

# Policy Does Not Provide Coverage for Acts Pre-Dating Attorney's Service

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A New York appellate court has held that a malpractice claim against an "of counsel" attorney is not covered under a claims-made professional liability policy where the claim stems from the attorney's actions in a real estate transaction pre-dating his term of service with the insured law firm. *Senate Ins. Co. v. Tamarack Am.*, 2004 WL 3112580 (N.Y. App. Div. Jan. 20, 2005).

In 1996, the underlying plaintiff was represented in a property purchase by an attorney who served as general counsel for another company. In April 1997, one year after the real estate transaction, the attorney left his post as general counsel and joined a law firm on an of counsel basis. The law firm identified the attorney's status as "of counsel" on its letterhead and in various legal publications.

The insurer issued a one-year, claims-made policy to the law firm in July 1999. The policy defined "insured" to include "each lawyer acting as 'of counsel,' but only to the extent such lawyer performs services on behalf of the named Insured." In September 1999, the underlying plaintiff sued the attorney, alleging that the property purchased in 1996 was rendered worthless because of the attorney's negligence in the initial representation. The attorney then tendered notice of the action to the insurer, which denied coverage on the grounds that the attorney was not of counsel at the insured law firm at the time of the purported malpractice.

The appellate court ruled in favor of the insurer, rejecting the argument that the attorney should be classed as a covered "insured" employee of the law firm. The plaintiff argued that it was ambiguous whether the attorney was an of counsel or an employee of the law firm since the relevant policy did not define of counsel. The court reasoned that the term was not ambiguous because the "ordinary and accepted meaning" of the term "of counsel" in the legal profession was plain and also consistent with the attorney's role with the law firm. The court also noted that it was "clear" that the acts comprising the basis for the malpractice action occurred prior to the attorney's affiliation with the law firm.