

Other Decisions of Note

January 2007

Court Holds Retroactive Date Bars Coverage for Legal Malpractice Claim

In an unreported decision, the Appeals Court of Massachusetts has ruled that an insurer owed no duty to defend or indemnify under an errors and omissions policy for a legal malpractice claim because the attorney's negligent conduct occurred prior to the policy's retroactive date. *Aviles v. Westport Ins. Corp.*, 67 Mass. App. Ct. 1117, (Mass. App. Ct. Nov. 28, 2006). In so ruling, the court noted that, in making the coverage determination, the date when the legal malpractice action became legally actionable by the plaintiff is irrelevant, even if it fell within the policy period.

The errors and omissions policy contained an April 29, 1996 retroactive date. The plaintiff, a former client of the insured attorney who had received the attorney's rights under the policy pursuant to a prior settlement, argued that, even though the attorney's misconduct occurred prior to that date, the claim for legal malpractice did not become legally actionable until May 15, 1996. The court rejected the plaintiff's argument, reasoning that when the "claim first became legally actionable is irrelevant to the issue of whether the attorney's conduct triggered coverage" under the policy. Because the underlying conduct took place prior to the policy's retroactive date, the court concluded that the policy unambiguously precluded coverage.

Court Denies Insurer's Motion for Summary Judgment Regarding Late Notice

In an unpublished opinion, a Colorado federal district court refused to grant summary judgment in favor of an insurer on the issue of late notice under an EPL policy where the policyholder sent a letter with information about a notice of potential claim and the insurer never responded because it did not believe that the letter satisfied the notice obligations under the policy. *United Car Care, Inc. v. Travelers Cas. & Sur. Co. of Am.*, 2006 WL 3488005 (D. Colo. Dec. 1, 2006). Although the court noted that untimely notice could not be excused under a claims-made policy, it held that there were disputed issues of fact concerning whether the notice of potential claim letter provided sufficient notification to the carrier.

Service Provided by Ambulance Crew Constitutes Professional Service

The United States District Court for the District of South Carolina, applying South Carolina law, has held that an ambulance crew tasked with transporting an individual on a stretcher to an ambulance provides "professional services" as it is defined by the exclusion in a general liability policy. *Western World Ins. Co. v. Empire Fire & Marine Ins. Co.*, 2006 WL 3337427 (D.S.C. Nov. 16, 2006). The court first noted that the South Carolina Supreme Court has defined a professional act or service to be "one arising out of a vocation, calling, occupation, or employment involving specialized knowledge, labor or skill, and the labor or skill involved is predominantly

mental or intellectual, rather than physical or manual" and that the court must look "not to the title or character of the party performing the act, but to the act itself." The court explained that whether an act constitutes a "professional act" depends upon "the nature of the services provided. In concluding that an ambulance crew provides a professional service, the court relied on the fact that the crew includes an EMT, who must be licensed by the state and thus possesses "specialized knowledge and skill."