

No "Damages" or "Legal Services" Alleged in Underlying Fee Dispute Lawsuit Against Lawyer

May 2010

The Appellate Court of Illinois has determined that a lawyers professional liability policy did not provide coverage for an underlying fee dispute between an attorney and his medical malpractice client because her claim did not involve allegations of "damages" or arise out of "legal services" as those terms were defined by the policy. *Continental Cas. Co. v. Donald T. Bertucci, Ltd.*, 2010 WL 1033448 (Ill. App. Ct. Mar. 19, 2010). Wiley Rein LLP represented the insurer.

The former client alleged that her attorney retained too much of her contingent settlement for his fee. The client sued the attorney in state court, bringing claims for breach of contract, unjust enrichment, conversion, breach of fiduciary duty, fraud and violation of an Illinois statute that limits contingent fees in medical malpractice actions. She also instituted a disciplinary proceeding against the attorney. The client had no complaints with the attorney's handling of her claim or with the settlement figure he secured on her behalf; her grievance was limited to the disputed fees. The insurer denied coverage for the underlying lawsuit and disciplinary matter and instituted the coverage action.

The appellate court affirmed the lower court holding that there was no coverage for the underlying lawsuit because it failed to allege covered "damages," defined by the applicable policy to exclude "legal fees" and "injuries that are a consequence [thereof]." The insured attempted to characterize the client's claims as more than a dispute over fees, alleging that, among other things, the lawyer erred in his representation of the client by failing to comply with the Illinois statutory requirement that he obtain court approval for an enhanced fee. The court disagreed with the characterization, finding that, despite the theories of relief asserted, the client's lawsuit sought simply: "(1) restitution for legal fees which [the lawyer] improperly charged against her settlement proceeds from the medical malpractice case and (2) consequential expenses for his impropriety, including statutory interest and her new attorneys fees, as well as punitive damages." Accordingly, the court determined that the matter was simply a "fee dispute" that did not allege covered "damages" under a "reasonable construction" of the policy.

The appellate court likewise determined that the underlying action and the disciplinary proceeding did not implicate the rendering of any "legal services," defined by the policy as "those services performed by an Insured for others as a lawyer, arbitrator, title agent, or notary public." In this regard, the Appellate Court held that "retention of money [here, the disputed portion of the client's medical malpractice settlement] cannot be construed as any type of service for another person and is a business practice independent of the lawyer-client relationship." Any other conclusion, according to the court, "would expand the insurance coverage beyond what was reasonably contemplated by the parties at the time of contracting."

Finally, the appellate court affirmed the lower court's dismissal of the insured's argument that the dishonesty exclusion provided him with a stand-alone grant of defense coverage, even if the claim was not otherwise covered by the insuring agreement. The applicable dishonesty exclusion barred coverage for "dishonest, fraudulent, criminal or malicious acts or omissions," but stated that the carrier "would provide a defense of such claim unless or until the dishonest, fraudulent, criminal or malicious act has been determined by" trial verdict, or court or regulatory ruling. According to the court, "an exception to an exclusion does not create coverage or provide an additional basis for coverage, it only preserves coverage granted in the insuring agreement."