failed to advise the underlying plaintiff of his rights against his insurance broker.

The district court initially noted that, under New York law, an insured's failure to comply with a notice provision in an insurance policy is generally a complete defense regardless of prejudice. In addition, "[f]ailure to give timely notice of a claim may be excused if the insured either had no knowledge of the occurrence or reasonably believed that he was not liable."

The court held that the attorney had not provided timely notice of the allegation that he had failed to move to vacate the default judgment because "an objectively reasonable person would have concluded by 1999, when [the attorney] filed the motion to vacate the default that [the attorney's] actions could give rise to potential liability." Since the attorney did not provide notification to the insurer in 1999, the court held he had failed to comply with the notice requirements of the policy.

However, the court also held that, with respect to the other allegations against the attorney, "a reasonable person would not have been aware of the potential for malpractice liability before the suit was actually filed." The district court explained in a conclusory manner why the particular facts at issue did not give rise to an expectation of a claim for malpractice. Among other things, the court noted that the attorney had not been retained to provide services in connection with the rehabilitation proceeding or to pursue a potential malpractice claim against the insurance broker. The court also noted that since the lawsuit against the underlying plaintiff already named the underlying plaintiff's insurer, a cross claim against that insurer would have been duplicative. The court concluded that because the attorney had provided timely notice of the lawsuit, which included three allegations as to which the attorney would not have expected a malpractice claim to result, the insurer was required to defend and indemnify the attorney.

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