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ALERT

No Coverage Where Insured Had Subjective Knowledge of Fraud

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The Appellate Division of the New York Supreme Court has held that a professional liability policy's prior notice exclusion was unambiguous and barred coverage where the underlying record established that the insureds had subjective knowledge of facts likely to give rise to a claim. *CPA Mut. Ins. Co. v. Weiss & Co. of Am. Risk Retention Group*, 915 N.Y.S.2d 57 (N.Y. App. Div. Jan. 4, 2011).

The policy contained a prior knowledge exclusion barring coverage for "any Interrelated Acts or Omissions" which, before the effective date of the policy, the insureds "believed or had a basis to believe might result in a Claim." According to the appellate court, the record established that, prior to the policy's effective date, the insureds had "subjective knowledge" of numerous facts pertaining to their clients' fraudulent scheme, which facts also implicated the insureds. The court held that it was unreasonable for the insureds not to have foreseen that such facts might be the basis of a claim against them and that the exclusion accordingly applied. The court also denied the insureds' motion to renew, noting that their asserted subjective belief they were not facing a claim in connection with the fraud committed by their clients would not have warranted a different result, as the record established that such a belief was not reasonable under the circumstances.

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