

# Coverage Barred by Failure to Provide Notice and by Dishonesty Exclusions; Physical Delivery of Policy to Insured Not Necessary

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The United States District Court for the District of Massachusetts has held that a failure to deliver insurance policies to a policyholder did not estop insurers from relying on the terms and conditions of the policy. *Gargano v. Liberty Int'l Underwriters, Inc.*, 2008 WL 4148254 (D. Mass. Sept. 9, 2008). The court further ruled that the insurers properly denied coverage because the policyholder provided notice outside of the policy period and coverage otherwise would have been barred by the policies' dishonesty exclusions.

The policyholder, an attorney, was insured for three consecutive policy periods under three different claims-made-and-reported policies that were, respectively, issued by three different insurers. Each of the policies contained a dishonesty exclusion, although the language was not identical. For the 2004-2005 policy period, the policy excluded coverage for any claim "based on or arising out of any actual or alleged dishonest, fraudulent, criminal or malicious act." For the 2005-2006 policy period, the policy excluded coverage for "[a]ny claim arising out of a criminal, intentionally wrongful, fraudulent, or malicious act or omission." For the 2006-2007 policy period, the policy excluded coverage for "any judgment or final adjudication based upon, arising out of or in any way related to any dishonest, fraudulent, criminal, malicious, or deliberately wrongful acts or omissions committed by the [policyholder]."

In the underlying matter, the attorney's client retained him after firing its prior attorney. The fired attorney had been representing the client pursuant to a contingency fee arrangement and was assured by the newly retained attorney that he would be entitled to a "referral fee" as compensation for his prior work. The new attorney ultimately never paid a referral fee and was sued by the fired attorney during the 2004-2005 policy period. In 2007, the insured attorney provided notice to his insurers after a judgment was entered against him. The judgment included a finding that he had engaged in "intentional and willful" unfair and deceptive trade practices. The insurers denied coverage, asserting either that the claim was not made during their policy period or that notice was provided outside the policy period. The insurers also relied on their policies' respective dishonesty exclusions.

The attorney challenged the denials, first asserting that the insurers were estopped from relying upon the

terms and conditions of the policies to deny coverage because copies of the policies were never actually delivered to him. The court rejected this argument. The court explained that under Massachusetts law, a broker's knowledge is imputed to a policyholder and that, in this case, the policies were delivered to the broker. Further, the court noted that in those cases where courts found actual delivery necessary, such delivery was expressly required under the terms of the policy. The court further explained that in those cases where delivery was required but not made, the courts ruled that the policies were void, and thus provided no coverage, rather than holding that the insurer was estopped from denying coverage.

The court then addressed the insurers' arguments that coverage was barred because the policyholder either failed to comply with the claims-made-and-reported conditions of the policies or was otherwise barred by the policies' dishonesty exclusions. The court noted that the claim was first made during 2004-2005 policy period because that was when the underlying action was filed. In so ruling, the court held that the 2005-2006 and 2006-2007 policies did not provide coverage because the claim was not first made during those policy periods. The court held that coverage was barred under the 2004-2005 policy because the attorney failed to provide timely notice. The court rejected the attorney's argument that coverage should nonetheless be available because the insurer during the 2004-2005 policy period was not prejudiced by the late notice, explaining that prejudice is irrelevant under Massachusetts law when considering a claims-made-and-reported policy. Finally, the court held that the dishonesty exclusions in each of the policies applied because the underlying court had found the attorney's actions to have been "intentionally and willfully fraudulent."

The court also rejected the policyholder's statutory bad faith arguments. The court first noted that Massachusetts General Laws chapter 176D did not establish an independent private cause of action. With respect to Massachusetts General Laws chapter 93A, the court stated that there were "only two categories of actions that might possibly apply to the instant case: (1) refusal to pay claims without conducting a reasonable investigation or (2) failing to settle if liability is clear." The court rejected the latter, reasoning that the insurers had no duty to settle because it was clear that they were not liable. Considering the former, the court held that an insurer is under no obligation to conduct a full investigation of a claim when it is clear that there is no coverage.