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ILLINOIS APPELLATE COURT HOLDS THAT A LAWYER NEED NOT INFORM HER PROSPECTIVE PROFESSIONAL LIABILITY INSURER ABOUT EVERY CLIENT WHO HAS EXPRESSED DISSATISFACTION WITH THE LAWYER'S PROFESSIONAL SERVICES

Professional liability insurers should take note of the recent decision of the Appellate Court of Illinois in *Illinois State Bar Association Mut. Ins. Co. v. Arthur S. Gold, et al.*, 2013 IL App (1st) 122401-U. On August 7, 2013 the First District Court issued an opinion holding that "[i]n an application for a claims-made malpractice insurance policy, an attorney need not inform the prospective insurer about every client who has expressed dissatisfaction with the attorney's services. A letter in which a client mentions the possibility of suing an attorney for malpractice, and in which the client requests further professional services from the attorney on the client's behalf, does not notify the attorney of a claim for malpractice." This decision may limit lawyers' and other professionals' obligation to disclose potential malpractice circumstances to liability insurers under Illinois law.

In 2002, William Messner and the Institute of Vocal Science ("Client") retained Arthur S. Gold of the firm Gold & Coulson ("Lawyer") to represent them in a lawsuit against Cynthia and Sarabeth Krenzelak. In November of 2003, the trial court in the Krenzelak lawsuit entered judgment in favor of the Krenzelaks and against the Client. Thereafter in March of 2004, the Client wrote the Lawyer expressing extreme dissatisfaction with the Lawyer's performance. In the letter, the Client outlined three options going forward: (1) permitting the Lawyer to appeal from the adverse judgment; (2) "going to war" and filing a malpractice action against the Lawyer; and (3) settling the underlying case for the costs the Krenzelaks would incur defending an appeal. Initially, the Client decided to pursue option number three. However, when settlement negotiations proved unfruitful, the Client authorized the Lawyer to pursue an appeal.

Later in 2004, the Lawyer purchased a professional liability insurance policy from Illinois State Bar Association Mutual Insurance Company ("ISBA Mutual"), without disclosing the Client's threatened malpractice action. The policy was renewed in 2005 and 2006.

On June 30, 2005, the Appellate Court affirmed the judgment in favor of the Krenzelaks. In June of 2007, three years after the Client's letter raising the possibility of a malpractice action, the Client sued the Lawyer for malpractice. The Lawyer tendered the malpractice action to ISBA Mutual and ISBA Mutual agreed to defend under a full reservation of rights. However, in 2008, ISBA Mutual filed a complaint seeking a declaration that it had no duty to defend and indemnify the Lawyer because of the Lawyer's failure to disclose the potential malpractice action as required by the policy. ISBA Mutual and the Lawyer filed cross motions for summary judgment on, among other issues, ISBA Mutual's duty to defend and indemnify. The trial court granted the Lawyer's motion and denied ISBA Mutual's on the issue of the insurer's duty to defend.

The Appellate Court affirmed, reasoning that:

> The letter [the Client] sent in 2004 informed [the Lawyer] that [the Client] had considered "going to war" against [the Lawyer], but the letter did not state a clear unmistakable intent to bring a claim for professional malpractice.... [In addition, the Client] continued to seek and use the lawyer's professional services both in the letter he sent in 2004 and thereafter, in negotiations and in an appeal. [The Client] made no further mention of dissatisfaction with [the Lawyer] for more than two years before [the Client] applied for the insurance policy at issue here. The entire course of the attorney-client relationship showed that the threat of a claim had apparently dissipated before [the Lawyer] applied for the policy that covered claims brought in 2006 and 2007.

The Appellate Court's decision in this case is troubling for professional liability insurers in a number of respects. First, policyholders may consider that this case sets a new standard for reporting of potential claims that only requires reporting if the putative plaintiff has made a statement of its "clear unmistakable intent to bring a claim for professional malpractice." Here, the court held that a client's statement that he is considering a malpractice action is not enough to trigger a policyholder duty to disclose.

Second, and perhaps most troubling, the Appellate Court's decision appears to write part of the ISBA Mutual's definition of CLAIM out of the policy. Under the policy, like most professional liability policies, CLAIM is defined to mean both an actual demand for money but also "2. an incident or circumstance of which YOU have knowledge that may result in a demand against YOU that seeks DAMAGES arising out of YOUR WRONGFUL ACT." Although the Appellate Court quotes this portion of the ISBA Mutual policy, it completely disregards it in disposing of the appeal.

Third, the Court appears to have considered the long delay between the initial 2004 threat of a malpractice claim and the 2007 malpractice lawsuit to be a fact that weighs in favor of excusing non-disclosure by the policyholder. The Court observed that during the course of the Lawyer's representation of the Client in 2005-2006, the 2004 threat of a malpractice claim appeared to have dissipated. While it may have *appeared* to have dissipated, the filing of the malpractice action in 2007 makes manifest the illusory nature of that perception. Moreover, a third-party claimant's delay in acting upon a threatened claim for malpractice should have no impact on the policyholder's duty to disclose potential claims.

Insurers can take some comfort from the rather unusual facts of this case which should allow counsel, in many instances, to distinguish this case on a meaningful basis. Nevertheless, insurers should keep this case in mind when evaluating professional liability insurance coverage in cases governed by Illinois law.