

New Hampshire Supreme Court: Prejudice Not Required to Establish Late Notice under Claims-Made Policy

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In a recent opinion, the New Hampshire Supreme Court has held, *inter alia*, that an insurer need not demonstrate that it was prejudiced in order to deny coverage based on the failure by the insured to provide notice "as soon as practicable" of "any act or omission which would reasonably be expected to be the basis of a claim or suit" under a claims-made professional liability policy. See *Bianco Professional Assoc. v. The Home Ins. Co.*, No. 95-58, 1999 N.H. LEXIS 110 (N.H. Nov. 5, 1999).

A former client of the Bianco Professional Association, a law firm, sued two former employees of the firm (Falkenham and Farley), one current member of the firm (Bianco) and the firm itself. The former client claimed that the defendants negligently failed to file a lawsuit on the client's behalf prior to the running of the statute of limitations. The client was injured in June 1988 and met with Falkenham one week later. In August of 1989, Falkenham passed the file along to Farley. Six days after the limitations period lapsed, June 17, 1991, Farley filed the suit. On June 29, 1992, the defendant filed a motion to dismiss on statute of limitations grounds, and the motion was granted in November of 1992. On March 23, 1993, the client, with new counsel, asserted a claim of malpractice against the Bianco firm. The firm, Bianco personally, Falkenham and Farley sought a defense from the firm's professional liability insurer.

The insurer (the Home Insurance Company) issued policies to the Bianco firm for the period from March 1, 1992 to March 1, 1993, and from March 1, 1993 to March 1, 1994. The policies required the insured to give written notice "as soon as practicable" after the insured becomes "aware of any act or omission which would reasonably be expected to be the basis of a claim or suit." The Home asserted, *inter alia*, that no coverage was available because of the failure to provide notice during the 1992-93 policy period when the underlying suit was dismissed on statute of limitations grounds.

On appeal from the trial court's order requiring the insurer to provide a defense, the appellate court first examined whether Falkenham and Bianco should have provided notice to the Home of the potential for claims against them personally. The court concluded that the policy language requiring notice of "any act or omission which could be reasonably be expected to give rise to a claim" implied a "reasonable attorney" standard. Thus, the question was whether a "reasonable attorney" in the insured's position would expect a

claim. As to Bianco, the court concluded that his mere status as a shareholder in the firm was insufficient to establish vicarious liability and therefore there was insufficient basis for a reasonable attorney to have expected that the clients would file a claim against Bianco in his personal capacity. As to Falkenham, the court deferred to the trial court's credibility determinations concerning the lack of any involvement by Falkenham after transferring the file to Farley.

Next, the court concluded that neither Bianco nor Falkenham had a duty under the policy to notify the Home about the potential for claims against either Farley or the firm. Finding the term "Insured" ambiguous, the court construed it in favor of the insured, concluding that only the "Insured" against whom a claim might be asserted bears the obligation to notify the insurer of a potential claim.

While the court found that Falkenham and Bianco, in their individual capacities, lacked knowledge that would require them to notify the insurer of a potential claim, the court determined that Farley and the firm were not entitled to coverage. Neither Farley nor the firm provided notice to the Home in 1992 when the former client's potential claim became apparent after the client's untimely lawsuit was dismissed.

The court concluded that, under a claims-made policy, the Home need not demonstrate prejudice resulting from late notice because the discovery and notice of the claim serves to trigger the coverage. As such, there is a presumption of prejudice resulting from untimely claims, because the notice requirement "accelerates a future claim to bring it within the current policy period." Accordingly, the failure of the firm and Farley to notify the Home of the potential claim in 1992 barred coverage for the former client's actual claim made against them in 1993.