

Lack of Timely Notice, Anticipated Claims Exclusion Bar Coverage

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A Maryland federal court has held that no coverage exists under two professional liability policies because the policyholder failed to provide timely notice to the insurer and because the claim was barred by an exclusion precluding coverage for circumstances that the policyholder could have reasonably foreseen might be the basis of a claim. *Maynard v. Westport Ins. Co.*, 208 F. Supp. 2d 568 (D. Md. 2002).

Plaintiffs retained the attorney to process a Chapter 13 bankruptcy petition prior to foreclosure on their home. The attorney failed to timely file for Chapter 13, and the plaintiffs lost their home. The plaintiffs sued the attorney for malpractice and secured a default judgment against her.

The attorney was insured under two successive "claims made and reported" policies, the first from January 13, 1998 to January 13, 1999 ("Policy One") and the second from January 13, 1999 to January 13, 2000 ("Policy Two"). The insurer received notice of plaintiffs' legal malpractice claim against the attorney on April 6, 1999 when it received a copy of the plaintiffs' complaint filed with the District of Columbia Bar Counsel in April 1998. The insurer sent a letter to the attorney stating that it would likely deny coverage based on an exclusion ("Exclusion B") that precluded coverage for "any claim based upon, arising out of, attributable to, or directly or indirectly resulting from...[a]ny act, error, omission, circumstance...occurring prior to the effective date of this POLICY if an INSURED at the effective date knew or could have reasonably foreseen that such act, error, omission, circumstance...might be the basis of a CLAIM."

In their subsequent declaratory judgment action against the insurer, plaintiffs argued that the malpractice claim was covered under Policy One because plaintiffs initiated the D.C. Bar Counsel complaint within that policy period. The plaintiffs also asserted that although the insurer did not receive notice of the Bar Counsel complaint until April 1999, the attorney's belated notice did not result in a forfeiture of coverage because the insurer was not prejudiced by the delay.

The court rejected plaintiffs' arguments and found that the delay in notice precluded coverage under Policy One. According to the court, the language of the notice provision "clearly and unambiguously" mandates that a claim must be both made and reported to the insurer to fall within the coverage of the policy. Under such "claims made and reported" policies, the court held, the insurer does not need to demonstrate actual prejudice in order to deny coverage based on untimely notice.

The court also found that coverage was precluded under the language of Exclusion B in Policy Two because "an objectively reasonable attorney knew or should have known that the Plaintiffs had a potential legal malpractice claim based upon their April 1998 letter to the Bar Counsel." The filing of the complaint should have therefore put the insured on notice prior to the effective date of Policy Two.

The court also rejected the plaintiffs' argument that the insurer waived its right to rely upon Exclusion B because it did not expressly deny coverage of the claim against the attorney. The court noted that the insurer sent a letter to the attorney stating that it would likely deny coverage based on Exclusion B one month after receiving notice of the claim. The letter also instructed the attorney that she should take all steps to avoid a default. Additionally, the court noted that the insurer sent three additional letters to the attorney informing her that the insurer would rely on Exclusion B to deny coverage.