

First Circuit Holds No Coverage for Claims First Made and Reported Outside Policy Period

August 2009

The United States Court of Appeals for the First Circuit has held that, under Massachusetts law, an insured is not entitled to coverage when, under a "claims made and reported policy," a claim is not both made and reported during the relevant policy period. *Gargano v. Liberty Int'l Underwriters Inc.*, 2009 WL 2020480 (1st Cir. July 14, 2009).

The insured law firm obtained three separate professional liability policies from three different insurers covering three successive policy years spanning September 1, 2004 through September 1, 2007. All of the policies provided coverage "only for claims that are *both* first made against the insured and reported to the insurance company during the term of the policy." In March 2005, an attorney brought suit against the law firm seeking to enforce an attorney's lien for fees and damages resulting from the insured's allegedly deceptive business practices. The state court entered an order establishing the insured's liability in December 2005, and entered final judgment after a hearing on damages in July of 2007. After the entry of judgment, the law firm reported the subsequent fee and damages award as a claim to each of the three insurers. The insurers that issued the policies covering the September 1, 2004 through September 1, 2006 policy periods denied coverage on the basis that the claim was not made during the terms of their policies. The insurer that issued the policy covering the September 1, 2006 through September 1, 2007 policy period denied coverage on the ground that the claim was made prior to that policy's inception. The law firm subsequently filed suit against all three insurers alleging that they should be estopped from disclaiming coverage because all three failed to deliver a copy of their policy to the insured. The district court granted the insurance companies' motions to dismiss for failure to state a claim.

The First Circuit affirmed, holding that the law firm failed to state a claim because the claim it tendered for coverage did not fall within the scope of coverage of any of the three policies. The court first noted that, under Massachusetts law, "for a 'claims made and reported' policy, 'the insured event' is the combination of both requirements: (1) the claim must be first made against the insured during the policy period, and (2) the claim must be reported to the insurer within the policy period." The court then concluded that the policies did not afford coverage because no claim was both made and reported during any of the three policy periods. The court also "reject[ed] out of hand [the insured's] assertion that the insurance companies must demonstrate

prejudice from his untimely notice in order to escape liability." Further, the court stated that absent an express requirement in the policy, "neither delivery nor actual possession by the insured [of the policy] is essential to the making of an insurance contract"