

Texas Court Considers Prior Acts Condition in Professional Liability Policy

Friday, February 10, 2012

In its recent decision in *Darwin Select Ins. Co. v. Laminack*, 2012 U.S. Dist. LEXIS 15712 (S.D. Tex. Feb. 8, 2012), the United States District Court for the Southern District of Texas had occasion to consider the scope of a prior acts condition in a lawyers' professional liability policy.

The insured law firm of Laminack, Pirtle & Martines, L.L.P., and in particular two individual attorneys of the firm, were named as defendants in an underlying legal malpractice action filed in October 2010 arising out of the attorneys' representation of the plaintiff in an antitrust lawsuit years earlier. Plaintiff claimed that the attorneys advised him on several occasions that he was not in danger of missing the statute of limitations to file his antitrust lawsuit. This, however, proved not to be the case. In 2008, a Texas federal district court dismissed the antitrust action based on the statute of limitations having expired prior to the time suit was filed. This holding was affirmed by the Fifth Circuit Court of Appeals in 2009.

The claims made errors and omissions policy at issue incepted in June 2010, some four months prior to the filing of the malpractice action. The policy stated that coverage was unavailable for any 'wrongful act' occurring before the inception date of the Policy if, prior to the inception date, any Insured had a basis to foresee that the Wrongful Act might reasonably be expected to be the basis of a Claim against any Insured." The insurer, Darwin, denied coverage to its insureds on the basis that prior to the policy's June 2010 inception date, the insureds had a reasonable basis to expect that they would be sued as a result of their alleged malpractice.

The court determined, as an initial matter, that there was no question that the insureds were aware of the unfavorable statute of limitations rulings concerning their representation of plaintiff. The court further determined that applying an objective standard, as required by the language of the prior acts condition (i.e., "*reasonably be expected*"), as a matter of law, the insureds knew or should have known that they would be the subject of a malpractice claim. As the court explained, "it is inconceivable that two experienced, accomplished attorneys, having received notice that a federal district judge had determined that they filed a lawsuit outside the statute of limitations, would not have a basis to foresee that missing the filing deadline might reasonably be expected to be the subject of a malpractice claim against them." As such, the court held as a matter of law that the insureds did not satisfy the policy's prior acts condition, and as a consequence, the insurer had no duty to defend or indemnify.