

# Malpractice Claim Deemed Made at Time of Insured's Legal Error

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The United States District Court for the District of Maryland, applying Maryland law, has granted summary judgment in favor of an insurer, holding that a malpractice claim against an insured law firm was deemed first made during a prior policy period-at the time the law firm filed an opposition to a motion for summary judgment that failed to comply with state law in an underlying case, or alternatively, when the underlying trial judge noted an unexecuted affidavit as a basis for a ruling against the insured's client-and thus not covered under a subsequent policy. *Minn.Lawyers Mut. Ins. Co. v. Baylor & Jackson, PLLC*, 2012 WL 1109731 (D. Md. Apr. 3, 2012). The court also held that providing timely notice under a claims-made policy is a condition precedent to coverage such that an insurer is not required to prove prejudice to disclaim coverage for late notice.

In the underlying case, the insured law firm represented a defendant who was sued for breach of contract and breach of fiduciary duty in Maryland state court. In response to the underlying plaintiff's motion for summary judgment, the insured law firm filed an opposition brief in which the defendant contended that the contract at issue was not valid. The insured failed, however, to submit either an affidavit or sworn statement to support its client's contentions. Based on this failure and other arguments, the judge in the underlying action granted summary judgment to the underlying plaintiff. On appeal, the Maryland intermediate appellate court affirmed the trial court's ruling, commenting that the opposition to summary judgment "was not supported by affidavits, deposition testimony, interrogatory answers, or any sworn evidence as required by Maryland Rule 2-501" and that the insured's "failure to comply with Maryland Rule 2-501 severely undermined their opposition to summary judgment on all the counts." The insured provided notice of a potential malpractice claim shortly after the appellate court's decision. The insurer denied coverage on the grounds that notice of the potential malpractice claim should have been provided during a prior policy period, *i.e.*, at the time of the filing of the opposition to summary judgment or at the time of the trial court's ruling. The insurer also denied coverage under the prior policy in place at the time of the summary judgment filing on the basis of late notice.

Both the prior and subsequent policies provided that the "act, error or omission giving rise to the CLAIM must have occurred during the POLICY PERIOD or prior to the POLICY PERIOD . . . , if the INSURED had no knowledge of facts which could reasonably support a claim at the effective date of this policy." The policies further provided that a "CLAIM is deemed made when . . . an act, error or omission by any INSURED occurs

which has not resulted in a demand for DAMAGES but which an INSURED knows or reasonably should know, would support such a demand."

In the ensuing coverage action, the court held that, "[g]iven the policy's definition of coverage, the act, error, or omission giving rise to the . . . malpractice claim occurred . . . when [the insured] filed the opposition to summary judgment without supporting evidence." In applying an objective standard for evaluating the reasonableness of an insured's providing notice of a potential claim, the court held that "any reasonable lawyer faced with a motion for summary judgment could simply have read Maryland Rule 2-501 and known that an unexecuted affidavit does not satisfy the Maryland standard for summary-judgment practice." The court further stated that "[a]ny reasonable lawyer would have read [the trial judge's] opinion with alarm as to what it meant to him or her personally" and that "[a]ny reasonable lawyer would have been worried it could lead to a malpractice claim." In so holding, the court rejected the insured's argument that the trial court's decision only partly relied upon the filing of an unexecuted affidavit, noting that the insurer's "concern is liability for malpractice, not whether [the insured] would have lost the case on the merits anyway." The court held that, based upon the policy's language, the malpractice claim was deemed first made during the prior policy period, during which the insured failed to provide notice of a potential claim, and that the subsequent policy does not respond because the claim was made during the prior policy period.

In addition, the court rejected the insured's argument that the insurer must prove prejudice in order to deny coverage based upon the insured's untimely notice under the policy in effect when the summary judgment opposition was filed. After a discussion of Maryland's notice law, the court recognized that the prior policy's insuring agreement provided coverage only for claims that were made and reported within the policy period and that the time for reporting a claim "was incorporated into the definition of coverage and, therefore, became a condition precedent to coverage." Accordingly, the court held that the insurer was not required to prove prejudice in order to disclaim coverage for lack of timely notice under Maryland law.