

# District Court Holds No Retroactive Application of Coverage Provisions for Claims Made Prior to the Policy Period

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The United States District Court for the District of Maine has held that a settlement entered into by the policyholder was not covered under a claims-made D&O policy because neither the insuring agreement nor the optional extension of coverage applied to claims made before the policy inception. *Gardner v. Podiatry Ins. Co. of Am.*, 2007 WL 1170774 (D. Me. Apr. 18, 2007).

A podiatrist was insured under a claims-made policy covering the period from February 1, 2005 to February 1, 2006. The relevant Insuring Agreement of the policy provided that, if the podiatrist terminated his podiatry practice during the policy period as a result of death or disability, the policy would "extend to apply to claims for damages because of malpractice or personal injury committed or caused by the Insured during the policy period stated in the Schedule." In 2003, two former employees of the podiatrist filed discrimination charges against the practice and eventually filed their claims in state court in 2004. The podiatrist closed his practice in July 2005 as a result of mental and physical disability. Following notification of the closure, the insurer sent the podiatrist an Optional Extension Coverage endorsement, extending coverage to claims made against the podiatrist "during the applicable period of any statute of limitations following immediately after 07/01/2005 . . . . This extension shall apply only to claims arising out of malpractice or personal injury which happened subsequent to the Retroactive Date . . . namely 12/12/1979, and prior to the effective date of such cancellation of non-renewal." In September 2005, the podiatrist provided notice of the discrimination suit to the insurer. The insurer denied coverage. The discrimination suit subsequently settled, and the podiatrist filed suit against the insurer seeking coverage for the settlement. Both parties sought summary judgment.

In granting the insurer's motion for summary judgment, the court emphasized that neither the insuring agreement nor the Optional Extension Coverage had retroactive application to cover injuries caused prior to the policy period. The court recognized that the Insuring Agreement provided coverage for "claims made beyond the policy period arising from conduct engaged in during the policy period," and the Optional Extension Coverage provided coverage for any claim "made following cessation of the practice, based on conduct engaged in during any of the years in which the practice was insured." Neither the Insuring Agreement nor the Optional Extension Coverage provided coverage "for liability arising from situations in

which a claim was both caused *and made* in bygone years," and thus coverage was not available for the underlying settlement.