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Summary Judgment to Insurer Based on Breach of Notice and Cooperation Clauses

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Lawyers for the Profession® Alert

Leeds v. First Mercury Insurance Company, ___ F. Supp. ___, 2011 WL 2971228 (S.D. Fla.)

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Brief Summary

The U.S. District Court for the Southern District of Florida granted defendant insurers' motion for summary judgment based on: (1) plaintiff insured's failure to notify one of defendant insurers within 10 days of receiving notice of a former client's claim, as required under the subject policy's terms; and (2) the fact that the insured and plaintiff law firm failed to obtain express written authorization of their settlement of the claim.

Complete Summary
The issue before the court was whether certain of the actions of the insured (who was a lawyer) were covered by a professional liability insurance policy issued by the insurers. Beginning in 1999, the insured represented a first client in an action against the Republic of Cuba for her fraudulent marriage to a Cuban spy. The client was awarded final judgment in the amount of $7,175,000, which was later amended to include $20 million in punitive damages. The insured and the client ultimately recovered $190,000 that had been in the U.S. Department of the Treasury's possession.

The insured later represented a second client in another action against the Republic of Cuba and obtained a $67 million final judgment. In December 2006, they collected over $67 million in Cuban assets, and the second client's final judgment was satisfied with it. The first client, who presumably had a first-in-time claim on any proceeds recovered, saw none of the recovery because certain necessary domestication actions apparently were not taken, and her claims had no priority over the funds obtained. Upon learning that her judgment was not being satisfied from those proceeds, the first client e-mailed the insured and other lawyers on August 23, 2007, asking why her judgment was not satisfied with the proceeds of the subject $67 million. She did not then demand monetary satisfaction from the insured, but the insured nevertheless retained counsel in September 2007.

On January 26, 2008, one of the insurers issued to the insured and others a claims-made policy, which was effective from January 26, 2008 through January 26, 2009. The policy stated that coverage would be provided only if certain conditions were satisfied, including: (1) the claim occurred on or after the retroactive date [February 1, 2006]; and (2) the claim was reported within 10 days of receipt "by the Named Insured of a written notice of a claim or circumstances which could give rise to a claim." Another policy section stated that "[n]o insured shall, except at their own expense, make any payment, admit any liability, agree to any settlement of a claim, incur any expenses or assume any obligations *without [defendant insurers'] written consent*." (emphasis added).

On March 12, 2008, the first client retained counsel to represent her interests in a malpractice claim against the insured. Beginning in April 2008, the first client's new counsel and the insured's counsel began attempting to resolve any claim that the first client might have against the insured. On November 17, 2008, the first client's new counsel e-mailed the insured's counsel a copy of a draft complaint. The basis for the claim was the first client's inability to share in the collection of the Cuban funds. In her draft complaint, she sought $27 million.

The insured notified defendant insurers of that claim on December 2, 2008. The insurers then informed their representative that mediation had been scheduled. The insured informed the insurers' representative of the amount of the claim, but never told her of any prior settlement discussions or how much would be necessary to settle the claim. The insurers' representative authorized resolution of the matter at mediation, but never explicitly authorized either a settlement or an amount to be paid. The insured attended a January 7, 2009, mediation and settled the claim for $287,000. The insurers later denied coverage because: (1) the first client's claim did not meet the policy's definition of a "claim"; and (2) the claim was settled without the insurers' consent.

The insurers claimed that the insured's malpractice occurred prior to the policy's retroactive date; that the insured and the law firm breached their notice requirements; and that the insured violated the policy's provisions by settling the first client's claim without their express written consent. The court found that the insurers were entitled to summary judgment because plaintiffs had failed to: (1) notify defendants within 10 days of receiving notice of the first client's claim, and (2) obtain express written authorization of their settlement. The court noted that the policy was clear as to its notice requirements. There were two such requirements: (1) an immediate notice provision, and (2) a 10-day notice requirement. The court rejected plaintiffs' attempt to parse multiple definitions of "claim" given the undisputed evidence, including the retention of counsel and the settlement negotiations.

The court also concluded that the authorization that the insured claimed he received from the insurers' representative did not qualify as authorization under the policy. The insurers' representative did not provide a settlement ceiling, and was not informed of all the prior settlement discussions. As such, the court found that she could not have been informed of the first client's claims enough to give *carte blanche* to an insured to settle a claim that had been valued at $27 million. Indeed, the court found that plaintiffs' argument to the contrary defied logic, especially given the magnitude of the first client's claims against the insured. The court concluded that this common-sense realization based on the undisputed facts, when combined with the policy requirement for the insurers' written consent in settling claims, barred plaintiffs' recovery.

Significance of Opinion
This opinion underscores the importance of giving timely notice to the insurer of a claim or circumstances which may reasonably give rise to a claim, and the importance of obtaining consent before reaching any type of settlement.

For more information, please contact Terrence P. McAvoy or your regular Hinshaw attorney.