

# Insurer Has Duty to Defend Attorney in Suit Alleging Negligent Failure to Obtain Bankruptcy Discharge of Attorney's Pre-Petition Fees

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An Illinois appellate court has held that an insurer had a duty to defend an attorney, insured under a legal malpractice policy, in a lawsuit alleging that the attorney negligently failed to obtain discharge of his pre-petition fees in connection with the representation of a client in a bankruptcy proceeding. *Cont'l. Cas. Co. v. Law Offices of Melvin James Kaplan*, 2003 WL 22861281 (Ill. App. Ct. Dec. 3, 2003).

The insurer issued a professional liability policy to an attorney that provided coverage for all sums the attorney "shall become legally obligated to pay as damages and claim expenses because of a claim that is first made...against the [insured] and reported in writing to the [insurer] during the policy period by reason of an act or omission in the performance of legal services...." The policy defined legal services as "those services performed by an insured for others as a lawyer." The policy excluded from the definition of damages "legal fees, costs and expenses paid or incurred or charged by...[the insured]."

A former client of the attorney filed a class action complaint based on the attorney's representation of the client in a chapter 7 bankruptcy proceeding. The client alleged that prior to the filing of a bankruptcy petition on the client's behalf, the attorney required the client to sign a retainer agreement for the payment of fees in installments and that a portion of the fees collected by the attorney was for services rendered prior to the bankruptcy submission, which the client alleged violated the Bankruptcy Code. The client's three count complaint alleged: (1) that the attorney violated the automatic stay provisions of the Bankruptcy Code by collecting fees after the filing of the bankruptcy petition for services rendered pre-petition, (2) that the attorney was negligent in failing to obtain a discharge of his pre-petition fees, and (3) that the client was entitled to an award of actual and punitive damages based on the attorney's violation of the Bankruptcy Code's statutory injunction on the collection of pre-petition debt after discharge.

The appellate court initially noted that the policy in question was a "Lawyer's Professional Liability" policy and, therefore, the risks undertaken by the insurer included "those inherent in the practice of law." The court concluded that the first and third counts of the client's complaint were not covered under the policy because

they arose out of the attorney's actions as a creditor collecting on a debt, and not out of any act or omission of the attorney in rendering legal services. However, the court held that the policy provided coverage for the second count, alleging that the attorney had failed to obtain a pre-petition discharge of the client's fee obligation to the attorney. The court reasoned that simply because the amount of damages under this claim would be analyzed in terms of the fees collected by the attorney pre-petition did not mean that the injury was in fact caused by the fees charged and therefore excluded from coverage. Instead, the court held that the damage was caused by the attorney's alleged negligence in rendering legal services and was potentially within the coverage afforded by the policy.

For more information, please contact us at 202.719.7130.