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ALERT

No Coverage for Claim First Made Prior to Inception of Claims-Made Policy

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The United States District Court for the District of New Hampshire, applying New Hampshire law, has held that no coverage was available for a legal malpractice lawsuit because the claim was first made before the inception of the claims-made policy. *Clauson & Atwood v. Professionals Direct Ins. Co.*, No. 12-cv-199 (D.N.H. May 13, 2013). Wiley Rein represented the insurer.

The insured, a law firm, represented a client in a trespass action, which was dismissed because the suit was filed after the expiration of the statute of limitations. During the pendency of the appeal of the adverse trial court ruling, the client's malpractice lawyer sent a letter to the firm stating that the client retained the lawyer to represent the client in a potential malpractice against the firm, requesting that the firm provide the letter to its malpractice carrier, and demanding that the firm enter into a tolling agreement. The firm executed the tolling agreement but did not provide notice of the letter to its insurer during the policy period of its legal malpractice policy (the "10-11 policy") then in effect.

The same insurer then issued a subsequent claims-made and reported policy to the firm for the policy period of September 29, 2011 to September 29, 2012 (the "11-12 policy"). In February 2012, the client filed a legal malpractice action against the firm. The firm tendered the lawsuit to the insurer under the 11-12 policy, and the insurer denied coverage because the claim was first made before the inception of the 11-12 policy. Coverage litigation followed.

The court held that no coverage was available for the legal malpractice action because it was first made before the inception of the 11-12 policy. The 11-12 policy defined "claim" as "when you first

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receive oral or written information or have knowledge of specific circumstances involving a particular person or entity which could reasonably be expected to result in a demand or suit for money or services." The 11-12 policy also provided that a claim is first made "when you first receive information or have knowledge of specific circumstances involving a particular person or entity which could reasonably be expected to result in a claim." The court reasoned that it was "inescapable" that the firm's representation of the client "could reasonably be expected to result in a demand or suit" in February 2011—seven months before the inception of the 11-12 policy. At that time, the firm had received a letter from the client's legal malpractice attorney threatening a potential legal malpractice action and demanding that the firm provide the letter to its insurer.

The court also rejected the insured's four contentions that the claim was first made during the 11-12 policy. First, the court held that the firm's subjective beliefs concerning the merits of the potential legal malpractice action were irrelevant to the determination of when a claim was made. Second, the firm's characterization of the February 2011 letter as a mere request for an extension of time was "wishful thinking" because the request for a tolling agreement was intended to allow the firm to focus on appealing the adverse trial court ruling in the client's case. Third, the court distinguished the holding in *Shaheen, Cappiello, Stein & Gordon, P. A. v. Home Ins. Co.*, 143 N.H. 35 (1998), because, in February 2011, the client was not expressing continued confidence in the firm's handling of his case and the trial court had already ruled that the statute of limitations barred the client's suit. Fourth, the court determined that the insurer was not required to prove prejudice to deny coverage.