

"Might" Does Not Render a Prior Knowledge Exclusion Ambiguous

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The United States Court of Appeals for the Ninth Circuit has held that the term "might" in a prior knowledge exclusion in a lawyer's professional liability policy does not make the exclusion ambiguous and that any reasonable lawyer whose errors led to the dismissal of a client's lawsuit with prejudice and sanctions by the court would recognize that his actions "might" be the basis of a claim. *Westport Ins. Corp. v. Markham Group, Inc.*, 2010 WL 4643018 (9th Cir. Nov. 17, 2010).

The policy excluded coverage for claims arising out of "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." Eleven months prior to the policy's inception, the insured committed errors that caused a wrongful death suit to be dismissed with prejudice, and the trial court awarded Rule 11 sanctions against the insured. The insured appealed the decision, but, during the policy period, the appellate court affirmed the lower court's decision. Thereafter, the insured notified the insurer of potential malpractice claim.

The insurer filed a declaratory judgment action. The trial court granted the insured's motion for summary judgment, finding that use of the term "might" rendered the prior knowledge exclusion ambiguous and that the exclusion reasonably could be interpreted to apply only when there were no longer any meaningful avenues open for curing the adverse ruling. The Ninth Circuit reversed the trial court's decision, finding that the prior knowledge exclusion was not ambiguous and that any reasonable insured would have recognized that his errors, which led to a client's case being dismissed with prejudice and court sanctions for filing a baseless claim without proper investigation, "might" result in a claim notwithstanding the possibility of a successful appeal. Furthermore, the court rejected the insured's argument that the claim was covered under a prior policy notwithstanding the lack of notice because, under Washington law, the notice-prejudice rule does not apply to claims-made policies.