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Notice of Claim to Insurer by Claimants Is Insufficient, But Estoppel Precludes Summary Judgment

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Ashby v. Bar Plan Mut. Ins. Co., ___ N.E.2d ___, 2011 WL 2493067 (Ind. 2011)

Brief Summary

An insurer sought a declaration of no coverage for claims against its insured attorney, who had abandoned his law practice, was disbarred, and then failed to report known claims. The issue was the sufficiency of the notice of claims coming from the claimants. The Indiana Supreme Court stated that the policy was issued solely for the insured's benefit, "and its terms made it clear that coverage could be triggered only by its insured" notifying the insurer. Nevertheless, the Court held that summary judgment was inappropriate because there was an issue of fact as to estoppel because the insurer did not tell the claimants that the policy required the insured to provide the insurer with notice of demand within 20 days of the claim. The record did not negate the possibility that had the insurer disclosed its coverage defenses, the claimants might have been able to locate the insured and persuade him to give notice to the insurer.

Complete Summary

Plaintiff claimants retained an attorney to pursue claims on their behalf. The attorney filed a case on behalf of one of the claimant's, but that case was dismissed based on the attorney's failure to comply with court orders. He never filed a timely claim on the other claimant's behalf.

The attorney applied for professional liability coverage but did not disclose any potential claims. His application indicated that he had no "knowledge of any incident, circumstance, act, error or omission which may give rise to a [professional liability] claim." The insurer then issued its "claims made" policy.

The attorney was later suspended and eventually disbarred from the practice of law due to his abandonment of his law practice and his accompanying failure to complete work for clients, his failure to keep them informed or take reasonable steps to protect their interests, and his theft or conversion of legal fees paid to him. He then filed for bankruptcy. Neither claimant ever notified the attorney of their malpractice claims against him, and both contended that the attorney's

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whereabouts were unknown, resulting in their presenting their claims directly to the insurer.

The insurer acknowledged the claimants' letters, notified the claimants that it "is the professional liability carrier for [attorney]" that would "be investigating this matter," and advised the claimants of the "Claim No[s]." The claimants filed separate actions against the lawyer, which were then consolidated. The insurer intervened and asserted a cross-claim seeking declaratory relief establishing that it was not obligated to indemnify the lawyer because: (1) its unambiguous policy language established that as a condition precedent to coverage, the lawyer was required to provide written notification to the insurer within 20 days of any claim and he failed to do so; and (2) the attorney failed to comply with the policy's requirement that he assist and cooperate. The claimants disputed the insurer's arguments and emphasized that they both provided timely, written notice of a claim against the lawyer directly to the insurer and that the insurer was estopped from insisting upon strict, technical compliance with the policy provisions and had failed to act in good faith in its interactions with the claimants. The court of appeals reversed summary judgment in favor of the insurer, concluding that the purposes of the claim and notice provisions were fulfilled by the claimants providing actual notice to the insurer.

The Supreme Court of Indiana reversed, but found a question of fact regarding estoppel. The Court initially noted that the attorney was neither obligated by any statute or rule to purchase insurance coverage to protect his clients, nor compelled to obtain professional liability insurance coverage for his own protection but had elected to purchase the policy to obtain coverage to protect himself. The policy was solely for lawyer's protection against professional liability claims, and its terms made it clear that coverage could be triggered only by the insured notifying the insurer of the claim.

The Court held that the insurer established that there were no genuine issues of fact as to the attorney's failure to comply with the policy's condition precedent requiring his personal written notice of a claim, but that this was not dispositive because of the insurer's responses to the claimants when they notified the insurer. The insurer's claims representatives had sent written communications to the claimants implying the existence of coverage by providing conventional treatment of their claims by assigning a claim number, seeking further information from the claimants, and inviting further negotiations to work "to resolve your claim." The Court noted that conspicuously absent was any caution about the possibility of no coverage due to the absence of written notice from the insured attorney. The Court found issues of fact as to whether the claimants were misled to believe that the insurer provided professional liability coverage for the attorney as to their claims.

The Court noted that for the claimants to be entitled to summary judgment in their favor on the detrimental reliance issue, they had to establish that if the insurer's initial responses had disclosed their coverage defenses, they would have been able to locate the attorney and persuade him to provide written notification to the insurer within 20 days of his first learning of the claimants' professional liability claims against him. This question remained an issue for resolution at trial, thus precluding summary judgment.

Significance of Opinion

This is one of the few legal malpractice cases in which a court has held that notice from a claimant, as opposed to notice from the insured attorney or law firm, is insufficient to comply with the terms of the policy provisions.

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

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