

Eleventh Circuit Finds No Coverage for Contempt Proceedings under Lloyd's Professional Liability Insurance Policy

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In *Jones, Foster, Johnston & Stubbs, P.A. v. ProSight-Syndicate 1110 at Lloyd's*, United States No. 15-12399, 2017 WL 586450 (11th Cir., February 14, 2017) the insured law firm sought to recover legal fees and costs incurred in the defense of a contempt proceeding brought against two of the firm's attorneys. Even though the attorneys were cleared of the contempt charge, the insurer refused to cover legal fees and costs incurred by the firm on behalf of its members, arguing that the policy extended coverage and a corresponding duty to defend only to claims seeking compensation, not sanctions. The Eleventh Circuit upheld the trial court's determination that because civil contempt is a sanction, no coverage existed under the policy.

Background

JonesFoster sued its insurer, ProSight alleging breach of contract, breach of the covenant of good faith and fair dealing, and declaratory relief after ProSight declined to defend two attorneys from the firm who were the subject of a contempt motion brought by the defendant in a defamation suit in which the firm represented the plaintiff. A protective order had been entered in the defamation suit, barring JonesFoster's client from using privileged information that had been inadvertently disclosed by the defendant. The JonesFoster attorneys had amended their client's complaint to add a new defendant whose identity had been revealed in the inadvertent disclosure. The defendant filed a contempt motion seeking remedies for the alleged misconduct of the defendant, which included sanctions of the JonesFoster lawyers for their use of privileged information, purportedly in violation of the protective order. However, the court eventually denied the contempt motion, finding that there was no clear and convincing evidence that the lawyers or their client had violated the protective order. The District Court had granted ProSight's motion to dismiss with prejudice and JonesFoster appealed to the Eleventh Circuit.

The Policy

The Policy covered "all sums which the Insured shall be come legally obligated to pay as damages for claims . . . arising out of any act, error, [or] omission . . . in the rendering of or failure to render Professional Services by any Insured covered under this Policy." The Policy also obligated ProSight to "defend any suit against the Insured seeking Damages to which this insurance applies." Claims were defined to include "a demand for money or services," but exclude "proceedings seeking injunctive or other non-pecuniary relief." The definition of Damages under the Policy was restricted

to “compensatory judgments, settlements or awards” and excluded “punitive or exemplary damages, sanctions, fines or penalties assess directly against any Insured.”

The Eleventh Circuit Decision

JonesFoster argued that the legal fees and costs sought in the contempt motion were compensatory in nature and the insurer must defend even if the allegations against the insured are factually incorrect or meritless. But the Eleventh Circuit, agreeing with the trial court, found that, other than exceptional circumstances, the duty to defend is limited to cases where the insurer would be bound to indemnify the insured if the plaintiff prevailed on the merits of the underlying claim. The Policy included language entitling the insured to a defense of claims “arising out of any dishonest, fraudulent, criminal or malicious act or omission, or deliberate misrepresentations” even though coverage was excluded for awards arising from such acts. But the court found that because the duties to indemnify and defend extended only to claims for compensatory judgments, settlement, and awards, the law firm was not entitled to recover defense costs for the contempt motion, which the court held to be a “sanction” and not compensatory in nature.

The court recognized that the contempt sanction sought by the defendant in the defamation suit to recover out of pocket legal fees and costs did have a compensatory purpose to some degree, but found that its essential character was still that of a punishment. The court found that a sanction may serve a compensatory purpose while still functioning as a punishment and the contempt motion was simply an attempt to sanction the JonesFoster attorneys for their allegedly “outrageous conduct.” Since there was no coverage for punitive or sanction claims, the provision providing a defense for fraud and other dishonest acts was irrelevant. Thus ProSight was found not to have breached the terms of the Policy by refusing to provide a defense of the Jones Foster attorneys.

The Takeaway

Although an award of sanctions against an attorney can be as costly as a malpractice verdict, depending on the wording of the policy, law firms may not be insured for such awards under their lawyer’s professional liability insurance policies. Also, law firms may not be insured for defense costs incurred in battling such claims, even if the defense is ultimately successful. There are policies on the market that provide coverage for penalties in the nature of compensatory or punitive damages that do not expressly exclude coverage for sanctions. Law firms may want to look for carriers who provide such coverage if they don’t already have it.

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