

Insurer Estopped from Raising Defense Unsuccessfully Litigated in Prior Case

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The U.S. Court of Appeals for the Second Circuit, applying New York law, has held that an insurer is collaterally estopped from arguing that an exclusion in a legal malpractice policy precludes coverage where, in prior litigation against a different insured, a court ruled against the insurer on the same issue. *Fuchsberg & Fuchsberg, et al. v. Galizia, et al.*, No. 01-7654 (2d Cir. Aug. 1, 2002).

The insured was a law firm that was sued for malpractice as a result of its failure to prosecute a claim. The law firm sought a defense and indemnification from its legal malpractice insurer pursuant to a "tail" coverage provision that afforded coverage that occurred after the effective date of the circumstances prior policy but prior to the effective date of the current policy. Tail coverage was available, however, only if, before the policy's effective date, "the Named Insured, any partner, shareholder [or] employee...had no reasonable basis to believe that the Insured had breached a fiduciary duty or to foresee that [a] Claim would be made against the Insured." The insurer denied coverage, arguing that an associate at the law firm who had handled the case had a "reasonable basis" to foresee the claim. Coverage litigation ensued.

The court held that the insurer was collaterally estopped from arguing that the "reasonable basis" provision precluded coverage as a result of prior litigation by the same insurer concerning the application of the same policy provision in a case with very similar facts. In the prior litigation, the insurer had unsuccessfully raised the same "reasonable basis" argument in an effort to deny coverage to a law firm that had been sued for malpractice after one of its associates had failed to file a personal injury action before the statute of limitations had run.

The Second Circuit reasoned that although the prior decision did not expressly address the proper interpretation of the "reasonable basis" provision, the decision had preclusive effect because the scope of the provision was "by necessary implication...contained in that which [was] explicitly decided." Since the insurer had clearly raised the "reasonable basis" provision in the prior litigation and the court in that case had ruled that the insurer was obligated to indemnify, the court had necessarily rejected the application of the provision under these circumstances. Accordingly, the insurer was barred from relitigating that issue in this case.

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