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Insurance Coverage Update

May 29, 2018

Class Action "Overbilling" Lawsuit Not Covered Under Lawyer's Malpractice Liability Policy

The Tenth Circuit U.S. Court of Appeals recently affirmed a Colorado district court decision holding that an attorney's billing practices do not fall within an insurance policy's coverage for "professional services." *Evanston Ins. Co. v. Law Office of Michael P. Medved, P.C.,* No. 16-1464, 2018 WL 2306871 (10th Cir. May 22, 2018).

The insured attorney and law firm were sued in a class action alleging that the attorney and his firm overbilled for services in their handling of foreclosure matters. The firm's malpractice insurer, Evanston, assumed the defense of the suit subject to a general reservation of rights, but did not specify the reasons for its reservation of rights until almost 10 months later. The insured eventually settled the class action suit.

The policy covered damages incurred as a result of a claim only if the claim involved "professional services." Evanston filed a declaratory action asserting that the policy did not provide coverage because the underlying allegations involved billing practices, which did not constitute "professional services." Evanston also sought reimbursement of the defense costs it paid before the insured settled with the claimants. The insured attorney and firm asserted counterclaims for breach of the policy and bad faith.

The U.S. District Court for the District of Colorado granted Evanston's motion for summary judgment on all claims and counterclaims, finding that (1) Evanston had no duty to defend because the underlying allegations pertained only to billing practices, which were not "professional services," (2) Evanston was not estopped from asserting coverage defenses because estoppel cannot create insurance coverage under Colorado law, (3) the counterclaims for bad faith failed because there was no coverage under the policy, and (4) Evanston was entitled to reimbursement of defense fees and costs.

The insured attorney and firm appealed, and the Tenth Circuit agreed with the district court that allegations of overbilling did not fall within the policy's definition of "professional services." The court cited two cases - *Zurich American Insurance Co. v. O'Hara Regional Center for Rehabilitation*, 529 F.3d 916 (10th Cir. 2008) and *Cohen v. Empire Cas. Co.*, 771 P.2d 29, 31 (Colo. App. 1989) - where the Tenth Circuit and Colorado's intermediate appellate court reached the same conclusion after considering similar issues.

The Tenth Circuit also rejected the insureds' argument that the overbilling claims arose out of the professional service of documenting the fees and costs for foreclosure. The court relied on the Colorado appellate court's *Cohen* decision, holding that a claim involving a failure to pay the fees of another attorney did not arise out of professional services because expenses are incidental to an attorney's business and do not involve legal advice or assistance to others in the attorney's capacity as a lawyer.

The Tenth Circuit also sided with the insurer on the insureds' argument that Evanston's failure to

effectively reserve its rights estopped it from asserting coverage defenses. The court acknowledged that an insurer is required to raise or reserve all defenses within a reasonable time after learning of the defense or risk waiver or estoppel. However, the court also noted that estoppel cannot create coverage for risks falling outside of an insurance policy unless (1) the insurer knew of the non-coverage, (2) the insurer assumed defense without a reservation of rights, and (3) the insured relied to its detriment on the insurer's defense. The court found that even if Evanston's general reservation of rights was deficient, the insureds did not demonstrate the requisite prejudice to estop Evanston from asserting coverage defenses.

The court disagreed with the insureds' position that prejudice is established as a matter of law where an insurer assumes a defense without reserving its rights. The court relied on a Colorado appellate court decision holding that no presumption of prejudice arises where the insurer disclaims coverage prior to trial, and estoppel only arises where the insured demonstrates that it detrimentally relied on the insurer's defense.

Comment

The decision upholds the critical distinction between billing practices, which are merely incidental to the commercial operation of any business, and professional services requiring specialized knowledge or skill, which are the subject of coverage under professional liability policies.

If you have any questions about this Update, please contact the author listed below or the Aronberg Goldgehn attorney with whom you normally consult:

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