

Burden on Insurer to Prove Insured's Prior Knowledge of Potential Claim

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The United States District Court for the Western District of Pennsylvania, applying Pennsylvania law, has held that an insurer has the burden of proof on whether at the inception of the policy an insured has a reasonable basis to believe that an act or omission might result in a professional liability claim. *Foster v. Westchester Fire Ins. Co.*, 2012 WL 2402895 (W.D. Pa. June 26, 2012). The court's denial of the insurer's motion for summary judgment was addressed in a previous article available here. *Foster v. Westchester Fire Ins. Co.*, 2011 WL 4382971 (W.D. Pa. Sept. 20, 2011).

The insurer denied coverage for a claim against a lawyer, the policyholder, because the insurer contended that the lawyer knew of the potential claim before the inception of the policy. Before the inception of the policy, the lawyer advised a client on the propriety of the creation of a trust that was later declared invalid. The client filed a malpractice suit against the lawyer after the inception of the policy. The policy provided as part of the insuring agreement that coverage was only available provided that "at the inception of this policy the Insured had no reasonable basis to believe that any Insured had breached a professional duty and no reasonable basis to believe an act, error, omission or Personal Injury might be expected to result in such Claim or Suit." The court previously held that the prior knowledge condition was exclusionary in nature so that the insurer had the burden of proof on the lawyer's prior knowledge and that genuine issues of material fact existed as to the lawyer's knowledge that he had breached a professional duty. The insurer filed a motion for reconsideration as to the court's determination that it carried the burden of proof on the insured's prior knowledge.

The court declined to reconsider its holding that the insurer must meet the burden of proof as to whether the lawyer had prior knowledge of acts or omissions that might be expected to result in a claim or suit. Although the language appeared in the policy's insuring agreement, the court held that the placement of exclusionary language within the policy was not determinative of whether the insured or insurer had the burden of proof. The court held that reconsideration was inappropriate because no clear precedent from the Pennsylvania Supreme Court or the United States Court of Appeals for the Third Circuit addressed the issue of burden of proof in this context. The court therefore reasoned that the Pennsylvania Supreme Court would place the burden of proof on the insurer because of Pennsylvania's "treat[ment of] of the insured with great liberality." In addition, the court declined to "second guess" its prior holding that questions of fact precluded summary judgment regarding the lawyer's knowledge of his actions and the standard of care in counseling the client

on the propriety of the trust.