

# Prior Knowledge of Potential Malpractice Claim Precludes Coverage Under LPL Policy

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The United States District Court for the District of Columbia, applying District of Columbia law, has held that a prior knowledge provision in a lawyers professional liability policy barred coverage where the insured attorney, prior to the insurer issuing its first policy to the insured law firm, had reason to believe that a malpractice claim might be filed due to his failure to file a timely answer, which resulted in a default judgment against his client. *Ross v. Cont'l Cas. Co.*, 2009 WL 4351478 (D.D.C. Dec. 2, 2009). Wiley Rein LLP represented the insurer in the case.

The insured attorney, a member of the insured law firm, represented a restaurant equipment supply company in a civil action brought against the company. After the insured attorney failed to file a timely answer to the complaint, the court entered default judgment for more than \$800,000 against the restaurant equipment supply company. The default judgment was affirmed on appeal.

While the appeal of that default judgment was pending, the insurer issued a lawyers professional liability policy to the insured law firm. The policy provided, in part, that the insurer would:

Pay on behalf of the Insured all sums in excess of the deductible that the Insured shall become and claim expenses because of a claim that is both first made against the Insured and during the policy period . . . , provided that . . . prior to . . . the inception date of the first policy issued by the Company . . . no Insured had a basis to believe that any such act or omission, or related act or omission, might reasonably be expected to be the basis of a claim.

The insured first provided notice of a malpractice claim by the trustee of the now-bankrupt restaurant supply equipment company during the policy's extended reporting period and more than four years after the entry of default judgment. The insurer denied coverage for the insured's claim on the basis that the insured had reason to know, prior to the inception date of the first policy issued to the insured firm, that a malpractice claim might be brought against it as a result of the default judgment.

In the resulting coverage action between the trustee and the insurer, the court granted summary judgment to the insurer, holding that the insuring agreement unambiguously barred coverage because of the insured's prior knowledge of the circumstances surrounding the default judgment. In doing so, the court rejected the trustee's contention that "the use of a subjective word 'believe' and an objective word 'reasonably' in the same provision" was ambiguous, concluding that the "policy provision at issue . . . unambiguously requires an objective inquiry into what might have been reasonably expected to form a claim based on the knowledge [the insured] possessed when the policy took effect." The court rejected the trustee's argument that the insured's belief that the appeal of the default would be successful was sufficient to avoid the policy's unambiguous terms, stating that the prior knowledge provision did "not require certainty that a malpractice claim will be filed."

The court also held that D.C. Code § 31-4314 did not apply to the insurer's decision to deny coverage. D.C. Code § 31-4314 provides that an insurer may not deny coverage under a policy based on an insured's false statement on a policy application unless "such false statement was made with intent to deceive or unless it materially affected the acceptance of the risk or the hazard assumed" by the insurer. The court ruled that the insurer "did not ground its denial of the insured's claim on any assertion that the insured made any false statement in its application. [The insurer] denied the claim based on the assertion that when the policy went into effect, [the insured] knew that his representation of [the restaurant equipment supply company] might reasonably be expected to be the basis of a malpractice claim." Thus, the court held that D.C. Code § 31-4314 did not apply here as the insurer "did not deny coverage by claiming that the policy was void or not in effect."