

# Law Firm Had No Reasonable Basis to Believe that an Associate Had Breached a Professional Duty Prior to Effective Date of Policy

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The United States District Court for the Southern District of New York has ruled that a professional liability insurer must defend and indemnify a law firm for legal malpractice claims despite the insurer's claim that the law firm was aware of its associate's malpractice prior to the inception of the policy period. *Fuchsberg & Fuchsberg v. Chicago Ins. Co.*, No. 00CIV3118, 2001 U.S. Dist. LEXIS 5738 (S.D.N.Y. May 8, 2001).

One of the law firm's associates acted negligently in the handling of a client's medical malpractice lawsuit by failing to prosecute the action. The associate represented the client from 1984 through 1994. The law firm purchased professional liability insurance from May 1995 to May 2000 through the New York State Bar Association ("NYSBA") from the defendant insurer. Previously, from 1989 to 1995, the insured had secured insurance through the NYSBA from a different carrier.

After the medical malpractice action was dismissed for failure to prosecute, the client sued the associate and the law firm for legal malpractice, and the law firm sought coverage. The insurer disclaimed on the grounds that the policy provided coverage for "malpractice prior to the effective date of the policy only if 'the Named Insured, any partner, shareholder, employee . . . had no reasonable basis to believe that the Insured had breached a professional duty or to foresee that [sic] Claim would be made against the Insured.'"

In a previous case, another law firm sought coverage from the same insurer under a policy obtained through the NYSBA for legal malpractice that occurred before the date of the insurer's policy. The insurer, as in this case, denied coverage on the grounds that the law firm had a reasonable basis to believe that an associate had breached a professional duty. The appellate court, however, ruled that because the associate had concealed the malpractice from the law firm, the associate's knowledge could not be imputed to the law firm.

In this case, the insured maintained that this prior decision estopped the insurer from arguing that the associate's knowledge of her malpractice could be imputed to the firm. The court agreed and held that the insurer was collaterally estopped from claiming that the knowledge of the negligent associate should be imputed to the firm and to other attorneys at the firm. The court found that because the issue regarding the

imputation of knowledge had actually been litigated and necessarily decided adversely to the insurer in the prior case and because the insurer had a full and fair opportunity to litigate that issue in the prior case, the insurer was collaterally estopped from making the argument in this case.

Moreover, the court held that the law firm had no actual or constructive knowledge of the associate's malpractice prior to the effective date of the policy. As a preliminary matter, the court determined that the effective date of the policy was May 15, 1995, the date the law firm first obtained coverage from the insurer, and not May 15, 1989, the date the law firm first obtained coverage from the NYSBA. The insurer claimed that in 1993, the law firm became aware that the associate had misrepresented the status of another case and that the law firm failed to conduct an investigation of the associate's cases. The court rejected the insurer's argument and found that it had failed to prove that prior to May 15, 1995 the law firm had a reasonable basis to believe that its associate had breached a professional duty or to foresee that a claim would be made against the law firm.