

Prior Knowledge Exclusion Inapplicable Where "Meaningful Avenues" for Curing Potential Malpractice Remain

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The United States District Court for the Eastern District of Washington has held that under Washington law the prior knowledge exclusion in a lawyers professional liability policy was ambiguous and does not preclude coverage for a legal malpractice claim. *Westport Ins. Corp. v. The Markham Group, Inc.*, 2009 WL 2777845 (E. D. Wash. Aug. 26, 2009). The court determined that it "only becomes reasonably foreseeable that a claim might be brought when there are no longer any meaningful avenues open for curing the adverse ruling available to the client."

The insurer issued a professional liability policy to the law firm for the claims-made policy period of July 1, 2007 to July 1, 2008. The policy provided specified coverage for claims made against the insured during the policy period. In relevant part, the policy's prior knowledge exclusion precluded coverage for any claim based on "[a]ny act, error, omission, [or] circumstance . . . occurring prior to the effective date of the POLICY if any INSURED at the effective date knew or could have reasonably foreseen that such act, error, omission, [or] circumstance . . . might be the basis of the CLAIM." The insured lawyer represented a client in connection with a wrongful death suit against a nursing home operator arising out of the death of the client's father. Issues arose with respect to whether the defendant named in the case operated the nursing home at the time of the alleged negligence. On August 4, 2006, the trial court granted summary judgment to the defendant in the underlying case, concluding that, if the insured "had made a reasonable inquiry as to the actual operator of . . . [the facility], he would have determined that the licensed operator on the date of the alleged negligent acts was not the named Defendant but another party[.]" The court also imposed sanctions against the insured. On October 3, 2006, the trial court denied the policyholder's motion for reconsideration and leave to file an amended complaint. On December 31, 2007, the Washington Court of Appeals affirmed the trial court's ruling. After the appellate ruling, the insured notified his client that the client potentially had a legal malpractice claim against the insured and, on January 24, 2008, the insured put the carrier on notice of a potential malpractice claim arising out of the representation.

In the coverage litigation that followed, the insurer argued that the policy's prior knowledge exclusion applied because, prior to the policy's effective date, the policyholder reasonably could have foreseen that a claim

might be made against him based on the trial court's August 4, 2006, grant of summary judgment in favor of the defendant in the underlying suit. The policyholder disputed this position, arguing that the prior knowledge exclusion was ambiguous and inapplicable.

The court sided with the policyholder, concluding that the policy exclusion's use of the term "might," in relation to circumstances that "might" be the basis of a claim, was vague and ambiguous. The court noted that, in the underlying case, there were a number of events that preceded the court's August 4, 2006 grant of summary judgment that potentially could be construed as triggering events sufficient to indicate that a claim "might" be made against the insured. The court stated that the policy provided no principled basis to pick the August 4, 2006 ruling as the triggering event, versus these other events, thus rendering the exclusion ambiguous. The court concluded that a reasonable interpretation of the policy's prior knowledge exclusion was that "it becomes reasonably foreseeable that a claim might be brought when there are no longer any meaningful avenues open for curing the adverse ruling available to the client." In this regard, the court noted that up until the time the appellate court rejected the appeal, a reasonable attorney could have believed that the trial judge's decision would be reversed, thereby negating the potential for any legal malpractice claim. Accordingly, the court held that the prior knowledge exclusion did not bar coverage.