

Ninth Circuit Applies Objective Standard to Prior Knowledge Exclusion; No Coverage for Malpractice Claim

November 2009

The United States Court of Appeals for the Ninth Circuit, applying California law, has held that a prior knowledge exclusion barred coverage under a lawyers professional liability policy where the insured had knowledge, prior to the policy's effective date, that a lawsuit that the insured had brought on behalf of a client had been dismissed for failure to prosecute. *Weddington v. United Nat'l Ins. Co.*, 2009 WL 3028237 (9th Cir. Sept. 23, 2009).

The policy excluded coverage for claims "arising out of any WRONGFUL ACT occurring prior to the effective date of this policy . . . if the INSURED at or before the effective date knew or could have reasonably foreseen that such WRONGFUL ACT might be expected to be the basis of a CLAIM." At the time the insured applied for coverage, the insured was aware that a lawsuit that the insured had brought on behalf of a client had been dismissed based on the insured's failure to bring the action to trial within five years. The client later asserted a claim against the insured for malpractice, and the insured sought coverage under the policy. The insurer denied coverage based on the policy's prior knowledge exclusion.

In the coverage litigation that followed, the court held that the prior knowledge exclusion unambiguously mandated the application of an objective standard. In reaching this conclusion, the court stated that "the use of the phrase 'or could have reasonably foreseen' indicates that coverage is excluded where a claim was foreseeable from a reasonable, objective viewpoint." The court also noted that a prior knowledge exclusion need not use the term "objective" or "subjective" in order for the provision to be found unambiguous. On the contrary, according to the court, an exclusion's use of the term "reasonably" unambiguously indicates that an objective standard should apply.

Applying the objective standard to the facts presented, the court rejected the policyholder's argument that the insurer's denial of coverage was based on insufficient information. In this regard, the court noted that a dismissal for failure to prosecute "is the sort of incident likely to give rise to a claim" and, therefore, that the insured's knowledge of the dismissal provided a sufficient basis for the insurer to deny coverage.