

Claimant Is Collaterally Estopped From Asserting That Arbitration Award Triggers Coverage Under Lawyers Professional Liability Policy

December 2010

The Court of Appeals of North Carolina has held that a claimant is collaterally estopped from asserting that an arbitration award triggers coverage under an insured's lawyers professional liability policy where the arbitration award found the insured liable solely in his capacity as a fund manager. *WHD, L.P. v. Lawyers Mut. Liab. Ins. Co. of N.C.*, 2010 WL 4068905 (N.C. Ct. App. Oct. 19, 2010).

The policy stated, in relevant part, that the insurer would pay on behalf of any insured "all sums which such Insured shall become legally obligated to pay as money damages as compensation for actual monetary loss caused by any act or omission of any Insured in rendering or failing to render legal services for others while engaged in the practice of law as licensed by the State of North Carolina."

The insured, along with others, formed a venture capital fund for the purpose of investing in an initial public offering. The insured was a partial owner of the fund, one of five fund managers, and the attorney for the fund. The fund eventually failed and filed for bankruptcy. An investor in the fund filed a demand for arbitration against the insured and the other fund managers based on the fund's alleged misuse of the investor's money and the subsequent loss of that money. In the arbitration demand, the investor asserted a specific claim of legal malpractice and negligent misrepresentation against the insured in his capacity as an attorney. The investor also asserted claims against the insured and the other fund managers for negligent misrepresentation, vicarious liability and breach of fiduciary duty in their respective capacities as fund managers.

The investor obtained an arbitration award and subsequent judgment against the insured and the other fund managers based on negligent misrepresentations in the solicitation and subsequent misuse of the investor's funds. After the insured failed to pay the judgment, the investor filed a declaratory judgment action against the insured and his insurer, seeking coverage for the judgment under the policy.

In the coverage litigation, the investor argued that the arbitration award found the insured liable as both a fund manager and an attorney and, accordingly, that there was coverage under the policy for the award. The court disagreed, concluding that, although the award acknowledged that the insured acted as both a fund manager and an attorney for the fund, the insured's role as an attorney was never mentioned in the award's ultimate determination of liability, which focused specifically on the actions of the fund managers. Therefore, the court concluded that the award denied the investor's claim against the insured as an attorney. The court went on to hold that, since the claim against the insured in his capacity as an attorney was litigated in the arbitration hearing, and the arbitration award constituted a final judgment on the merits, the investor was collaterally estopped from relitigating in the coverage action the insured's liability as an attorney. Thus, the investor could not pursue coverage under the policy.