

Fee Dispute Not Covered Under Legal Malpractice Policy

September 2013

The United States District Court for the Western District of Louisiana has held that a lawyer's professional liability policy does not afford coverage for a fee dispute with a former client. *Pias v. Cont'l Cas. Ins. Co.*, No. 2:13-cv-00182-PM-PJH (W.D. La. Aug. 6, 2013). Wiley Rein represented the insurer.

The insured lawyer represented a client in a worker's compensation matter, which ultimately settled for \$95,000 to the client plus an additional \$40,607 made payable to the client for the initial Medicare Set Aside Account. The lawyer retained \$86,221.60 of the \$95,000, contending that he was entitled to that amount as his fee. The client, through new counsel, then filed a "Motion for Return of Funds Held as Attorney's Fees" with the worker's compensation office. In the motion, the client argued that the insured lawyer failed to advise her up front of his fees and that, in any event, the insured was not entitled to any fees whatsoever because he had failed to file the "Application for Approval of Attorney's Fees" as required by state statute. The lawyer tendered the matter to his insurer, which declined coverage on two grounds: 1. the motion did not seek any relief against the lawyer "by reason of" any conduct allegedly committed in the performance of "legal services" within the scope of the policy's insuring agreement; and 2. the motion did not constitute a claim for covered "damages" within the meaning of the policy.

In the coverage action that followed, the court granted the insurer's motion for judgment on the pleadings, concluding that a "straightforward fee dispute" is not a claim that falls under a legal malpractice policy's coverage because it does not arise from the performance of legal services. In so ruling, the court rejected the insured lawyer's argument that, at a minimum, the motion for return of fees triggered the duty to defend because the client alleged that the lawyer had acted negligently by failing to keep her informed as to his fees and by failing to file the application for fees as required by state statute. The court also rejected the lawyer's reliance on the policy's dishonesty exclusion, which set forth the obligation to defend a claim until a final adjudication establishing the insured's misconduct, noting that "an exclusion cannot create coverage that would not otherwise exist."

Additionally, the court held that the return of fees did not constitute covered "damages" under the policy. In reaching this conclusion, the court pointed out that the policy's definition of the term carved out "legal fees . . . paid or incurred or charged by [the insured] no matter whether claimed as restitution of specific funds, forfeiture, financial loss, set-off or otherwise" The court also rejected the lawyer's reliance on the fact

that the motion sought to impose “sanctions” on him for failing to file the required application.