

Insured's Failure to Disclose Knowledge of Breach of Professional Duty Precludes Coverage

January 2006

In an unpublished decision, a New Jersey appellate court has held that an insurer properly denied coverage under the prior knowledge exclusion in a legal malpractice policy for a claim based on the firm's failure, prior to the inception of the policy, to file a claim within the applicable statute of limitations. *Liberty Surplus Ins. Corp., Inc. v. Nowell Amoroso, P.A.*, 2005 WL 2878037 (N.J. Super. A.D. Nov. 3, 2005).

The insured law firm submitted an application for a claims made and reported lawyers professional liability insurance policy. The application asked whether "any lawyer to be insured under this policy: [had] knowledge of any circumstance, act, error or omission that could result in a professional liability claim." The insured law firm answered "no." The insurer then issued the policy, which provided coverage for claims made during the policy period, as well as certain claims prior to the policy period. The policy stated that claims for malpractice prior to the policy period would be covered only where the insured "had no reasonable basis to believe that the Insured had breached a professional duty or to foresee that a claim would be made against the Insured."

Prior to the inception date of the policy, the law firm undertook the representation of a client whose claim was ultimately dismissed by the trial and appellate courts as time-barred. The law firm submitted its insurance application one month after the appellate court affirmed the dismissal of the underlying claim, and while its certification for appeal to the state supreme court was pending. The law firm's client subsequently sued it for legal malpractice, alleging that the law firm failed to file the client's complaint within the limitations period. The law firm notified its insurer of the malpractice claim, and the insurer disclaimed coverage because the law firm was aware of the potential claim prior to the inception of the policy.

The court first noted that the clause requiring that the insured have "no reasonable basis to believe" that it had breached a professional duty is not in violation of public policy, and is straightforward and unambiguous. The court next stated that the clause requires a subjective analysis. The court concluded that, because the decision affirming dismissal of the underlying complaint as time-barred came one month before the insured law firm applied for the insurance policy, it was clear to the insured law firm at the time that it applied for coverage that the action had been rejected as untimely by both the trial and appellate courts.

The insured law firm argued that, because it was appealing the dismissal to the state supreme court, it was possible that the underlying lawsuit would not be dismissed and that the client would not file a malpractice claim. The court stated, however, that coverage was conditioned not only on a possible malpractice claim, but also on knowledge of "any deviation from a pertinent standard of legal care." The court concluded that, where the trial and appellate courts have held that the claim was barred by the statute of limitations, "no reasonable fact-finder could conclude the firm honestly conceived that there was no plausible basis to believe that they had breached a professional duty."

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