

7th Circ. Warns Firms Not To Sleep On Malpractice Coverage

By **Bibeka Shrestha**

Law360, New York (April 16, 2013, 7:55 PM ET) -- The Seventh Circuit recently swiped coverage for a malpractice suit accusing Koransky Bouwer & Poracky PC of botching a real estate deal, providing a cautionary tale for law firms that take lightly their obligation to notify insurers about the potential for professional liability claims.

In early April, the appeals court let Bar Plan Mutual Insurance Co. off the hook in a fight with Koransky over coverage under a claims-made policy for a lawsuit claiming the Indiana-based law firm unraveled a sales deal for a Rite Aid drugstore when it misfiled the buyer's contract and failed to deliver it to the seller.

The law firm saw its insurance coverage disappear because it didn't let Bar Plan Mutual know that there was a potential for a malpractice claim at the time of the error or when the firm renewed its policy with the insurer. Koransky eventually headed to Bar Plan Mutual for malpractice coverage under the renewed policy, but faced the hurdle of an exclusion that barred insurance for claims that the firm should have anticipated and reported in prior policy periods.

According to the Seventh Circuit **ruling**, a reasonable attorney at Koransky would have realized that a malpractice claim was possible because the Rite Aid's seller was refusing to complete the sale because of the attorney's mistake.

Attorneys say the decision should serve as a reminder that law firms should know the ins and outs of their policy's requirements for providing notice, whether it's notice of malpractice claims and of circumstances that could give rise to malpractice claims.

"[Koransky] easily could have obtained coverage for the claim if it had advised its insurer," said Richard Hoffman, a Duane Morris LLP partner. "It's one of those instances where the insured controls his or her destiny."

Hoffman said law firms should be aware that even if they don't believe they will get sued, they might want to let their insurers know anyway that they've made a mistake and it's possible that a client would sue.

In this case, an associate at Koransky admitted that the originals of the signed contract were placed in the wrong file and said in an email to the seller's counsel, "This whole situation is my fault and not the fault of my client." Later, the seller launched a suit in Alabama state court, seeking a ruling that no sales contract existed because it was never delivered.

Koransky claimed that it had no reason to believe that the deal was truly doomed because a former Alabama Supreme Court chief justice advised that the Alabama court would not exercise jurisdiction — which it did — and because Ohio counsel for the buyer said the contract was enforceable because Ohio law did not require delivery.

The Seventh Circuit said it didn't matter whether a court would eventually rule in favor of Koransky. The pertinent question was whether Koransky had reason to believe their error could result in a malpractice claim, it said.

According to Christian Preus, a partner at Meagher & Geer PLLP's Minneapolis office, law firms can often have a tough time arguing that they didn't anticipate a malpractice suit after they've made a mistake.

"Lawyers are in the profession of trying to determine whether claims or legal problems might arise," Preus said. "It's your job. It's your profession to know this, and to claim you didn't foresee the risk is a very uphill battle."

To be safe, attorneys might want to give notice of every circumstance that could give rise to a claim, said Marshall Gilinsky, a shareholder at Anderson Kill & Olick PC.

"That's hard for law firms to do. The bigger the law firm, the harder it is," Gilinsky said. "But if you want to be super conservative about it, that would be the best approach."

Attorneys said it was significant that the Seventh Circuit's ruling nixed coverage in a scenario where the same insurer would have been on the hook for the malpractice claim had it been reported on time. Usually, policyholders find themselves in a trap if they switch carriers providing their claims-made policies and each insurer refutes that it owes any coverage for malpractice claims.

Though some might argue that there was no prejudice to Bar Plan Mutual because the insurer would have been obligated to cover Koransky under its earlier policy, the Seventh Circuit pointed out that prejudice wasn't relevant, Hoffman said.

Bar Plan Mutual required its policyholder to provide notice of circumstances that could give rise to a claim as soon as the firm discovered them, to give notice of these circumstances while renewing each claims-made policy, and then to exclude coverage for potential claims that arose in a prior policy period.

That policy language is tight and not often found in policies outside of those issued to law firms, according to Preus.

"That might appear to be overkill, but it accomplished its purpose," Preus said. "If you have the same policy language or pretty close, [the ruling] will be very helpful to insurers."

According to Gilinsky, carriers providing claims-made policies typically give policyholders the option of providing notice of circumstances that could give rise to a claim, rather than requiring them to do so.

In another twist, the Seventh Circuit and the lower court both made the call that there were circumstances that required Koransky to inform its insurer about a potential malpractice claim. Courts often let a jury decide whether circumstances may give rise to a claim, since that's typically a gray area, experts say.

In its ruling, the Seventh Circuit said, "This case is not a close one."

But that's not always true, and law firms will likely be turned off from buying policies like the one Bar Mutual sold to Koransky if they know the conditions, Gilinsky said.

"You don't always know if you've committed malpractice," Gilinsky said. "A law firm wouldn't want to buy coverage where they're susceptible to this argument that you should have told us earlier."

The plaintiff is represented by Kristin A. Mulholland.

The defendant is represented by Philip E. Kalamaros of Hunt Suedhoff Kalamaros LLP.

The case is Koransky Bouwer & Poracky PC v. Bar Plan Mutual Insurance Co., case number 12-1579, in the Seventh Circuit Court of Appeals.

--Editing by John Quinn and Lindsay Naylor.

All Content © 2003-2013, Portfolio Media, Inc.