

**ALERT**

# Malpractice Complaint and Previous Counterclaim Constitute a Single Claim Made in Prior Policy Period

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Applying New Jersey law, the United States Court of Appeals for the Third Circuit has held that a malpractice complaint filed against an insured attorney in 2009 arose out of the same wrongful acts as a prior counterclaim filed against the same attorney in 2007, and thus was deemed first made in 2007 under a prior policy period.

*Szaferman, Lakind, Blumstein & Blader, PC, et al. v. Westport Ins. Corp.*, 2013 WL 2233915 (3d Cir. May 22, 2013).

In 2007, an attorney filed suit against several former clients for unpaid fees. One of the clients filed a counterclaim alleging incompetence on the part of the attorney. The attorney ultimately settled with the filer of the counterclaim and dismissed the fee collection suit against all of the former clients. Subsequently, the attorney joined another law firm and was added as an insured under the new firm's professional liability policy for the claims-made policy period of July 4, 2008 to July 4, 2009. In 2009, one of the former clients who had been named as a defendant in the attorney's collection action filed a malpractice complaint against the attorney making allegations similar to those found in the 2007 counterclaim.

The insurer denied coverage for the claim on the grounds that the 2009 complaint and the 2007 counterclaim were considered a single claim first made in 2007, before the policy's inception. In this regard, the policy's related claims provision provided that claims "arising out of a single Wrongful Act . . . or a series of related or continuing Wrongful Acts, shall be a single Claim . . . considered first made on the date on which the earliest Claim was first made." The court held that the allegations and demands in the 2007 counterclaim and the

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2009 complaint arose from the same or related wrongful acts regarding the insured attorney's negligence in the handling of a single collection action. The court therefore found that the 2009 complaint constituted a claim first made in 2007 and thus was not a claim first made during the policy period.

The policy also included a Prior Firm Endorsement, which amended the policy's definition of insured to include the insured attorney "as respects legal services rendered by [him] while associated with a prior firm." The insureds contended that the Prior Firm Endorsement required coverage for any claim arising out of the attorney's activities at his prior firm and trumped any policy terms that would limit such coverage. The court rejected this argument and found that the Prior Firm Endorsement did not supersede or supplement any policy provisions except to amend the definition of "insured."