

Law Firm's Conduct Not "Professional Services" Because No Attorney-Client Relationship Existed

December 2010

The United States District Court for the District of South Carolina, applying South Carolina law, has held that an insurer had no duty to defend or indemnify a law firm in a suit brought by the firm's bank to recover funds lost in a check-passing scheme because the firm's professional liability policy only covered "professional services" when an attorney-client relationship actually existed. *Bradford & Bradford, P.A. v. Attorneys Liab. Prot. Soc'y, Inc.*, 2010 WL 4225907 (D.S.C. Oct. 20, 2010).

In mid-2009, the law firm was contacted by an individual who requested that the firm represent an overseas company in collecting debts owed by its customers. The individual signed an engagement letter with the firm but did not immediately pay the firm's \$2,500 retainer. Shortly thereafter, the individual informed the firm that one of the company's customers was willing to provide partial payment to the company through the firm. The firm's partner told the individual to make the check payable to the firm. The individual then sent a forged check to the firm for \$362,400.25 and instructed the firm to deduct its retainer and wire the balance of the check to accounts in Japan. The firm deposited the check into the firm's Interest on Lawyers Trust Account and, once the check cleared, deducted its retainer and wired the rest of the funds to the overseas accounts. Several days later, the firm's bank notified the firm that the check was forged. When the bank failed to recover the amounts it had wired overseas, it filed suit against the firm. After the firm's professional liability insurer refused to defend the suit, the firm filed suit against the insurer.

The court granted summary judgment to the insurer, holding that it had no duty to defend or indemnify the firm because the bank's claim did not fall within the policy's coverage for "professional services." The policy provided coverage for a claim that "arises from or is in connection with . . . an act, error or omission in professional services that were or should have been rendered by the Insured." The policy defined "professional services" as "services or activities performed for others as an attorney in an attorney-client relationship on behalf of one or more clients." According to the court, the firm's actions would qualify as "professional services" only if they were: (1) services or activities; (2) performed for others as an attorney; (3) in an attorney-client relationship; (4) on behalf of one or more clients. The court noted that unless there was an actual attorney-client relationship, the firm's unwitting participation in the alleged check-passing scheme could not be considered "professional services." After exploring how a valid attorney-client relationship was

formed under South Carolina law, the court concluded that no such relationship existed in this case because the individual who instigated the check-passing scheme sought the firm's representation solely to aid him in committing a fraud, not to seek legal advice. Even though the firm believed it had a valid attorney-client relationship with the individual, the court found no evidence that the individual had used the firm for anything other than to facilitate the fraudulent scheme. Thus, the court concluded that, absent an attorney-client relationship, the firm's activities did not fall within the policy's coverage .