

ALERT

New York Trial Court Enforces Late Notice Provision

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A New York trial court has held that a law firm breached the policy's notice requirements when it failed to give notice of an error that gave rise to a malpractice suit until after it lost a motion regarding the effect of the error. *Prop. & Cas. Ins. Co. of Hartford v. Levitsky*, 2013 WL 3184625 (N.Y. Sup. Ct. Jan. 25, 2013).

The policyholder law firm represented a plaintiff injured during construction of a mall. By answer filed five days before the statute of limitations expired, the defendant denied ownership of the mall. At a deposition over a year later, a witness testified that the defendant did not own the mall, but provided more information about the relationship between the owner and the defendant. Shortly thereafter, the defendant moved to dismiss. The law firm opposed the motion and cross-moved to join the true owner as a defendant. The trial court granted the motion to dismiss and denied the cross-motion. The policyholder law firm then advised its client to obtain new counsel, and the new counsel advised the policyholder that its former client was considering a malpractice suit. The policyholder notified the carrier of the potential claim shortly thereafter.

The policy specified that the insured "must see to it that we are notified immediately, but in no event later than sixty (60) calendar days after the insured becomes aware of any circumstance which may give rise to a claim." The carrier agreed to defend the eventual malpractice suit, but reserved the right to deny coverage based on late notice. The carrier then sought declaratory relief.

The trial court held that the policyholder failed to comply with the unambiguous notice provisions because the policyholder became aware of circumstances which "may" give rise to a claim either when

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the defendant denied ownership of the mall or a few days later when the statute of limitations expired. The policy required the law firm to notify the carrier “when a reasonable possibility of a claim under the policy arose, even if such a claim remained uncertain.” The court further held that later-acquired evidence which might have supported a reasonable good faith belief that no malpractice claim could be maintained—the testimony about the relationship between the defendant and the owner—could not cure the failure to give notice earlier. The court accordingly declared that the carrier had no duty to defend against or indemnify with respect to the malpractice suit.