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ALERT

Court Rejects Insurer's Arguments That Claim Was Made Prior to Policy Period and Attorney Knew of Potential Claim

September 13, 2012

Goodman v. Medmarc Ins., ___ *Ohio App.* ___, 2012 WL 3861984 (8th Dist. 2012)

Brief Summary

The Court of Appeals of Ohio held that defendant insurer had a duty to defend plaintiff, an insured attorney, and rejected the insurer's arguments that: (1) the claim against the attorney was made prior to the policy period, and (2) the attorney had a reasonable basis to believe that his failure to prosecute the plaintiff's appeal was a breach of the standard of care and could result in a claim against him.

Complete Summary

The attorney represented a client in an employment case against the U.S. Veterans Administration. The client contended that the lawyer committed malpractice in his representation, including by failing to timely file an appeal. The client had received an adverse ruling from the U.S. Merit Systems Protection Board (MSPB) and planned to appeal the decision. Due to a series of events, however, the brief was not timely filed and the appellate court refused to reinstate the appeal. The attorney contacted the client, advised him of what had occurred, and offered to refund the retainer paid for the appeal.

The attorney and the client then memorialized the agreement to refund the money in a document dated June 16, 2009 titled "Appeal Resolution." At that time, the client did not express dissatisfaction with the lawyer's representation, nor did he indicate that he planned to sue the attorney. The lawyer did not hear from the client again until he received a letter from another attorney, dated February 18, 2010, stating that the client was considering filing a malpractice action. The client alleged that he had not contemplated suing the lawyer until he consulted with a bankruptcy attorney in January 2010. The bankruptcy lawyer advised him to contact another attorney regarding how the appeal was handled. On March 8, 2010, the client filed a complaint against the lawyer for legal malpractice.

The attorney had a policy with the insurer from February 15, 2009 to February 15, 2010. On February 14, 2010, the attorney completed a claims made application (Application), requesting the same limits as in his previous policy. At the time the attorney completed the Application, he had not had contact with the client for approximately eight months. The lawyer was asked on the Application whether he was aware of any possible claims or to any errors or admissions that might reasonably be expected to be the basis of any claims. The attorney replied "no" to these questions.

Based on the Application, the insurer issued the policy. The insurer denied any obligation to provide coverage to the attorney, who then filed a complaint for declaratory relief. The trial court granted the lawyer's motion for summary judgment and denied the insurer's motion. The insurer appealed.

The insurer argued that the claim was first made at the time that the attorney and the client signed the "Appeal Resolution." Because the document was executed prior to the policy period, the insurer argued that it is not required to defend and/or indemnify for the claim. The insurer also argued that even if the claim first arose during the policy period, the attorney had a reasonable basis to believe that his failure to prosecute the client's appeal was a breach of a professional duty and could result in a claim against him. The insurer argued that this rendered the policy void *ab initio*.

According to the insurer, the "Appeal Resolution" was the initiation of the claim, and because the "Appeal Resolution" occurred prior to the policy's effective date, the insurer was not required to defend or indemnify the attorney. The uncontested affidavits from the lawyer and the client established, however, that at the time the "Appeal Resolution" was executed, there was no demand for money or services made against the attorney, nor any suit, arbitration proceeding, motion, complaint, grievance, or other allegation of wrongdoing. Rather, the affidavits established that the lawyer informed the client that he had not filed the appeal; that the attorney agreed to return the $6,000 the client had given him to file the appeal; and that at that time neither party contemplated any further action. The client indicated in his affidavit that he was not displeased with the lawyer's representation and did not intend to sue the attorney at the time that they executed the "Appeal Resolution."

The appellate court also noted that the client did not communicate any intention to file a claim against the attorney until he sent the attorney a letter, dated February 18, 2010. The complaint was not filed until March 8, 2010. The court thus concluded that because the policy period was from February 15, 2010 to February 10, 2011, the claim was made during the policy period.

The insurer next argued that the policy provided coverage only if the attorney had no reasonable basis to believe that he committed acts or omissions that could result in a claim against him. The insurer argued that the lawyer's "no" answer constituted a warranty, that the attorney breached that warranty, and the policy was thus void *ab initio*. The appellate court disagreed. In summary, the court concluded that the statements made by the lawyer on the Application were representations, not warranties. The appellate court held that the trial court properly declared that the insurer had a duty to defend and indemnify the attorney.

Significance of Opinion

This decision underscores the significance of disclosing not only all claims on a professional liability insurance application during the renewal process, but also all acts and/or omissions that might reasonably be expected to be the basis of a claim.

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