

Attorneys' Alleged Diversion of Settlement Payment Does Not Constitute Professional Services

June 2009

The United States Court of Appeals for the Eleventh Circuit has held that a law firm's alleged diversion of a settlement payment to satisfy its client's outstanding legal fees did not constitute professional services under a lawyers professional liability policy. *Great Am. Ins. Co. v. Baddley & Mauro, LLC*, 2009 WL 1316094 (11th Cir. May 13, 2009).

The policy provided specified coverage for claims arising out of the insured law firm's acts, errors or omissions in the provision of "Professional Services." It defined "Professional Services" as services the law firm performed for a client "in [its] capacity as a lawyer; . . . or as an administrator, conservator, executor, guardian, trustee, receiver, or in any similar fiduciary capacity, provided that such services are connected with and incidental to [its] profession as a lawyer."

The law firm and its client entered into a contingency agreement whereby each party agreed to recover its expenses and divide any remaining proceeds according to an agreed ratio. After the client's case settled, a dispute arose between the law firm and its client regarding the law firm's expenses. When the dispute failed to resolve, the law firm paid itself the full amount of its claimed expenses from the settlement funds and divided the remaining proceeds pursuant to the contingency agreement. The client sued the law firm based on the law firm's handling of the settlement funds.

In the coverage litigation that followed, the insurer took the position that there was no duty to defend the underlying lawsuit because the "essence" of the suit was a demand for the return of legal fees. The court agreed that the law firm did not owe a duty to defend. The court held that the firm's alleged actions in diverting the settlement funds were "self-serving and not made on behalf of or to protect the interest of its client" and therefore did not constitute "Professional Services" under the policy. The court also concluded that the district court properly considered the allegations in the underlying complaint, as well as the parties' submissions in support of their cross-motions for summary judgment, to determine whether the insurer had a duty to defend the law firm in the underlying suit.