

**ALERT**

# Malpractice Claim Barred by Insureds' Prior Knowledge of Error

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July 12, 2011

The United States District Court for the District of Columbia, applying District of Columbia law, has held that no coverage is available for a malpractice claim against an insured law firm where the firm had reason to believe, prior to the policy's inception, that its admitted error could be the basis of a claim. *Capitol Specialty Ins. Corp. v. Sanford Wittels & Heisler, LLP, et al.*, 2011 WL 2530690 (D.D.C. June 27, 2011). The court also held that the insurer was not estopped from denying coverage due to its delay in issuing a declination letter because the insured had not suffered any prejudice from the delay. Wiley Rein represented the insurer in this case.

The insured law firm had represented clients in an intended class action lawsuit in 2005. The firm, however, failed to comply with the court's deadline for filing a motion to certify the class. As a result, the court struck the clients' class claims and denied the right to proceed as a class action. The clients filed a malpractice lawsuit against the firm in January 2010.

Upon notice of the claim, the firm's insurer agreed in March 2010 to undertake the firm's defense, subject to a reservation of rights. Subsequently, in November 2010, the insurer informed the firm of its tentative conclusion that no coverage was available based on a policy provision that required as a condition precedent to coverage that "prior to the inception date of the first policy issued by the Company if continuously renewed, no Insured had any basis (1) to believe that any Insured had breached a professional duty; or (2) to foresee that any such act or omission or Related Act or Omission might reasonably be expected to be the basis of a Claim against any Insured." While the defense counsel appointed by the insurer continued defending the malpractice claim against the firm, the

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insurer initiated this action seeking a declaration as to coverage.

The court granted the insurer's motion for summary judgment, holding that the policy affords no coverage for the claim due to the failure to satisfy the condition precedent. The court held first that the policy provision was not ambiguous. In addition, the court determined, as a matter of law, that the firm's act of missing a deadline was a clear error that would have given any reasonable attorney reason to foresee a potential malpractice action. Accordingly, because the firm had such knowledge prior to the policy's inception, no coverage was available for the malpractice claim.

The firm also argued that the insurer was estopped from denying coverage based on the delay between the notice of the claim and the insurer's denial in November 2010. The court rejected this argument, finding that the insurer had issued an adequate reservation of rights prior to assuming control of the defense, and the firm had not suffered any prejudice as a result of the insurer's delay because there was no evidence that the insurer-appointed defense counsel had not provided an effective defense of the claim.