

ALERT

No Coverage under Lawyer's Professional Liability Policy for Action to Recover Legal Fees

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The United States District Court for the District of Massachusetts has held that an insurer has no indemnity obligation under a lawyer's professional liability policy for an action seeking damages based on the insured's violation of a fee-sharing arrangement with a previous employer. *Clermont v. Continental Casualty Co.*, 2011 WL 1235389 (D. Mass. Mar. 29, 2011).

The insurer issued a lawyer's professional liability policy to the insured providing coverage for claims made during the policy period "by reason of an act or omission in the performance of legal services." The policy defined "legal services" as "those services, including pro bono services, performed by the Insured for others as a lawyer" In 2009, the insured left his previous employer, a law firm, and started his own practice. In the transition, the insured retained several ongoing client representations. In 2010, the insured received a large contingency fee following the settlement of one of the retained actions. Following settlement, his previous employer filed suit seeking a portion of the insured's legal fees based on an alleged fee-sharing agreement. The insured tendered the claim to the insurer, and the insurer provided a partial defense subject to a reservation of rights. The insured subsequently was found to owe his previous employer a portion of the fees. The insured sought indemnification of this amount from the insurer, which denied coverage. The insured then filed a coverage action, and both parties moved for summary judgment.

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The court held that the insurer was not obligated to indemnify the insured because the underlying action was not based on the performance of legal services, as required by the plain terms of the policy. According to the court, the underlying action sought to recover legal fees and was not based on an act or omission involving "specialized knowledge and skill that is acquired through rigorous intellectual training," as required by the policy language and relevant case law, but was rather based solely "in the operation of a business that happened to provide legal services." In so holding, the court rejected the insured's contention that indemnification was available because the underlying complaint alleged various deficiencies and misconduct by the insured in handling the matter. The court concluded that the underlying action, at its core, sought relief solely "for the alleged violation of a fee-sharing arrangement with a former employer." Moreover, the court rejected the insured's reliance on case law to the contrary, noting that those cases involved liability policies covering harms "arising out of" legal services, as opposed to the policy issued to the insured, which only covered harms "by reason of" legal services provided by the insured. In addition, the court held that the insurer was not obligated to indemnify the insured based on the policy's definition of "damages," which expressly excluded from coverage any action to recover legal fees.

Finally, the court rejected the insured's contention that the insurer was estopped from refusing to provide indemnification based on alleged representations that it would provide coverage for the claim. According to the court, the insurer defended the action subject to a reservation of rights issued within two weeks following initiation of the defense and had not done anything to prejudice the plaintiff's defense, so estoppel did not apply.