2015 IL App (1st) 142070-U
No. 1-14-2070
March 24, 2015

SECOND DIVISION

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

SYNERGY LAW GROUP, LLC, and BARTLY J. LOETHEN, Plaintiffs-Appellants, v. IRONSHORE SPECIALTY INSURANCE COMPANY, IRONSHORE INDEMNITY, INC., and RICHMOND INSURANCE GROUP, LLC, Defendants-Appellees.	)	Appeal from the Circuit Court Of Cook County. No. 13 L 6868 The Honorable Raymond Mitchell, Judge Presiding.

JUSTICE NEVILLE delivered the judgment of the court.
Presiding Justice Simon and Justice Pierce concurred in the judgment.

ORDER

¶1 *Held*: When an attorney knows he made an error in drafting a document for a client, and that error has led to litigation against his client, the attorney has reason to know a malpractice claim might result from the error. Courts may consider the use of a word throughout a policy to help interpret the word in any of its uses. The separate acts of malpractice alleged in two complaints all arose from a single act of making an error in drafting a contract for the law firm's client, and therefore counted as a single claim for purposes of the malpractice insurance policy.

¶2 This case involves the interpretation of a clause in a legal malpractice insurance policy excluding coverage for claims of which the insured had prior knowledge. The insured, Synergy Law Group, LLC, made an error in 2006 when it drafted a shareholders agreement for its client, Gaston Advertising, Inc. (GA, Inc.). Synergy and GA, Inc., discovered the error in 2008 when a shareholder sued to enforce the agreement as written. Synergy applied for new malpractice insurance from Ironshore Indemnity, Inc., in 2010. After the effective date of the new insurance, Synergy notified Ironshore that GA, Inc., might file a malpractice claim. Ironshore denied coverage, invoking the prior knowledge exclusion. GA, Inc., and the shareholder filed separate complaints naming Synergy as a defendant. Ironshore refused to defend Synergy.

¶3 Synergy then brought the lawsuit presently on appeal, charging Ironshore with breach of contract, and charging the insurance broker, Richmond Insurance Group, LLC, with negligence. The circuit court granted Ironshore's motion for summary judgment, and it granted the broker's motion to dismiss the complaint.

¶4 In this appeal, we hold that Synergy knew of the possibility of a malpractice claim at least by the time the circuit court denied GA, Inc.'s motion to dismiss the shareholder's lawsuit to enforce the shareholders agreement as written. The acts of malpractice alleged in the two complaints filed against Synergy all arose from the initial error in drafting the shareholders agreement, so all the allegations in the complaints formed part of a single claim within the meaning of the exclusions listed in the insurance policy. The prior knowledge exclusion justified Ironshore's refusal to defend Synergy against both lawsuits. Synergy also

failed to allege facts showing that Richmond's alleged negligence caused any damages. Accordingly, we affirm the circuit court's judgment.

¶5 BACKGROUND

¶6 In 2000, David Gaston owned 80 shares of stock in GA, Inc., representing 80% of the corporation's equity. Rena Zito, an employee of GA, Inc., owned the remaining 20 shares. In 2006, Bartly Loethen of Synergy prepared a shareholders agreement for GA, Inc. The agreement established a formula for computing the price for repurchasing shares if either shareholder terminated employment with GA, Inc.

¶7 In April 2008, Zito left her position with GA, Inc. GA, Inc., exercised its option to repurchase Zito's shares. It offered Zito $56,335.47 for her shares. Zito responded that under the formula established in the shareholders agreement, GA, Inc., owed Zito $56,335.47 per share. She had 20 shares, and therefore, GA, Inc., owed Zito $1,126,709.40 for her interest in the corporation.

¶8 GA, Inc., and Synergy then realized that Synergy had made an error in drafting the shareholders agreement. GA, Inc., intended the formula in the agreement to set the repurchase price for 20% of the corporation, but the agreement referred to the formula as setting the price per share. GA, Inc., tried to withdraw its exercise of the option to repurchase Zito's shares. In 2008, Zito sued GA, Inc., for breach of the shareholders agreement.

¶9 Synergy handled the defense of the lawsuit. It also assisted Gaston with the formation of a new corporation, Gaston Advertising, LLC (GA, LLC), and a change in the name of GA, Inc. to Paulina Street Furniture Rental Co. (Paulina). Zito responded in June 2009 with a

motion for a temporary restraining order and a preliminary injunction to prevent GA, Inc., from disposing of its assets before paying her the amount it owed her under the shareholders agreement.

¶10 On March 26, 2010, Synergy, with the assistance of Richmond, applied to Ironshore for malpractice insurance. On the application, Synergy answered "No" to the question, "Are you or any members o[r] employees of your firm aware of any fact, circumstance, or situation which might reasonably be expected to give rise to a claim?"

¶11 Ironshore issued a malpractice insurance policy to cover claims made and reported between May 1, 2010, and May 1, 2011. Ironshore also renewed the policy to cover claims made and reported for the following year. The policy provided:

> "The Insurer shall not be liable to make any payments in connection with any Claim made against any Insured *** alleging, arising out of, based upon or attributable to Professional Legal Services if an Insured, prior to the effective date of the first Lawyers Professional Liability Policy issued by the Insurer to the Insured, had knowledge of the circumstances that gave rise to the Claim and reason to believe that a Claim might result." (Emphasis in original.)

¶12 In August 2010, the circuit court entered a judgment in favor of Zito on her claim against GA, Inc. GA, Inc. then fired Synergy, and in September 2010, Gaston demanded that Synergy reimburse GA, Inc., for any judgment entered against GA, Inc., in favor of Zito, for more than $56,335.47. On January 7, 2011, Synergy notified Ironshore that GA, Inc. and Gaston might charge Synergy with malpractice. Ironshore denied coverage, relying on both

the prior knowledge exclusion and the representation in the application about circumstances which might be expected to give rise to a claim.

¶13 On September 19, 2011, GA, Inc., and Gaston sued Synergy and Loethen for legal malpractice. GA, Inc., alleged that Synergy (1) erred in drafting the shareholders agreement; (2) failed to advise Gaston and GA, Inc., about the drafting error before GA, Inc., exercised the option to repurchase Zito's shares; (3) failed to preserve defenses against Zito's breach of contract lawsuit; and (4) failed to advise GA, Inc., that by creating the new entity, GA, LLC, and by renaming GA, Inc. as Paulina, GA, Inc. might make Gaston personally liable to Zito for the payments due under the judgment entered in favor of Zito in her breach of contract action.

¶14 In December 2011, Zito filed a complaint naming as defendants Gaston, Loethen, Synergy and Paulina. Zito alleged that after GA, Inc., and Gaston refused to pay Zito the contractually set amount for her shares of GA, Inc., Synergy sent Zito notice of a special shareholders' meeting to decide whether to sell the assets of GA, Inc., to GA, LLC. She alleged that the maneuver would put GA, Inc., out of business, so that GA, Inc., would not have funds with which to pay the amount it owed to her under the shareholders agreement and the judgment ordering enforcement of the shareholders agreement as written. Zito alleged that Gaston diverted payments from the clients of GA, Inc., to GA, LLC, upon the advice of Loethen and Synergy. The employees of GA, Inc., resigned and joined GA, LLC. Zito charged Gaston with breach of his fiduciary duties to Zito as a shareholder of GA, Inc. She charged Synergy and Loethen with fraud and with aiding Gaston's breach of fiduciary duties.

¶15 Synergy asked Ironshore to defend it against Zito's lawsuit. Ironshore refused to defend Synergy.

¶16 On June 14, 2013, Synergy and Loethen sued Ironshore for breach of the insurance contract. They also sued Richmond for negligence, alleging that Richmond gave Synergy misinformation about the meaning of "claims" in Ironshore's insurance policy. According to Synergy and Loethen, Richmond "[f]ail[ed] to advise Synergy as to the consequences of submission of the faulty [insurance] application."

¶17 Richmond moved to dismiss the complaint for failure to state a cause of action. Ironshore moved for summary judgment on the complaint. Loethen submitted his affidavit in opposition to the motion for summary judgment. Loethen swore that he did not know that Gaston and GA, Inc., intended to make a claim against him until September 2010, when GA, Inc.'s new attorney demanded payment by Synergy of the difference between $56,335.47 and any judgment entered against GA, Inc. and in favor of Zito. Loethen explained why he did not believe the mistake in the shareholders agreement would cause GA, Inc., any harm or lead to a malpractice claim. In further opposition to the motion for summary judgment, Synergy emphasized the many different acts of malpractice alleged in Gaston's and Zito's complaints against Synergy and Loethen.

¶18 In the written order granting the motions of Ironshore and Richmond, the circuit court said:

> "Synergy does not contest that it knew of the drafting error at the time it applied for the policy or at the time the policy was incepted.

*** At the time the policy was incepted, Gaston had already been sued by Zito. Gaston's motion to dismiss had been denied. Zito had moved for summary judgment against Gaston. Reasonable minds could not quarrel with the conclusion that a reasonable attorney would realize that a claim *might* result from the situation.

***

Synergy also argues that the claims brought against it in the second Zito suit are separate and distinct from the alleged drafting mistake and that it is entitled to a defense on those claims. In the second suit, Zito alleged that Gaston and its lawyers attempted to create a limited liability company and transfer [GA, Inc.'s] assets to it in order to avoid paying a judgment to Zito. Here, again, Synergy had knowledge of the circumstances that gave rise to the claim. Zito alleged in various pleadings that [she] sought to hold Gaston liable for attempting to escape [his] obligations. Prior to the inception of the policies, Zito had even alleged that Gaston's lawyers (Synergy) were involved in the plan to make it insolvent. Thus, again the question is whether Synergy had reason to believe that a claim might result [from] this conduct. A reasonable lawyer that has been accused of trying to fraudulently transfer the assets of his client in order to avoid paying a judgment would realize that a claim might result from that situation."

¶19 The court also found that Synergy could not allege any causal connection between Richmond's alleged negligence and Synergy's losses. The court said:

> "The materials provided by Richmond purport to instruct an insured when to report a claim arising during the course of the policy. The materials do not have any connection to the known circumstances exclusion that defeats Synergy's right to coverage."

Accordingly, the circuit court granted both Ironshore's motion for summary judgment and Richmond's motion to dismiss the complaint.

¶20 Synergy moved for reconsideration of the order, again arguing that some of the claims allege acts of malpractice that took place after the start of the policy period, so it could not have known of the claims based on those alleged acts when it applied for the insurance. The court held:

> "The negligence that is alleged in [Synergy's] handling of cases that came about because of the negligence it committed prior to the policy's inception does not allow [Synergy] to bring itself under the coverage of a policy incepted while that litigation was ongoing. It is apparent here, that this should be considered one claim for purposes of determining Ironshore's duty to defend, and that it falls under the 'known circumstances' provision's 'arising out of, based upon or attributable to' exclusion. To hold otherwise would be to permit a practice whereby lawyers who have committed malpractice could purchase litigation insurance, and create coverage by subsequent negligent acts in resolving the underlying case. By holding that, in such a situation, information such as this may be withheld from insurers, but still mandate that insurers provide a defense defeats insurance's foundational basis of mutual unknown and contingent risk."

¶21 The circuit court denied the motion for reconsideration. Synergy now appeals.

¶22 ANALYSIS

¶23 Ironshore

¶24 We review *de novo* the order granting summary judgment in favor of Ironshore. *Murneigh v. Gainer*, 177 Ill. 2d 287, 298 (1997). To determine whether an insurer has a duty to defend an insured,

> "the court must look to the allegations of the underlying complaints. If the underlying complaints allege facts within or *potentially* within policy coverage, the insurer is obliged to defend its insured even if the allegations are groundless, false, or fraudulent. [Citation.] An insurer may not justifiably refuse to defend an action against its insured unless it is *clear* from the face of the underlying complaints that the allegations fail to state facts which bring the case within, or potentially within, the policy's coverage. [Citation.] Moreover, if the underlying complaints allege several theories of recovery against the insured, the duty to defend arises even if only one such theory is within the potential coverage of the policy. [Citation.]
>
> The underlying complaints and the insurance policies must be liberally construed in favor of the insured. Where a policy provision is clear and unambiguous, its language must be taken in its 'plain, ordinary and popular sense.' *Hartford Accident & Indemnity Co. v. Case Foundation Co.*, 10 Ill. App. 3d 115, 121 (1973). A provision is ambiguous if it is subject to more than one reasonable interpretation. [Citation.] All doubts and ambiguities must be

resolved in favor of the insured." (Emphasis in original.) *United States Fidelity & Guaranty Co. v. Wilkin Insulation Co.*, 144 Ill. 2d 64, 73-74 (1991).

¶25 We must construe the insurance policy as a whole in light of the purpose of the policy. *Clayton v. Millers First Insurance Co.*, 384 Ill. App. 3d 429, 431 (2008). Our supreme court explained the purpose of prior knowledge exclusions from insurance coverage in *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 103-04 (1992), where the court said:

> "By its very nature, insurance is fundamentally based on *contingent risks* which may or may not occur. [Citations.] One dictionary defines 'insurance' as '[a] contract whereby one undertakes to indemnify another against loss, damage, or liability arising from an *unknown or contingent event* and is applicable only to *some contingency or act to occur in [the] future.*' (Emphasis added.) (Black's Law Dictionary 721 (5th ed. 1979).) If the insured knows or has reason to know, when it purchases a CGL [commercial general liability] policy, that there is a substantial probability that it will suffer or has already suffered a loss, the risk ceases to be contingent and becomes a probable or known loss. [Citation.] Where the insured has evidence of a probable loss when it purchases a CGL policy, the loss is uninsurable under that policy (unless the parties otherwise contract) because the 'risk of liability is no longer unknown.' (*Appalachian Insurance Co. v. Liberty Mutual Insurance Co.* (3d Cir.1982), 676 F.2d 56, 63; [citations.]) Therefore, the insurer has no duty to defend or indemnify the insured with respect

> to the known loss *ab initio*, unless the parties intended the known loss to be covered. ***.
>
> There is no bright-line test to determine whether and at what point in time the insured knew or had reason to know of the substantial probability of the loss at issue. The extent of the insured's knowledge of the loss must be determined on a case-by-case basis. In a motion for summary judgment, the court must determine whether any factual questions exist with respect to the insured's knowledge at the time it bought each policy." (Emphasis in original).

¶26 Synergy argues first that when it bought the policy from Ironshore, it had no reason to believe a claim might result from the mistake it made in drafting the shareholders agreement. When Synergy bought the Ironshore policy, it knew (1) it had made an error in drafting the shareholders agreement; (2) Zito had sued to enforce the shareholders agreement as drafted; (3) under the shareholders agreement as drafted, GA, Inc., owed Zito more than $1 million in excess of the amount it intended to offer Zito for her shares of GA, Inc.; and (4) the circuit court had denied GA, Inc.'s motion to dismiss Zito's complaint. At the very least, Synergy knew that because of its drafting error, settlement of Zito's claim would likely cost GA, Inc., more than the $56,335.47 it intended to pay for Zito's shares. We agree with the circuit court that a reasonable attorney in Synergy's position would realize, by August 2010, that a malpractice claim might result from its error in drafting the shareholders agreement. See *Koransky, Bouwer & Poracky, P.C. v. Bar Plan Mutual Insurance Co.*, 712 F.3d 336, 343 (7th Cir. 2013).

¶27 Synergy relies mostly on its contention that when it bought the insurance, it had no reason to believe that GA, Inc., would claim Synergy committed malpractice by failing to preserve defenses to Zito's lawsuit and by failing to warn Gaston that by transferring GA, Inc.'s assets to GA, LLC, Gaston might become personally liable to Zito for payments due under the shareholders agreement. The circuit court held that all of GA, Inc.'s allegations of malpractice constituted a single claim, within the meaning of Ironshore's policy.

¶28 Ironshore's policy defines a claim as "a demand received by an Insured for money or services, including the service of suit or institution of arbitration proceedings against the Insured." The "Limit of Liability" section provides that "[m]ore than one Claim involving the same Professional Legal Services or Related Professional Legal Services of one or more Insureds shall be considered a single Claim, subject to the Each Claim Limit of Liability *** and only one Deductible shall be applicable to such single Claim." The "Notice of Claim" section provides that Synergy must give Ironshore notice of any claim made during the policy period, and "[i]f notice is provided pursuant to this Section, any Claim subsequently made against an Insured and reported to the Insurer alleging, arising out of, based upon or attributable to the prior noticed Claim or alleging the same Professional Legal Services or Related Professional Legal Services, shall be considered related to the prior Claim and made at the time notice of the prior Claim was first provided." The "Notice of Claim" section further establishes that once Synergy notifies Ironshore of "circumstances that may reasonably be expected to give rise to a Claim being made against [Synergy] *** then a Claim that is subsequently made against such Insured and reported to the Insurer alleging, arising out of, based upon or attributable to such circumstances or alleging any Related

Professional Legal Services, shall be considered made at the time notice of such circumstances was given."

¶29 The policy defines "Professional Legal Services" as "legal services and activities performed for others as a lawyer," followed by an extensive list of activities that qualify as legal services. The policy defines "Related Professional Legal Services" as "Professional Legal Services that are the same, related or continuous, or Professional Legal Services that arise from a common nucleus of facts. Claims can allege Related Professional Legal Services regardless of whether such Claims involve the same or different claimants, Insureds or legal causes of action." The policy excludes coverage for any claim "alleging, arising out of, based upon or attributable to Professional Legal Services prior to the Retroactive Date *** and any subsequent Related Professional Legal Services."

¶30 Synergy contends that the uses of "claim" in the sections pertaining to limits of liability and notice of claims have no relevance to the meaning of a single claim for purposes of the exclusions. Synergy cites no law to support its assertion. Virginia Surety advanced an argument like Synergy's in *National Union Insurance Co. of Pittsburgh, PA. v. Holmes & Graven*, 23 F. Supp. 2d 1057 (D.C. Minn. 1998). The court said, "if we accepted Virginia Surety's construction, National Union would be faced with the palpably unreasonable result that the two claims would be joined, as one, for notification purposes, but would be treated as separate claims for purposes of the policies' coverage limits. We cannot condone such a divergence in the construction of a common term, in separate portions of the same insurance contract." *National Union*, 23 F. Supp. 2d at 1071. In *Berry & Murphy, P.C. v. Carolina Casualty Insurance Co.*, 586 F.3d 803, 811-13 (10th Cir. 2009), the court needed to

determine the scope of an exclusion for prior claims, and it found guidance in cases deciding what counts as a single claim for purposes of liability limits. We find that the meaning of a single claim for purposes of notice of claims and liability limits guides our construction of the policy's exclusion for claims of which Synergy had prior knowledge.

¶31 The policy establishes that multiple charges of malpractice constitute a single claim if the later charges "alleg[e], aris[e] out of, [are] based upon or attributable to the prior noticed Claim." In its complaint, GA, Inc., charged Synergy with four separate acts of malpractice. First, Synergy erred in drafting the shareholders agreement. Second, Synergy failed to advise GA, Inc., of the drafting error before it advised GA, Inc., to exercise its option to repurchase Zito's shares. Third, Synergy failed to preserve GA, Inc.'s defenses to Zito's lawsuit, brought to enforce the shareholders agreement as drafted. Fourth, Synergy failed to advise Gaston that transferring GA, Inc.'s assets to GA, LLC, might make Gaston personally liable to Zito for the price of her shares.

¶32 Synergy contends that the four alleged acts of malpractice must count as separate claims, and that Ironshore must defend it against the allegation that it committed malpractice when it advised GA, Inc., to transfer its assets to GA, LLC. A plaintiff made a similar argument in *Bay Cities Paving & Grading, Inc. v. Lawyers' Mutual Insurance Co.*, 855 P.2d 1263 (Cal. 1993). The *Bay Cities* court held:

> "Under Bay Cities' view, the greater the number of an attorney's negligent acts, the greater the number of claims under the policy, even if all the acts cause only a single injury. Such a rule would have the plainly undesired result of providing the attorney who has made one error with an incentive to then make as many

> additional errors and omissions as possible, so as to increase the amount of insurance coverage." *Bay Cities*, 855 P.2d at 1266-67.

¶33 We note that the circuit court here found the same reasoning compelling. We too find that if we require Ironshore to defend Synergy for malpractice Synergy committed in its efforts to undo the damage of its error in drafting the shareholders agreement, we would encourage underinsured attorneys who commit a single act of malpractice to purchase new insurance and commit more malpractice related to the initial malpractice. Synergy's interpretation of a claim would defeat the policy's purpose of protecting the insured from "liability arising from an *unknown or contingent event*" and not when "the insured knows or has reason to know, *** that there is a substantial probability that it will suffer or has already suffered a loss." (Emphasis in original.) *Outboard Marine*, 154 Ill. 2d at 103. We find that all of the allegations in GA, Inc.'s complaint constitute a single claim against Synergy, within the meaning of the insurance policy, and all the alleged malpractice arose out of the initial error in drafting the shareholders agreement.

¶34 We also conclude that Synergy's acts, as described in Zito's complaint, also arose out of the initial error in drafting the shareholders agreement. Zito alleged that Synergy helped GA, Inc., and Gaston create a new corporation, GA, LLC, and helped transfer GA, Inc.'s assets to GA, LLC, thereby eliminating the value of the judgment Zito obtained in the breach of contract lawsuit against GA, Inc. Zito alleged in the breach of contract action that GA, Inc., refused to pay her the amount established in the shareholders agreement for her shares of GA, Inc. Thus, all of the alleged tortious conduct arose from the error in drafting the shareholders agreement.

¶35 Richmond

¶36 Synergy alleged in its complaint that Richmond negligently gave Synergy papers that said:

> "The following circumstances may be considered claims by a professional liability carrier and require reporting:
>
> 1. when a demand is received for money or services;
>
> 2. service of suit;
>
> 3. institution of alternative dispute resolution or arbitration proceedings;
>
> 4. disciplinary action is threatened or filed;
>
> 5. any written or verbal notice received by any insured that it is the intention of a person or entity to hold the insured responsible for the consequences of an alleged wrongful act;
>
> 6. any request to toll or waive a statute of limitations relating to an alleged wrongful act."

¶37 Synergy alleged that it relied on the list when it decided to state on its insurance application that it was not "aware of any fact, circumstance, or situation which might reasonably be expected to give rise to a claim." Synergy also alleged, summarily, that "[a]s a result of Richmond's negligence, [Synergy] suffered damages." Synergy's response to the motion to dismiss clarifies that it seeks damages to compensate it for the expense of defending itself against the claims of GA, Inc., and Zito, and for any loss Synergy suffers due to lack of insurance coverage from Ironshore for those claims.

¶38 The circuit court held that Ironshore had no duty to defend Synergy against the claims of GA, Inc., and Zito because the policy excluded coverage for claims "arising out of *** Professional Legal Services if an Insured, prior to the effective date of the first Lawyers Professional Liability Policy issued by the Insurer to the Insured, had knowledge of the circumstances that gave rise to the Claim and reason to believe that a Claim might result." No answer on the insurance application, and no earlier filing of a claim, would have imposed on Ironshore a duty to defend or indemnify Synergy for the claims of Zito and GA, Inc., as those claims arose from an occurrence that Synergy knew about before it applied for insurance coverage from Ironshore. Thus, Synergy has not alleged facts that could support a finding that but for Richmond's alleged negligence, Synergy would have purchased different insurance in 2010 that would have covered the claims of GA, Inc., and Zito, which arise from an error Synergy made in 2006, where the error led to litigation in 2008. See *Castillo v. Neely's TBA Dealer Supply, Inc.*, 776 S.W.2d 290, 296 (Tex. App. 1989); *Kersh v. UnitedHealthcare Insurance Co.*, 946 F. Supp. 2d 621, 639-40 (W.D. Tex. 2013). Accordingly, we affirm the judgment dismissing Synergy's and Loethen's claims against Richmond for failure to state a cause of action.

¶39 CONCLUSION

¶40 Ironshore owed no duty to defend or indemnify Synergy and Loethen against the lawsuits of GA, Inc., and Zito, because Synergy had prior knowledge of its error and the possibility of malpractice claims arising from that error. Synergy and Loethen failed to state facts that could support an inference that Richmond's negligence caused Synergy and Loethen not to have purchased in 2010 adequate insurance coverage for the 2006 error in drafting the

shareholders agreement. Accordingly, we affirm the circuit court's judgment granting summary judgment in favor of Ironshore and dismissing the complaint against Richmond.

¶41 Affirmed.