wiley

NEWSLETTER

Attorney's Notice of Claim Two Years After Letter Threatening Legal Malpractice Claim Deemed Untimely

July 2010

The United States District Court for the District of New Jersey, applying New Jersey law, has held that an insured attorney breached the notice provision of his lawyers liability policy by giving notice two years after the claimant first sent a letter alleging the insured committed legal malpractice. *Russoniello v. Twin City Fire Ins. Co.*, 2010 WL 2024084, (D.N.J. May 20, 2010). In so holding, the court stated that the letter received by the insured from the claimant constituted a claim and rejected the insured's contention that his subjective conclusion that the letter was not a claim should control.

The insured attorney represented a realty corporation in connection with a proposed redevelopment plan. According to the realty corporation, the insured attorney was an experienced land use attorney who was retained to assist in getting the redevelopment project approved by the town. After allegedly failing to return the client realty corporation's phone calls, failing to coordinate with the project's architect and failing to receive the township's permission to move forward on the project, the realty corporation terminated the insured attorney's representation. In an October 12, 2006 letter, the realty corporation wrote that the insured attorney's representation "was completely inadequate and may well be considered malpractice" and that the realty corporation "will be forced to refer this matter to The Office of Attorney Ethics and the Client Protection Fund" if the insured attorney did not return the fees he had been paid. Approximately two years later, in August 2008, the realty corporation filed a legal malpractice suit against the insured attorney, which he tendered to the insurer in October 2008. The insurer denied coverage on the basis that the insured attorney's notice of claim was untimely.

The insurer issued lawyers liability policies to the insured attorney for the 2006-2007 policy period and for subsequent periods. Each of the policies provided that the insured was required to provide notice of any claim against him "during the policy period or applicable extended reporting period . . . in writing to the [insurer] immediately but in no event later than sixty (60) calendar days after the expiration date of the policy period or applicable extended reporting period." The policies further defined "claim" to mean "[a] demand received by an insured for money or services alleging a negligent act, error, omission or personal injury in the rendering of or failure to render professional legal services for others" by the insured.

The court granted summary judgment in favor of the insurer, holding that the insured attorney failed to provide notice as required under the terms of the 2006-2007 policy, which was in effect at the time of the October 12, 2006 letter. The court held that the October 12, 2006 letter constituted a "claim" because "it is a demand for money and it alleges 'completely inadequate' representation from [the insured attorney]," which "may well be considered malpractice" and also threatened to report the insured attorney to state ethics authorities.

The court rejected the insured attorney's argument that his "subjective state of mind" and "belief" that the realty corporation's letters were a "shake down" excused the obligation to provide notice under the policy. In rejecting this argument, the court recognized that "the definition of a 'claim' does not include any subjective component, leaving it up to the insured to determine whether a demand has merit." Relying on *Zuckerman v. National Union Fire Insurance Co.*, 495 A.2d 395 (N.J. 1985), the court noted that "under New Jersey law, the notice requirements of a claims made policy are strictly enforced without regard to an insured's subjective assessment of the merits." Recognizing that the insured attorney's "reluctance to make timely notice" was understandable, perhaps due to concern that his malpractice premiums would be raised, the court noted that "to [the insured attorney's] chagrin, this was the wrong approach. The notice provisions within his claims made [p]olicy are for the most part absolute."