

Policy Affords No Coverage for Lawsuit Where Insured Failed To Provide Notice

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The United States District Court for the District of New Jersey has held that a claims-made-and-reported policy afforded no coverage for a lawsuit where the insured failed to comply with the policy's notice provisions. *Popovitch & Popovitch, LLC v. Evanston Ins. Co.*, 2009 WL 2568090 (D.N.J. Aug. 17, 2009).

An insurer issued a lawyer's professional liability policy to a lawyer for the claims-made period of December 29, 2000 to December 29, 2002. The policy contained a "prior acts" exclusion that barred coverage for claims arising out of acts or errors in professional services prior to the policy's inception date of December 29, 2000. In addition, as a condition precedent to coverage, the policy required the insured to forward immediately any claims to the insurer.

The insured law firm represented a woman in a medical malpractice lawsuit, which was dismissed prior to the inception of the policy due to the insured's negligence. The woman learned that her lawsuit had been dismissed and filed a verified petition in November 2001 seeking discovery from the insured regarding his representation of her in the medical malpractice suit. The insured forwarded the verified petition to the insurer during the policy period. The insurer acknowledged the verified petition as notice of a potential claim, but stated that the policy would not afford coverage for any future claims arising out of the lawyer's representation of the woman because those alleged acts and errors occurred prior to the retroactive date of December 29, 2000.

In April 2004, the woman filed a complaint alleging professional malpractice against the insured as a result of his representation of her in the medical malpractice suit. The insured did not provide the insurer notice of the lawsuit. A default judgment was entered against the lawyer, and the court awarded damages of \$275,000 plus attorney's fees to the woman. The insured filed suit seeking coverage for the judgment.

The court granted summary judgment for the insurer based on the insured's undisputed failure to provide notice of the malpractice lawsuit. The court rejected the insured's argument that it would have been "futile" to provide notice of the complaint because the insurer had previously advised that future claims arising out of the representation of the woman would be barred by the prior acts exclusion. The court concluded that the insurer's acknowledgment of the notice of circumstances invited further information and did not preclude the

insurer's future consideration of a claim. The court opined that the insurer was prejudiced by the insured's failure to provide further information, and that a showing of "appreciable prejudice" is not required when a notice provision of a claims-made policy is breached.