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ELP on the Way: Professional Liability Coverage for In-House Counsel

By Diana Shafter Gliedman

Attorneys understand that every job and client brings with it the potential for great reward . . . and the possibility of a lawsuit. As such, law firms and solo practitioners purchase professional liability insurance coverage, also known as errors and omissions or legal malpractice insurance, to protect themselves from claims of negligence or malpractice. But lawyers working in private practice are not the only legal practitioners who need to be wary of legal malpractice claims. The past 10 to 15 years have seen a sharp increase in the number of lawsuits brought against in-house counsel by creditors, customers, shareholders, trustees, government regulators, and even their own employers. And as in-house lawyers face increased scrutiny, in-house legal departments must scrutinize their insurance programs to ensure that in-house legal staff is adequately protected.

While traditional E&O policies do not cover claims against in-house counsel, professional liability insurance specifically designed for in-house counsel is becoming increasingly common. These policies, generally referred to as employed lawyers profes-

sional (or ELP) liability policies, can provide coverage for a company's entire legal team, including paralegals, clerks and patent administrators. ELP policies typically cover claims for legal malpractice arising out of legal work that an employed lawyer performs for her company or organization. These include claims brought by third parties such as creditors, regulators or shareholders, as well as "internal" claims brought by other employees or executives. ELP policies may also provide coverage for pro bono services, disbarment and professional disciplinary proceedings, and other claims not covered by D&O policies.

Like all professional liability policies, however, ELP policies are rife with exclusions, conditions and ambiguous language that insurance companies may rely upon to deny coverage. Although there is almost no existing case law specifically interpreting the scope, reach and intent of ELP coverage, an examination of existing cases interpreting the scope and reach of typical E&O policies sheds light on likely future battles between covered in-house counsel and their ELP insurance companies.

Diana Shafter Gliedman is a shareholder in Anderson Kill's New York office. Ms. Gliedman represents policyholders in actions ranging from small insurance coverage disputes to multi-party, multi-issue insurance coverage litigations. Ms. Gliedman often counsels professional firms and organizations seeking to analyze potential sources of insurance coverage and maximize insurance recovery when faced with liabilities arising from professional practice. She is chair of the firm's professional liability group and co-chair of the firm's hospitality group.

(212) 278-1036 | dgliedman@andersonkill.com

Conduct Exclusions: Included in almost all ELP policies, conduct exclusions typically exclude coverage for deliberate, fraudulent or criminal acts; illegal personal or financial gain; and/or *intentional* violations of the law. Although most insurance companies will pay defense costs until a final adjudication demonstrates intentional wrongdoing, some insurance companies will halt defense payments if there is an adverse finding of fact during litigation. Policyholders should look for policies that explicitly provide coverage until there is a *final adjudication* of wrongdoing. Policyholders should also remember that in almost every state, where there is even a chance that a part of a claim will be covered, the insurance company has a duty to defend the entire claim. Thus, where a complaint alleges an attorney engaged in wrongful acts, but also alleges a negligent act, error or omission, the attorney is entitled to a full defense. Where the complaint only raises allegations of fraud, however, there may be no coverage.

Fortunately, most ELP policies contain innocent policyholder provisions, which provide that policyholders who did not commit or participate in the wrongful acts at issue are entitled to coverage, notwithstanding any applicable conduct exclusion.

Prior Acts and Prior Knowledge Exclusions: ELP policies typically exclude coverage for pending or prior litigation, proceedings, investigations or claims. Many insurance companies also seek to preclude coverage for any acts or circumstances occurring prior to a policy period, which an attorney *knew or could have reasonably foreseen* would result in a claim.

Such was the case in *Liberty Ins. Underwriters Inc. v. Corpina Piergrossi Overzat & Klar LLP*, (N.Y. App. Div. 1st Dep't 2010). In *Corpina*, a law firm represented a client in connection with a medical malpractice claim for personal injuries allegedly caused by vaccinations administered when the client was an infant. During the course of the representation, the firm missed a deadline to file a claim under the National Vaccine Injury Compensation Program, and some time afterward ceased its representation of the client. Shortly thereafter, the law firm purchased its first legal malpractice policy from Liberty Insurance Underwriters.

Some years later, the (former) client's new attorney advised the law firm by letter that he had been retained to prosecute a legal malpractice claim based on the failure to file the NVICP claim. According to the new attorney, the failure to file the claim not only foreclosed compensation under the program, but also barred any civil actions for damages, including a medical malpractice action. The law firm promptly provided notice to Liberty Insurance — which then brought a declaratory judgment action against the law firm, arguing that the policy excluded coverage because Corpina had reason to foresee that a claim might be made against it in this case.

The law firm argued that even though a paper trail showed that its associate knew of the NVICP and the deadline, the law firm *did not know* that the failure to file a timely administrative claim had the additional legal consequence of foreclosing any civil action for damages. On appeal, the Appellate Division, First Department, applied a two-pronged test in which the court “must first consider the subjective knowledge of the insured and then the objective understanding of a reasonable attorney with that knowledge.” More particularly, the court stated, “the first prong requires the insurer to show the insured’s knowledge of the relevant facts prior to the policy’s effective date, and the second requires the insurer to show that a reasonable attorney might expect such facts to be the basis of a claim.” Based on this test, the court denied Liberty Insurance’s motion for summary judgment regarding the applicability of the prior knowledge exclusion.

Defining Language: ELP policies generally provide coverage for claims alleging wrongful acts or negligence in the rendering or failure to render professional legal services. But not all such policies define “legal services.” Although insurance companies frequently take a very narrow view of what constitutes a legal service, courts often apply a more expansive view. For example, in *Minnesota Lawyers Mut. Ins. Co. v. Antonelli, Terry, Stout & Kraus, LLP*, (E.D. Va. 2010), the insurance company argued that providing business advice did not “result from the rendering of legal services.” The court disagreed, finding “the relation of attorney and client exists, and one is deemed

to be practicing law whenever he furnishes to another advice or service which imply his possession and use of legal knowledge and skill.”

Conclusion

As claims against in-house counsel increase, so does the need for adequate insurance coverage. Companies must carefully review their insurance policies to ensure their legal departments are protected.▲

About Anderson Kill

Anderson Kill practices law in the areas of Insurance Recovery, Commercial Litigation, Environmental Law, Estate, Trusts and Tax Services, Corporate and Securities, Antitrust, Banking and Lending, Bankruptcy and Restructuring, Real Estate and Construction, Foreign Investment Recovery, Public Law, Government Affairs, Employment and Labor Law, Captive Insurance, Intellectual Property, Corporate Tax, Hospitality, and Health Reform. Recognized nationwide by Chambers USA for Client Service and Commercial Awareness, and best-known for its work in insurance recovery, the firm represents policyholders only in insurance coverage disputes — with no ties to insurance companies and has no conflicts of interest. Clients include Fortune 1000 companies, small and medium-sized businesses, governmental entities, and nonprofits as well as personal estates. Based in New York City, the firm also has offices in Ventura, CA, Philadelphia, PA, Stamford, CT, Washington, DC, and Newark, NJ.

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