

Whether Insured Is Aware of Potential Claim Is Factual Question

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A federal district court in New York, applying New York law, has held that whether an attorney insured under a legal malpractice policy had knowledge of a potential claim at the time that a court precluded him from using an expert at trial, because he failed to serve an expert report in a timely manner, is a factual question that could not be decided on summary judgment. *Cade & Saunders, P.C., et al. v. Chicago Ins. Co.*, 2004 WL 415225 (N.D.N.Y., Mar. 2, 2004).

The insurer issued annual claims-made policies to a lawyer. The policies' notice provision provided that "[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, written notice shall be given by the Insured...as soon as practicable."

The insured attorney represented a plaintiff in a personal injury case in October 1998. The attorney became involved in the case at a relatively late stage and sought, at that point, to use a new expert witness at trial; however, the court precluded him from doing so because he did not file an expert report until the morning of trial. A different law firm then handled the trial, which resulted in a verdict for the defense. A subsequent appeal challenging the preclusion of the expert also failed. Three years later, in October 2001, the attorney received a letter advising him that his former client was contemplating a legal malpractice lawsuit. He promptly notified the insurer of the letter and the lawsuit that the former client subsequently filed against him. The insurer denied coverage on the grounds that notice was untimely since the attorney failed to provide notification of the potential claim when the court precluded use of the expert or shortly thereafter.

Coverage litigation ensued, and both parties moved for summary judgment. The insurer argued that notice was untimely since the attorney was on notice of the potential claim as soon as the trial court issued the order precluding use of the expert witness. The attorney argued that he did not have notice of the claim at that time because the preclusion order resulted from a "strategic choice," and because he had a "good faith" belief that a claim would not be filed because of his close relationship with the underlying plaintiff.

The court denied both motions for summary judgment. It first noted that it is "well-settled" that "[a]n insured must provide notice to the insurer upon discovery of facts and circumstances that would lead an objectively reasonable person to believe in the possibility of a claim." However, the court also explained that the

determination of reasonableness is generally a factual issue. In light of the arguments and supporting evidence raised by both parties, the court found, "as have a number of other courts when faced with the same issue, that the issue of notice cannot be resolved on a summary judgment motion."

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