

# Claimant's Extended Silence after Threats May Reduce Foreseeability of Claim

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In a dispute between a law firm and two professional liability insurers issuing successive policies to the firm, the United States District Court for the District of Utah denied summary judgment on a prior knowledge defense posed by the insurer issuing the second policy because delay between the last correspondence from the claimant and the effective date of the policy "significantly reduced the foreseeability of a claim." *Westport Ins. v. Ray Quinney & Nebeker*, 2009 WL 2474005 (D. Utah Aug. 7, 2009). The court also found a material issue of fact as to whether the claimant's letters would provide a reasonable attorney with notice that a claim would be filed, preventing summary judgment in favor of the insurer issuing the first policy. The court further denied summary judgment for the earlier insurer in order to allow discovery as to whether the insurer would be estopped from asserting that notice was inadequate because the insurer's agent had told the firm that only notice of formal claims needed to be submitted to the insurer, and the firm may have acted reasonably in response to such a misrepresentation.

In August 2003, the firm received a letter from a former client describing potential claims against the firm in connection with the firm's purported representation regarding the subject matter of a *qui tam* case against the client, seeking a tolling agreement and advising the firm to notify its professional liability carrier. The firm responded by seeking more information and advising the client that it did not believe it ever provided legal advice in connection with the subject matter at issue. In September 2003, the client repeated its request that the firm notify its insurer, and the firm refused, citing inadequate information of the circumstances at issue. In this regard, the firm previously had received advice from its first insurer's agent that the firm generally need not report threatened claims by clients until a formal complaint was filed. On this basis, it did not notify the first insurer of the matter before the expiration of the policy period. The firm also did not disclose the matter in its application to its second professional liability insurer, which sought information about "any incident, act, effort, or omission that could reasonably result in a claim or suit." The policy term of the second policy began in April 2005. In February 2006, the client wrote again to the firm, describing the amount it paid in the *qui tam* action and threatening that it would file a complaint in the near future. The firm provided notice to the second insurer and sought coverage for the matter. After the second insurer denied coverage based on the prior knowledge exclusion in its policy, the firm notified the first insurer of the claim and sought defense and indemnification.

In the coverage litigation that followed, the court denied the second insurer's motion for summary judgment on the basis of the second policy's prior knowledge exclusion, which excluded coverage for claims "based upon, arising out of, attributable to, or directly or indirectly resulting from: . . . any act, error, omission, circumstance or personal injury action occurring prior to the effective date of this policy, if any insured at the effective date knew or could have reasonably foreseen that such act, error, omission, circumstance or personal injury might be the basis of a claim." Citing the fact that nearly 18 months had passed following the last correspondence from the firm's client regarding the *qui tam* action during which the client had provided no response to the firm's denial of its request for a tolling agreement, the court found that the client's "extended silence over this period significantly reduced the foreseeability of a claim." The court concluded therefore that it could not determine as a matter of law that the requisite knowledge to trigger the exclusion existed and denied the second insurer's motion for summary judgment.

The court also denied the first insurer's motion for summary judgment, which argued that there could be no coverage under the first policy because no formal claim had been brought against the firm during the policy period. The court found that, under the first policy, while the firm was required to report claims or known wrongful acts that the insured could reasonably foresee resulting in a claim, it had the option to report circumstances that may result in a claim. The court found that, if the firm had properly reported the client's letters to the first insurer, the insurer would be obligated to provide coverage. The firm acknowledged that it did not provide written notice of the letters to the insurer but contended that its oral notice to the insurer's agent sufficed. The court found that the policy required notice to be in writing and that, under Utah law, no showing of prejudice would be required to deny coverage for lack of notice under the "claims made" policy. The court found, however, that the insurer may be estopped from asserting that notice was inadequate because the agent's representation that only formal claims should be reported to the insurer may constitute a material misrepresentation as to the scope of coverage. The firm may have acted reasonably in following the agent's instructions to run potential claims by him before reporting them to the insurer. The court therefore denied the insurer's motion for summary judgment so that discovery could continue to determine whether the firm should be estopped from asserting that notice was inadequate.