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ALERT

Knowledge of Potential Malpractice Claim Bars Coverage for Claim

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The United States District Court for the Middle District of Florida, applying Florida law, has held that no coverage was available for a claim because the policyholder had reason to believe prior to the policy's inception that a client might bring an accounting malpractice claim. *Cuthill & Eddy, LLC v. Cont'l Cas. Co.*, – F. Supp. 2d –, 2011 WL 1835851 (M.D. Fla. May 16, 2011). The court also held that notice of a demand letter provided to the insured's broker did not constitute notice to the insurer under a previously issued policy because, even if the broker was an agent of the insurer for certain purposes, the policy manifested the parties' unambiguous intent that notice of a claim be provided directly to the insurer. Wiley Rein represented the insurer in this case.

The policyholder, an accounting firm, and one of its partners performed accounting work for a client. The client informed the insureds that she had decided to change accounting firms, and her counsel sent a letter informing the policyholder that "several acts or omissions" seemed "obvious" to the attorney "to rise to the level of professional malpractice" and requesting that the policyholder provide notice of the letter to its insurer. The policyholder contended that these facts did not put it on notice of a claim or potential claim. In the alternative, the insured argued that it had given notice of the claim to the insurer under a prior policy by providing a copy of the demand letter to its insurance broker, who it claimed acted as an agent of the insurer.

The court held that no coverage was available under the claims-made and reported policy because the policyholder had a basis to believe before the inception of the policy that its accounting work for the client might reasonably be expected to be the basis of a claim.

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The policy provided that coverage was available for claims provided that "prior to the effective date of this Policy, none of you had a basis to believe that any such act or omission, or interrelated act or omission, might reasonably be expected to be the basis of a claim." The court opined that internal e-mails among the policyholder's partners demonstrated knowledge of a potential claim because one partner was concerned that no coverage would be available for the malpractice claim if the policyholder failed to notify the insurer and another partner responded that he did not want the "insurance carrier's attorney getting involved prematurely." The court held that these internal communications, coupled with the policyholder's admitted errors in a letter to the IRS, the client letters informing the policyholder of the client's change in accounting firms and the demand letter from the client's lawyer to the policyholder, "conclusively demonstrate[d]" that the policyholder was aware of circumstances that could reasonably be expected to be the basis of a malpractice claim.

In addition, the court held that notice of the demand letter from the client's lawyer to the insurance broker did not constitute valid notice to the insurer under the prior policy. The court held that the policy provisions requiring that notice be provided directly to the insurer at a specified address and providing that "[n]otice to any of our agents or knowledge possessed by any such agent or any other person shall not act as a waiver or change any part of the policy" indicated the parties' intent that the policyholder must provide notice directly to the insurer. The court also held that the insurer did not cloak the broker with apparent authority to accept notice of claims because the policy's terms put the policyholder on notice that the broker was not authorized to accept notice of claims on behalf of the insurer.