Avoiding Liability

Read the Policy Fine Print When There is a Potential Claim!

By Jeffrey P. Lewis

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The title of my column in this issue may be an obvious statement, but the occasional reported case in which coverage under a lawyer's professional liability policy has been denied for failure to comply with its requirements underscores the importance of this point. A recent Florida decision presents just one example in which the insured was denied coverage, not just for one gaffe but two with respect to satisfying the requirements under his policy when he was faced with a potential claim that later developed into an actual claim.

In *Leeds v. First Mercury Insurance Company,* 2011 WL 2971228 (S.D. Fla.), an attorney represented a woman "in an action against the Republic of Cuba for her fraudulent marriage with a Cuban spy." The attorney secured a final judgment for more than $27 million for his client. He then retained attorneys in Florida and New York to bring a collection action in New York to reach certain Cuban assets located there, and they were successful in recovering $190,000.

The insured attorney then took on the representation of another woman to bring another action against the Republic of Cuba, which resulted in a final judgment for $67 million. He again retained the same attorneys in Florida and New York to assist in collecting on the judgment.

Here's where he got into trouble. Even though the first client "presumably had a first-in-time claim on any proceeds recovered," the insured attorney and the other two attorneys who had represented her collected the entire amount owed on the second judgment, leaving the remaining amount owed on the first judgment unsatisfied. Apparently the attorneys had intended to give the first client priority over the second but had failed to file "certain necessary domestication actions" in New York on behalf of the first client to give her judgment priority.

The first client expressed her dissatisfaction with this development to the insured attorney and to at least one of the two attorneys he had retained on both her behalf and on behalf of the second judgment holder, although she made no demand at that time. The insured attorney did not report this matter to his carrier. Curiously, he did retain counsel at that time to attempt to address the issue. Thereafter the first client retained counsel to handle her potential professional liability claim against the insured attorney and one of the other attorneys retained in the underlying matter. In discussions about a possible settlement, an offer was made but not accepted. There was even an agreement to mediate, the selection of a mediator and a date set for the mediation. All of this activity took place without notice to the carrier.

Not until the first client's counsel emailed a draft professional liability complaint to the insured attorney's counsel was the claim reported to the carrier — approximately seven months after settlement discussions had begun. The claim notification form submitted to the carrier stated the amount of the claim and that mediation had been scheduled but did not state that there had been previous settlement discussions. The carrier "authorized the resolution of the matter at mediation, but never explicitly authorized either a settlement or an amount to be paid in settlement."

The case settled at mediation for $287,000, without express authority or approval from the carrier. When the carrier was informed of the settlement, it denied coverage both for failure to give timely notice of the claim and for settling without the carrier's express authority.

The policy provided that a claim must be "reported within 10 days of receipt 'by the Named Insured of a written notice of a claim or circumstances which could give rise to a claim.' " Even if the first report of dissatisfaction did not qualify as a potential claim, the court found as an "inevitable conclusion" that the attorney certainly knew of "circumstances which could give rise to a claim" when he was engaged in settlement discussions months before he notified his carrier.

In an attempt to circumvent the untimely notice, the insured attorney argued that the carrier should cover the claim because it had suffered no legal prejudice as a result of the untimely notice because he had managed to settle the claim for less than it was worth. Although the court found that the insured attorney had indeed settled the claim for less than its value, it found that the carrier had been prejudiced because the delay "prevented [the carrier] from investigating the negligence claims to its satisfaction or participating meaningfully in either [the insured's] defense or in the settlement of [the claimant's] claims."

With respect to the fact that the lawyer had settled without the carrier's express consent, the carrier relied upon a provision in the policy that "[n]o insured shall, except at their own expense, make any payment, admit any liability, agree to any settlement of a claim, incur any expenses or assume any obligations without [the carrier's] written consent." The carrier took the view, and the court so found, that giving consent to proceed with the mediation is not consent to settle, even if the settlement amount was a bargain ($287,000 in the face of a $27 million damages model), when no specific settlement figure had been expressly authorized by the carrier.

The carriers who write business in Pennsylvania use various policy forms, so the fact that the carrier in this case found a lack of coverage is not necessarily an indication that the same fact pattern would necessarily lead to the same result here. But to ensure that one does not do anything to jeopardize what otherwise would be a covered claim, this case graphically illustrates that it is imperative to review the fine print of any potentially applicable policy when there is even a whiff of a potential claim.