

**ALERT**

# No Coverage for Legal Malpractice Action Based on Same Conduct as Alleged in Earlier Suit

---

May 29, 2014

The United States District Court for the Eastern District of Pennsylvania, applying Pennsylvania law, has held that there is no coverage for a legal malpractice action pursuant to a policy's prior knowledge exclusion and relation back provision where the attorney and his clients had previously been sued for the same conduct in an action for wrongful abuse of civil proceedings. *Ettinger & Assocs., LLC v. The Hartford/Twin City Fire Ins. Co.*, 2014 WL 1672946 (E.D. Pa. May 22, 2014).

The insured attorney represented his clients in a dispute with their realtor, which allegedly had told the clients that a lot adjacent to the lot they wished to purchase could not be subdivided. The clients later learned, prior to closing, that the owners of the adjacent lot had received a zoning variance to subdivide the lot. The clients nevertheless went through with the purchase and were able to resell the lot for a profit. The insured advised them that they still had viable claims against the realtor over the alleged misrepresentation, and commenced a lawsuit against the realtor on the clients' behalf.

The realtor repeatedly asserted that the lawsuit against it was frivolous and warned the insured attorney that it would sue his clients for fraud, abuse of process, and malicious prosecution if the lawsuit was not withdrawn. The court ultimately dismissed the suit against the realtor, and the realtor then filed a lawsuit against the clients and the insured attorney, alleging wrongful abuse of civil proceedings. The attorney defended both himself and his clients in the realtor's action.

## Practice Areas

---

D&O and Financial Institution Liability  
E&O for Lawyers, Accountants and Other Professionals  
Insurance  
Professional Liability Defense

Subsequently, the clients filed a malpractice claim against the attorney, alleging negligence both in advising them to bring suit against the realtor and in failing to advise them of the conflict of interest in his dual representation of himself and the clients in the realtor's lawsuit. The attorney sought coverage for the legal malpractice action under his claims-made professional liability policy and brought this declaratory judgment action against the insurer.

The court first held that the policy's prior knowledge exclusion barred coverage for the malpractice suit. Under Pennsylvania law, a prior knowledge exclusion applies where, based on the facts known to the insured, a reasonable attorney would have a basis to believe that he had breached a professional duty. The court found that the attorney had actual knowledge before the policy period that he had filed and continued to pursue the suit against the realtor, even after he was warned that the claims asserted were baseless, and that the realtor had filed suit against both him and his clients based on the filing and pursuit of the lawsuit against it. The court held that a reasonable attorney would know that the filing of a wrongful abuse of civil proceedings suit, which requires the plaintiff to prove that the attorney failed to perform in accordance with professional standards, constitutes an allegation of professional negligence for purposes of the prior knowledge exclusion. The court observed that the realtor had specifically alleged that the attorney knew that his clients' claims against the realtor were wrongful and malicious, and that he had encouraged and/or permitted his clients to pursue the claims even after being warned of the consequences. The court rejected the attorney's argument that he did not have a basis to believe that the clients would pursue a claim against him because they had "begged" that he represent them in the suit against the realtor, holding that an attorney's subjective understanding of his former clients' motives and desires is not controlling, and that the proper inquiry is what a reasonable attorney would have concluded.

The court also considered whether, in light of the policy's "relation back" provision, the malpractice suit constituted a claim first made during the policy period where the wrongful abuse of civil proceedings action had been filed prior to the policy period. The "relation back" provision stated that all claims arising out of the same or related negligent acts would be treated as a single claim deemed made when the first claim was made. The court concluded that the clients' malpractice allegations regarding the insured's bad advice related back to the realtor's suit because they shared a common nexus of facts and arose out of the same occurrence of wrongful acts—the attorney's alleged professional misconduct in filing and pursuing the suit against the realtor. Thus, that aspect of the malpractice action was not a claim first made during the policy period. That said, the court found that the clients' malpractice allegations regarding the attorney's dual representation of himself and the clients in the realtor's suit was unrelated to the realtor's claim and thus did not implicate the relation back provision. The court ultimately determined, however, that this conclusion was immaterial because the prior knowledge exclusion clearly barred coverage for the dual representation allegations because the attorney knew that he had undertaken the dual representation prior to the policy period.