

Prior Knowledge Condition Not Met Where Attorney Had Pre-Inception Knowledge of Disciplinary Complaint Asserting Failure to File Suit in a Timely Manner

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Applying Pennsylvania law, the United States District Court for the Eastern District of Pennsylvania has held that the prior knowledge provision in a professional liability policy was not met where the insured attorney knew, before the policy's inception, that a disciplinary action had been filed against him based on his alleged failure to file a civil rights lawsuit prior to the expiration of the applicable statute of limitations. *Fishman v. The Hartford*, 2013 WL 5429272 (E.D. Pa. Sept. 27, 2013).

The underlying action arose from the attorney's alleged negligence in advising an inmate who sustained serious injuries during a beating by a corrections officer. Following the beating, the inmate began communicating with the attorney regarding a possible civil rights action. After initially indicating his interest in taking on the representation, the attorney allegedly failed to respond to the inmate's written requests until December 22, 2008—after the statute of limitations had run. On May 5, 2009, the attorney received notice that the inmate had filed a disciplinary complaint against him with the state's governing ethics body. Although the complaint was ultimately dismissed, the inmate filed suit against the attorney and his firm on November 24, 2010, alleging negligence based on the attorney's failure to file a civil rights claim in a timely manner and failure to pursue other tort claims against the corrections officer. The firm's professional liability insurer denied coverage based on the policy's prior knowledge provision, which made it a condition precedent to coverage that, as of August 25, 2010—the effective date of the policy—"no 'insured' knew or could have foreseen that [the act, error, omission or 'personal injury' giving rise to the claim] could result in a 'claim.'"

"The insurer asserted that the attorney had notice of the disciplinary complaint as early as May 5, 2009, meaning that he "could have foreseen" that a malpractice suit would follow.

In the ensuing coverage litigation, the district court granted the insurer's motion for judgment on the pleadings. The court observed that the Third Circuit uses a mixed, subjective-objective standard for analyzing prior knowledge provisions, requiring an assessment of: 1. what facts were subjectively known to the insured; and 2. whether a reasonable lawyer in possession of such facts would have a basis to believe that the lawyer breached a professional duty. Applying this test, the court held that a reasonable attorney with pre-inception

knowledge of the facts known to this insured—*i.e.*, that the statute of limitations on the inmate's civil rights claims had run and that the inmate had initiated a disciplinary proceeding alleging that the attorney was responsible for the missed deadline—could have foreseen that a claim might be asserted. The court rejected the insureds' argument that they could not have anticipated certain allegations in the malpractice suit that the inmate did not raise in the disciplinary complaint, noting that the prior knowledge provision does not require an insured to foresee the “precise contours” of a claim.

The court also rejected the insureds' two public policy arguments. First, the court interpreted Pennsylvania case law as establishing that the state's notice-prejudice rule does not apply to prior knowledge provisions in claims-made policies. Second, the court declined to credit the insureds' assertion that the omission of the word “reasonably” from the prior knowledge provision rendered coverage illusory. The court observed that the Third Circuit prior knowledge test requires the use of an objective standard, even where the subject policy does not expressly reference “reasonableness.”