

ALERT

Coverage Barred by Insureds' Failure to Provide Timely Notice of Circumstances and Breach of Consent Provision

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The United States District Court for the Southern District of Florida, applying Florida law, has held that there is no coverage under a lawyers professional liability policy where the insureds failed to give the insurer timely notice of circumstances that could give rise to a claim and, alternatively, where the insureds failed to obtain express written authorization for their settlement from the insurer. *Leeds v. First Mercury Ins. Co.*, 2011 WL 2971228 (S.D. Fla. July 20, 2011).

The insurers issued a claims made lawyers professional liability policy to attorneys for the period January 2008 through January 2009. In April 2008, counsel for the attorneys engaged in settlement negotiations with counsel for a former client regarding a potential malpractice claim by the client against the attorneys stemming from the attorneys' alleged failure to record the client's money judgment against the Republic of Cuba. The negotiations failed and, from August 2008 through October 2008, the parties periodically discussed the possibility of a mediation. The attorneys did not notify the insurer of these events until shortly after the client provided the attorneys with a copy of a draft complaint in November 2008. Upon notification, the insurer authorized mediation but did not discuss settlement with the attorneys. The parties then settled the claim for \$287,000 at the mediation. Thereafter, the insurer denied coverage on a number of grounds, including that (1) there was no "claim" under the policy, and (2) the claim had been settled without the insurer's consent. The attorneys filed suit against the insurer, and both parties moved for summary judgment.

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The court granted summary judgment in favor of the insurer on two discrete bases. First, the court held that the attorneys had failed to provide the insurer with timely notice of circumstances that could give rise to a claim. The policy required as a condition of coverage that the claim be reported within ten days of receipt " by the Named Insured of a written notice of a claim or circumstances which could give rise to a claim." The court held that the attorneys had clearly had notice of circumstances which could give rise to a claim, if not the claim itself, as early as the settlement negotiations in April 2008, over six months before the attorneys notified the insurer. Such delay, the court continued, was unreasonable as a matter of law. The court also held that the insurer had suffered prejudice, despite the fact that the attorneys had settled the potential \$27 million claim for only \$287,000, because the delay prevented the insurer from investigating the negligence claims to its satisfaction and from participating meaningfully in defense or settlement.

Second, the court held that the attorneys had failed to obtain express written authorization of their settlement as required by the policy. The policy provided that "[n]o insured shall, except at their own expense, make any payment, admit any liability, agree to any settlement of a claim[,] incur any expenses or assume any obligations without [the insurer's] written consent." The court noted that, although the insurer authorized the mediation, the insurer was not informed of any prior settlement discussions and did not in any way discuss or authorize settlement. The court thus held the insurer was entitled to summary judgment based on the attorneys' breach of the policy's consent provision.