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NEWSLETTER

Lawyer's Agreement to Return Retainer Not a Claim

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An Ohio appellate court has held that an agreement between an attorney and client memorializing the return of a retainer after the lawyer failed to timely file an appeal was not a "claim" and that the policy was not subject to rescission because the lawyer did not make a warranty on the application. *Goodman v. Medmarc Ins.*, 2012 WL 3861984 (Ohio Ct. App. Sept. 6, 2012).

An insured lawyer sought coverage under a claims-made policy issued for the policy period from February 15, 2010 to February 15, 2011. On February 14, 2010, the lawyer completed an application in which he answered "no" in response to the question: "after inquiry of all lawyers and employees of the law firm . . . is any such person aware of . . . an act or omission that might reasonably be expected to be the basis of a claim." The lawyer had previously been retained by a client to appeal an adverse ruling from the Merit Systems Protection Board, but the lawyer did not timely file the appeal. The appellate court refused to reinstate the appeal. The lawyer then informed the client that the appeal has been dismissed and offered to refund the retainer. The lawyer and client executed a document entitled "Appeal Resolution" on June 16, 2009 for the return of the retainer. The lawyer had no further contact with the client until February 18, 2010, when new counsel for the client advised that the client was considering filing a legal malpractice action against the insured, which it did in March 2010.

The court held that the client did not make a "claim" against the lawyer until February 18, 2010, after the inception of the policy. The policy defined "claim," in relevant part, as "a demand for money or services made against any Insured." The court held that the "Appeal Resolution" executed on June 16, 2009 was not a demand for money or services because the agreement only involved the return of the $6,000 retainer and the client did not indicate at that time any displeasure with the lawyer's representation. The court held that the client did not first make a claim until February 18, 2010 when the client communicated the intention to file a legal malpractice action against the lawyer.

The court also held that the insurer was not entitled to rescind the policy based on the negative response to the application question concerning whether the lawyer was aware of an act or omission that might reasonably be expected to be the basis of a claim. The court held that the insurer could only rescind the policy and void the policy *ab initio* if the insured made a warranty, for which Ohio law requires that the representation appear in or be attached to the policy and that the policy must warn that any

misrepresentation will void the policy from inception. Although the application was deemed to be part of the policy, the court reasoned that the potential misrepresentation was not a warranty because the policy "fails to plainly warn that a misrepresentation about potential claims renders the policy void ab initio." The court therefore held that the insurer was not entitled to void the policy *ab initio* and was obligated to defend the lawyer against the malpractice action.