

Insured Had Reasonable Basis to Foresee Legal Malpractice Action

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A federal district court has granted summary judgment in favor of an insurer, holding that, under Pennsylvania law, an exclusion in a lawyer's professional liability policy precluded coverage where the lawyer could have reasonably foreseen prior to the effective date of the policy that a prior act or omission could form the basis of a future claim. *Washko v. Westport Ins. Corp.*, No. 01-CV-4026, 2002 U.S. Dist. LEXIS 13822 (E.D. Pa. July 24, 2002).

Westport issued Joseph Washko a professional liability insurance policy that provided coverage for claims made and reported from May 1, 1999 to May 1, 2000. The policy contained an exclusion for "any act, error, omission, circumstance or personal injury occurring prior to the effective date of this policy if any insured at the effective date knew or could have reasonably foreseen that such act, error, omission, circumstance or personal injury might be the basis of a claim."

From 1997 to 1998, Washko had represented a client in state criminal proceedings, culminating in the client's conviction. Following the conviction, the client fired Washko, obtained new counsel, and filed a motion for post-verdict relief, alleging ineffective assistance of counsel, prosecutorial misconduct, and trial court error. In connection with this motion, in an October 1998 hearing, Washko gave testimony on his representation of the client, and was aware of the allegations of ineffective assistance. Following Washko's testimony, the client's new counsel allegedly informed Washko that he was "out of the woods." In November of 1998, the judge issued an opinion granting the client a new trial, basing his decision solely on the grounds of ineffective assistance of counsel. Prior to Westport's issuance of the professional liability policy, Washko learned that the judge had granted the motion for post-conviction relief, but was not aware of the grounds for the judge's decision. In December, 1999, the client filed a legal malpractice suit against Washko, and Washko sought and was denied coverage and defense under the policy. Coverage litigation ensued.

The court ruled in favor of the insurer. In so doing, the court rejected Washko's argument that the prior knowledge exclusion did not apply since he had not been aware that a finding of ineffective assistance was the basis for the court's decision granting his former client a new trial. It also rejected the lawyer's reliance on the statement by the client's new counsel that he was "out of the woods." The court held that the determinative factor was not the attorney's actual belief, but whether a reasonable attorney in possession of the facts known to Washko would have had a basis to believe that a future claim might arise. Prior to the effective date of the

policy, Washko had known that his former client had fired him and was arguing ineffective assistance of counsel; Washko had given testimony concerning his representation of the former client; and Washko had learned that the court had granted the former client a new trial. The court concluded that a reasonable attorney in possession of these facts would have had reason to believe that a future claim of legal malpractice might arise out of the representation of the former client. The court therefore granted summary judgment in favor of the insurer.