

LEGALLY SPEAKING



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We're Experts: The Use of the Word "Expertise" in Legal Advertising

By: Dennis J. Quinn, Esq. and Erin D. Hendrixson, Esq.

Attorneys enhance the marketing and delivery of legal services to prospective clients by distinguishing themselves through a variety of means, including citing to their expertise or specialty in particular areas of the law. Lawyers should consider, however, the ethical

implications of using the word “expertise” on their firm websites, business cards, tweets, blogs and other media platforms.

Legal advertising is a form of commercial speech, and may be restricted only when “the particular content or method of the advertising suggests that it is inherently misleading or when experience has proved that in fact such advertising is subject to abuse.”¹ Because the public generally lacks sophistication concerning legal services, misstatements that might be overlooked or deemed unimportant in other advertising may be inappropriate in legal advertising.²

The ABA Model Rules of Professional Conduct, adopted in Maryland, Virginia, and the District of Columbia, set forth several provisions governing legal advertising. Rule 7.1 (Communications Concerning a Lawyer’s Services) covers all communications, and requires that attorneys not make false or misleading statements about themselves or their services. “A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.”³ Rule 7.2 covers legal advertising and incorporates by reference the limitations imposed by Rule 7.1.

The prohibition of false or misleading communications includes truthful statements that may be misleading. A truthful statement is misleading if it omits a necessary fact that causes the statement to become materially misleading.⁴ A truthful statement is also misleading if there is a substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer’s services for which there is no reasonable factual foundation.⁵ For example, when an attorney advertises that he won a multi-million dollar verdict for his client, but fails to state that this verdict was later overturned by an appellate court, the omission of this key fact makes the statement misleading.

Rule 7.4 governs lawyer communications of fields of practice and specialization. Attorneys may advertise that they limit their practice to certain areas of the law, but such communications are subject to the false and misleading standard applied in Rule 7.1 to communications concerning a lawyer’s services. Attorneys may advertise that they are recognized or certified as a specialist in patent law, admiralty, or are certified as a specialist by an organization that has been approved by the state or accredited by the ABA. For example, many jurisdictions have certified mediators. The certifying organization, however, must be clearly identified in the communication.

In Maryland, however, a lawyer is prohibited from holding himself or herself out publicly as a specialist or expert.⁶ The Maryland State Bar Committee on Ethics opined that holding oneself out as an expert or specialist in an advertisement connotes that someone or

¹ *In re R.M.J.*, 455 U.S. 191 (1982); see also *Hunter v. Virginia State Bar ex rel. Third Dist. Committee*, 285 Va. 485, 2013 WL 749494, *11 (2013), *cert. denied*, 133 S. Ct. 2871 (2013).

² *Bates*, 433 U.S. at 383, 97 S.Ct. 2691.

³ ABA MODEL RULES OF PROF’L CONDUCT 7.1.

⁴ *Id.* at cmt. 2.

⁵ *Id.*

⁶ Md. R. Cts. J. & Attys. Rule 16-812, MRPC 7.4.

some organization has determined that such is the case.⁷ However, Maryland has no specialty designations. Therefore, any such distinction is inherently misleading. The Committee also held that the use of the word “expert” in place of “specialist” was not in keeping with the spirit of Rule 7.4 and therefore should not be used.

In Virginia, a lawyer’s use of the words “expert” or “expertise” in legal advertisements is generally prohibited unless the claim can be factually substantiated.⁸ Similarly, in the District of Columbia, attorneys are permitted to advertise truthful claims of legal specialization and expertise so long as they can be substantiated.⁹ Practitioners must be capable of authenticating their claims of expertise with documentation upon request by the client.¹⁰ For example, clients may evaluate an attorney’s expertise claim by learning the number of cases an attorney has handled in a particular area of the law and/or the number of years he has been practicing in that specialized area of the law.

As attorneys continue to differentiate themselves and highlight their unique selling points in the legal marketplace, they must be mindful not to make misleading claims of expertise. In Maryland, practitioners cannot hold themselves out as specialists or experts in a particular area of law. Virginia and D.C. allow attorneys to hold themselves out as experts, so long as these claims of expertise can be factually substantiated.

Defining Terms in an Insurance Policy Exclusion: What the “Eight Corners” Rule Doesn’t Require

By: Kelly M. Lippincott, Esq. and Katherine C. Ondeck, Esq.

In *Carlyle Investment Management, LLC v. Ace American Ins. Co., et al.*, No. 2013 CA 003190 B (D.C. Super. Ct. May 15, 2014), the District of Columbia Superior Court held that when an insurance contract’s definitions of relevant terms brings a claim within the scope of an exclusion within the policy, it does not matter whether those same terms might mean something else in the context of a different case or a different contract. The contract definitions of the terms control.

The plaintiffs were three limited liability companies operating under the banner of the Carlyle Group. In 2006, the plaintiffs organized a company called Carlyle Capital Corporation (CCC). The business of CCC was to invest primarily in residential mortgage-backed

⁷ MD. STATE BAR ETHICS DOCKET NO. 00-21 (1999); *see also* DOCKET NO. 2012-01 (2011).

⁸ VA. LEGAL ETHICS OP. 1750 (2001, revised 2006 and 2008).

⁹ DC RULES OF PROF’L CONDUCT RULE 7.1(a); D.C. BAR ETHICS OP. 249 (1994).

¹⁰ *See* D.C. BAR ETHICS OP. 249 (1994) (reviewing a legal advertisement where an attorney holds himself out as an immigration law expert, the Committee noted that his specific claim of expertise was not inherently or potentially misleading, since the basis of such claim was disclosed in the ad, and included that the attorney and his associates handled 2,150 INS matters over 28 years).

securities in heavily leveraged transactions financed by repurchase loan agreements. In the spring of 2008, the market for these types of investments collapsed. CCC could not meet its margin calls, defaulted on its repurchase agreements, and eventually slid into bankruptcy. A number of individual and institutional investors in CCC and the CCC liquidators in bankruptcy filed lawsuits against the plaintiffs, alleging various forms of misrepresentation and mismanagement. The plaintiffs notified the defendant insurers of these claims and asked for “defense costs” under the policies. The defendant insurers denied coverage.

The plaintiffs sought a declaration that the claims against which they were required to defend in actions relating to CCC were covered losses under their insurance contracts for which the defendant insurers were liable for settlements or judgments and “defense costs.” The defendants moved to dismiss, arguing that all of the claims against the plaintiffs in the CCC-related litigation fell within an exclusion of coverage in the insurance contracts. The relevant exclusion provided: “[T]he **Insurer** shall not be liable to make any payment for **Loss** in connection with any **Professional Services Claim** arising from **Professional Services** provided to Carlyle Capital Corp.” The bolded terms were defined elsewhere in the contract.

The dispute between the parties was over the meaning of the Exclusion. The defendants argued that the plaintiffs were stuck with the contract definitions of the terms as they applied to the Exclusion. The plaintiff countered that the Exclusion was narrower than the coverage and was intended to exclude only claims arising from professional services in the nature of those provided by lawyers and accountants (“E&O” claims), not “management-liability claims,” such as those alleging acts, errors, or omissions in corporate governance (often referred to as “directors & officers claims”). The plaintiffs argued that if one analyzed the underlying complaints count by count, it was clear that some of the claims were arguably within the Exclusion while the majority of the claims were not.

The plaintiffs’ argument invited the court to “get down in the weeds” to see if there may be some clever parsing of the language in any count in the many multiple-count complaints against them that could take that count outside of what would otherwise be the unambiguous language of the Exclusion. The Court stated that although the plaintiffs were correct that the Court was required to consider each claim in each complaint in deciding the coverage issue presented, the “eight corners rule” neither required nor permitted the Court to scrutinize each count in each complaint “with a dictionary in one hand and The Chicago Manual of Style in the other” to see if there was an allegation that could be contorted so as to bear an interpretation that would take it out of the Exclusion.

Rather, the contract definitions of the terms controlled the Court’s analysis. The Court held that the Exclusion was not ambiguous—it excluded Professional Services Claims (a defined term) arising from Professional Services (a defined term) provided to CCC. The contract defined the terms broadly enough to include virtually all of the conduct alleged against the plaintiffs in the underlying lawsuits, whether or not such conduct would be characterized as professional services or corporate management in the industry generally or in some other insurance contract. The Court held that if the contract definitions of the relevant terms brought the case within the scope of the Exclusion, it did not matter whether

those same terms might mean something else in the context of a different case or a different contract.

Late Notice Results in Bar to Coverage: *Chicago Insurance Co. v. Paulson & Nace, PLLC*

By: Kelly M. Lippincott, Esq. and Sarah W. Conkright, Esq.

Chicago Insurance Company filed an action against its insured Paulson & Nace, PLLC, and two of its attorneys, in the United States District Court for the District of Columbia seeking a declaratory judgment that it was not bound to cover the costs of a legal malpractice action against the firm and its attorney. *Chicago Insurance Co. v. Paulson & Nace, PLLC*, 2014 WL 1392101, --F. Supp. 2d -- (D.D.C. April 10, 2014). Following cross-motions for summary judgment, the Court held that Chicago Insurance had no duty to defend or indemnify its insureds as a result of their failure to timely notify their insurer of a potential legal malpractice claim and that doctrines of waiver and estoppel did not bar Plaintiff from asserting such a defense to coverage.

Underlying Medical Malpractice Lawsuit

On July 24, 2006, the Paulson & Nace filed a medical malpractice action in the Circuit Court for the City of Richmond on behalf of Sarah Gilbert, a minor, for injuries she sustained during spinal surgery. The statute of limitation expired four days after the filing. The Complaint failed to name a “next friend” as required by Virginia law, and the Court dismissed the Complaint without prejudice. Paulson & Nace filed a second complaint on October 25, 2006 that complied with Virginia law; however, the Court dismissed the matter with prejudice as being untimely on June 18, 2007.

Application for Insurance Policy

On July 18, 2007, Paulson & Nace applied for a “claims-made” professional liability insurance policy from Plaintiff. Defendant Nace answered “No” to the following question on the policy application:

Having inquired of all partners, officers, owners and employed lawyers, are there any circumstances which may result in a claim being made against the firm, its predecessors or any current or past partner, officer, owner or employed lawyer of the firm?

Plaintiff issued a “Lawyers Professional Liability Policy” to the Attorney Defendants that commenced on July 24, 2007 and was subsequently renewed through July 24, 2009. The terms of the policy provided that the insurance company would pay all sums that the

insured became legally obligated to pay as damages for claims occurring during the policy period or prior to the policy period provided that prior to the effective date of the policy, if the insured “had no reasonable basis to believe that the Insured had breached a professional duty or to Reasonably Foresee that a Claim would be made against the Insured.” The policy defined “Reasonably Foresee” to include “incidents or circumstances that involve a particular person or entity which an Insured knew might result in a Claim or suit prior to the effective date of the first policy issued by the Company to the Named Insured, and which was not disclosed to the Company.”

Notice of Claim and Legal Malpractice Action

The Paul & Nace first notified Chicago Insurance of Gilbert’s potential legal malpractice claim in May 2009, stating that the alleged error had occurred in 2008. Chicago Insurance retained a law firm to defend Paulson & Nace in the potential malpractice action. Chicago Insurance did not discover the correct timing of the dismissal in the *Gilbert* medical malpractice matter until November 2011.

On January 13, 2012, Chicago Insurance sent a reservation of rights letter to its insureds stating that it reserved its rights to deny coverage to the extent that the insured had a reasonable basis to believe that a professional duty had been breached or to reasonably foresee that a claim would be made against the insured before the policy commenced on July 24, 2007.

On March 13, 2012, Gilbert filed a legal malpractice lawsuit in Richmond Circuit Court against Paulson & Nace. Chicago Insurance issued another reservation of rights letter to its insureds on April 21, 2012. The Richmond court entered a \$1.75 million judgment against the firm and its attorneys on November 1, 2013.

U.S. District Court Action

On December 27, 2012, Chicago Insurance filed a diversity action in the United States District Court for the District of Columbia seeking a declaratory judgment that it was not obligated to continue defending the firm and its lawyers. The insureds moved for summary judgment claiming that the insurer had waived or was estopped from asserting its defense to coverage, pursuant to Virginia law. Chicago Insurance filed a cross-motion for summary judgment arguing that D.C. law applied and that it was entitled to a declaratory judgment as a matter of law.

Choice of Law

Under Virginia law, when a liability insurer discovers a breach of the terms or conditions of the insurance contract by the insured, the insurer must notify the claimant within forty-five days of either the discovery of the breach or of the claimant’s claim. Va. Code § 38.2-2226 (2013). No such notice requirement exists under D.C. law. Chicago Insurance provided no such notice to the claimant, Gilbert, until it filed its initial declaratory judgment action.

The Court held that D.C. law applied because Chicago Insurance had issued an insurance policy to the insureds in the District of Columbia, the law firm was organized under D.C. laws, the firm's principal place of business was in D.C., and the insureds engaged in the practice of law in D.C.

Policy Did Not Obligate Plaintiff to Defend or Indemnify

Applying D.C. law, the Court found that the insureds failed to report the potential legal malpractice claim to their insurer on a timely basis; therefore, Chicago Insurance was not obligated to defend or indemnify them against those claims.

Using an objective standard, the Court held that the insureds had a reasonable basis to believe that they had breached a professional duty to Gilbert no later than June 18, 2007 when the Virginia court dismissed the complaint as untimely. Because they should have reasonably known about the potential claim prior to the inception of the policy on June 24, 2007, they failed to meet a prerequisite for coverage by not notifying Chicago Insurance of the potential claim.

In addition, the Court found that although Chicago Insurance could have reserved its rights with respect to its prior knowledge defense sooner, it did not waive the defense and was not estopped from asserting it. D.C. law requires the insurer to reserve its rights before undertaking the defense of the insureds "against a litigious assertion of unprotected liability." Chicago Insurance issued a letter reserving its rights with respect to its prior knowledge defense three months before Gilbert filed her legal malpractice action. Chicago Insurance could have learned of the facts giving rise to its defense nearly two years before it issued the reservation of rights letter; however, there was no prejudice to the insureds because the insurer did not hinder the insureds' ability to defend themselves. Additionally, the insureds were on notice of Chicago Insurance's position regarding coverage while it defended them in the legal malpractice suit.

Conclusion

The Court granted Chicago Insurance's motion for summary judgment, concluding that under D.C. law, the insureds failed to report the legal malpractice claim to the insurer in a timely manner and that the insurer was not barred from asserting such a defense to coverage.



Bankruptcy Court Ruling May Result in New Litigation Strategies in Mass Tort Claims

By: Sarah R. Bagley, Esq.

Garlock Sealing Technologies, a manufacturer of gaskets, filed for bankruptcy in 2010 after years of defending thousands of lawsuits by plaintiffs alleging asbestos related diseases and ultimately having their insurance run out. According to a study by the Government Accountability Office, Garlock is one of approximately 100 companies who have declared bankruptcy as a result of asbestos related liability. In those lawsuits brought against Garlock, plaintiffs often sued multiple manufacturers and distributors of products, alleging that exposure to their products, in some cases up to 30 years earlier, resulted in the plaintiff developing asbestosis, mesothelioma or other asbestos-related illness. Garlock, like many manufacturing defendants in asbestos cases, typically argued that its products were not likely to have caused or contributed to the plaintiff's alleged disease because their products contained chrysotile asbestos, a less dangerous form of the substance when inhaled, and that any asbestos used in its gaskets was encapsulated within other products, typically insulation.

In asbestos litigation, states apply various standards of proof to plaintiffs' claims. Typically, they require a plaintiff to show that exposure to a particular asbestos-containing-product was a substantial contributing factor in causing a plaintiff's disease. Alternatively, in Virginia for example, a plaintiff must meet a "sufficient to cause" standard. Given those standards, defendants like Garlock attempted to establish that the plaintiff was either insufficiently exposed to its product or that repeated exposure to other asbestos-containing-products was more likely to have resulted in a plaintiff's alleged disease. Typically, Garlock and the various plaintiffs reached settlement values based on the extent to which exposure to certain products was established in discovery.

In January 2014 in the matter of *In Re Garlock Sealing Technologies LLC* in the US Bankruptcy Court for the Western District of North Carolina, Judge George Hodges found that plaintiffs' attorneys had manipulated evidence in prior cases in an effort to receive larger settlement payments from Garlock. Judge Hodges made that finding as part of his determination as to the amount of money that should be set aside from Garlock's remaining assets to fund future payments to remaining claimants. The committee representing the claimants and Garlock presented Judge Hodges with significantly different figures as to the amount necessary for that fund.

In an attempt to resolve whether Garlock had potentially overpaid on past claims, Garlock sought to investigate how plaintiffs handled their cases and allegations after settling with Garlock, which Hodges allowed. Garlock sought to discern whether its settlement payments constituted a relatively fair assessment of its potential legal liabilities in those past cases. In order to do so, the Court allowed Garlock to examine the actions of plaintiffs in 15 cases. A hearing was held over 17 days wherein the Judge heard from over 20 witnesses and hundreds of exhibits were introduced. Judge Hodges ultimately found that all 15 cases were tainted in some way by legal impropriety and that the settlement values Garlock paid could not be used as a reliable indicator of the size of the fund Garlock was required to set aside for payment of pending asbestos claims. The concern raised by Garlock, and confirmed by Judge Hodges, was that plaintiffs, after pursuing Garlock in litigation by alleging that its products were a substantial or significant factor in causing a plaintiff's disease, would then pursue payments from the trusts of bankrupt makers of asbestos-

containing-products, namely insulation products, after settling with Garlock. In their claims against the trust, those plaintiffs would argue that those products were in fact a substantial or significant cause of a plaintiff's disease. As a result of these findings, Judge Hodges determined that Garlock should create a \$125 million dollar fund for payment of pending asbestos claims rather than the \$1.3 billion dollar fund sought by the committee representing asbestos personal injury claimants.

Since Judge Hodges' ruling, both plaintiffs and defense firms representing clients in asbestos matters are examining the potential impact of this ruling on the future of asbestos litigation. It is likely to impact the manner in which defendants value their settlements, plaintiffs pursue viable and bankrupt defendants, and the discovery obligations of both sides during litigation. Several defendants in asbestos suits have moved the Bankruptcy Court in the *Garlock* matter to release records from the estimation hearing so that they can evaluate whether they were sued by plaintiffs firms after settlements with Garlock. In fact, Judge Hodges ruled in May of this year that Ford Motor Company should be provided certain previously sealed bankruptcy related documents to address that issue. Other defendants are citing to the holding in pending asbestos litigation in an effort to dispute plaintiffs' alleged claims regarding exposure and liability. Garlock itself is pursuing actions against various plaintiffs' firms alleging violation of the Racketeer Influenced and Corrupt Organizations Act based on the firms' failures to provide all evidence of their clients' exposures to products other than Garlock's during the discovery process and prior to settlement with Garlock. As part of that claim, Garlock is seeking both punitive and treble damages.

The *Garlock* bankruptcy ruling has also brought renewed attention to this issue from the business community, advocates of tort reform, and Congress. The U.S. Chamber of Commerce has commented on the ruling, and has called on federal and state legislatures to address potential abuses within asbestos litigation. Prior to the ruling, on November 13 the House passed, 2013 H.R. 982, the Furthering Asbestos Claims Transparency Act (FACT) which would require quarterly disclosures by bankruptcy trusts regarding claimants seeking compensation due to alleged exposure to asbestos. The Bill requires disclosure of the claimant's name, exposure history, and the basis for any payments made by the trust. On May 12, 2014, an identical Bill was introduced into the Senate, S. 2319. Opponents of the Bill have expressed concerns regarding victims' privacy and the potential for employment discrimination based on claims against the trusts becoming public records. Few states have yet to address the issue of transparency in bankruptcy trusts directly, with North Carolina having recently taken up the issue in SB 648. The "The North Carolina Commerce Protection Act" would require increased disclosures from plaintiffs to defendants regarding their claims to bankruptcy trusts. Advocates of these reforms argue that these types of disclosures would allow the parties to more accurately value and settle these cases.

In terms of the current status of the *Garlock* bankruptcy matter, the committee of asbestos personal injury claimants has asked Judge Hodges to reconsider his initial determination. They have asked to reopen the record from the estimation hearing in an effort to show that Garlock itself did not comply with discovery orders and provide all of the information it had about the 15 plaintiffs' alleged exposure to other products. Garlock opposed that motion and argues that the committee has not demonstrated any reason why

the holding of the Court was improper or erroneous. Judge Hodges' ruling on these issues, as well as the pending litigation by Garlock against plaintiffs firms, and the attention being given these issues by other courts and Congress, are sure to impact the strategies of both the plaintiff and defense bar in asbestos litigation. Despite these claims having originated in the 1970's, it is clear that asbestos litigation continues to evolve and that all parties will need to continue to revise and update their litigation and discovery strategies to reflect the changing legal landscape surrounding asbestos exposure claims.

Antonio v. SSA Security, Inc.: Are Security Guard Agencies in Maryland Liable for the Off-Duty Criminal Acts of an Employee if the Employee Planned the Acts While on Duty?

By: Nicholas G. Hallenbeck, Esq.

Under Maryland common law, an employer is not vicariously liable for the unauthorized, intentional acts of an employee that do not further the employer's business. For example, an employer is not responsible for an employee's unforeseeable criminal acts.

Under Maryland statutory law, however, security guard agencies may be treated differently than other employers. The Maryland Security Guards Act states that: "[a] licensed security guard agency is responsible for the acts of each of its employees while the employee is conducting the business of the agency." Md. Code Business Occupations & Professions, §19-501.

A case pending in Maryland, *Antonio v. SSA Security, Inc.*, 749 F.3d 227 (4th Cir. 2014), calls into question the meaning and scope of that provision:

In 2004, a real estate developer began building new homes in Charles County, Maryland. The developer hired SSA Security, Inc., a licensed security guard agency, to provide security at the construction site. A security guard employee learned that several racial minority families planned to move into the new homes. While on duty, the security guard drew maps of the neighborhood, marked the homes that racial minority families contracted to purchase, and conspired with another employee to burn those homes to the ground. One night, while off-duty, the security guard entered the construction site and burned the marked homes to the ground.

The homebuyers sued SSA Security, Inc. in the U.S. District Court for Maryland, pursuant to the Maryland Security Guards Act. The homebuyers argued that the Maryland Security Guards Act renders the company strictly liable for its employee's actions, including off-duty criminal acts that were planned while on duty. SSA Security, Inc. argued that the statute simply codifies the existing common law doctrine of *respondeat superior* (vicarious liability). The U.S. District Court sided with SSA Security, Inc., and granted summary judgment.

In Maryland, if the General Assembly does not explicitly abrogate the common law when it enacts a statute, then Maryland's canons of statutory construction require interpretation of a statute in conformity with the common law. Here, the Maryland General Assembly was silent regarding whether it intended to abrogate the common law when it enacted this statute. The statute itself, however, is much broader than the common law - it covers all acts committed "while... conducting the business of the agency."

The U.S. Court of Appeals could not reconcile these "conflicting indicators of section 19-501's meaning." Instead of ruling on this issue of state law, the U.S. Court of Appeals certified the following question to the Maryland Court of Appeals:

Does the Maryland Security Guards Act impose liability beyond common law principles of *respondeat superior* such that an employer may be responsible for off-duty criminal acts of an employee if the employee planned any part of the off-duty criminal acts while he or she was on duty?

The Maryland Court of Appeals will hear oral argument on this issue in December 2014. The Court will likely issue an opinion in early 2015.

Insurer Not Obligated to Cover Defense Costs Where Attorney Failed to Notify Insurer of Potential Legal Malpractice Claim

By: Sarah W. Conkright, Esq.

In *Chicago Insurance Co. v. Paulson & Nace, PLLC*, No. 12-2068 (ABJ), --- F. Supp. 2d --- (D.D.C. April 10, 2014), the United States District Court for the District of Columbia held that Chicago Insurance Company ("Plaintiff") was not obligated to cover the defense costs for a legal malpractice action brought against its insured, a law firm and two attorneys ("Attorney Defendants"), because the Attorney Defendants had failed to timely notify Plaintiff of a potential legal malpractice claim and further held that doctrines of waiver and estoppel did not bar Plaintiff from asserting such a defense to coverage.

Underlying Medical Malpractice Lawsuit

On July 24, 2006, the Attorney Defendants filed a medical malpractice action in the Circuit Court for the City of Richmond on behalf of Sarah Gilbert, a minor, for injuries she sustained during spinal surgery. The statute of limitations on the claim expired four days after the filing. The Complaint failed to name a "next friend" as required by Virginia law, and the court dismissed the Complaint without prejudice. The Attorney Defendants filed a second complaint on October 25, 2006, that complied with Virginia law; however, the court dismissed the matter with prejudice as being untimely based on the statute of limitations on June 18, 2007.

Application for Insurance Policy

On July 18, 2007, one of the Attorney Defendants applied for a “claims-made” professional liability insurance policy from Plaintiff. He answered “No” to the following question on the policy application:

Having inquired of all partners, officers, owners and employed lawyers, are there any circumstances which may result in a claim being made against the firm, its predecessors or any current or past partner, officer, owner or employed lawyer of the firm?

Plaintiff issued a “Lawyers Professional Liability Policy” to the Attorney Defendants for the period of July 24, 2007 to July 24, 2008, which was subsequently renewed through July 24, 2009. The terms of the policy provided that the insurance company would pay all sums that the insured became legally obligated to pay as damages for claims made during the policy period arising from events occurring during the policy period or prior to the policy period, provided that prior to the effective date of the policy, the insured “had no reasonable basis to believe that the Insured had breached a professional duty or to Reasonably Foresee that a Claim would be made against the Insured.” The policy defined “Reasonably Foresee” to include “incidents or circumstances that involve a particular person or entity which an Insured knew might result in a Claim or suit prior to the effective date of the first policy issued by the Company to the Named Insured, and which was not disclosed to the Company.”

Notice of Claim and Legal Malpractice Action

The Attorney Defendants first notified Plaintiff of Gilbert’s potential legal malpractice claim in May 2009, stating that the alleged error had occurred in 2008. Plaintiff retained a law firm to defend the Attorney Defendants in the potential malpractice action. Although Plaintiff received litigation documents from the underlying medical malpractice action in March 2010, Plaintiff did not discover the timing of the dismissal in the *Gilbert* medical malpractice matter until November 2011.

On January 13, 2012, Plaintiff sent letters to the Attorney Defendants stating that it reserved its rights to deny coverage to the extent that an insured had a reasonable basis to believe that a professional duty had been breached or to reasonably foresee that a claim would be made against the insured before the policy commenced on July 24, 2007.

On March 13, 2012, Gilbert filed a legal malpractice lawsuit in Richmond Circuit Court against the Attorney Defendants.¹¹ The Richmond court entered a \$1.75 million judgment against the Attorney Defendants on November 1, 2013.

U.S. District Court Action

On December 27, 2012, Plaintiff filed a diversity action in the United States District

¹¹ Plaintiff then issued another reservation of rights letter to the Attorney Defendants on April 21, 2012.

Court for the District of Columbia seeking a declaratory judgment that it was not obligated to cover the defense costs for the Attorney Defendants.¹² The Attorney Defendants moved for summary judgment claiming that Virginia law applied and that Plaintiff had waived or was estopped from asserting its defense to coverage. Plaintiff filed a cross-motion for summary judgment arguing that District of Columbia law applied and that Plaintiff was entitled to a declaratory judgment as a matter of law.

Choice of Law

The court first addressed the choice of law issue raised by the parties to determine whether Virginia or District of Columbia law applied to the substantive issues in the case. Under Virginia Code § 38.2-2226, when a liability insurer discovers a breach of the terms or conditions of the insurance contract by the insured, the insurer must notify the claimant within forty-five days of either the discovery of the breach or of the claimant's claim. No such notice requirement exists under District of Columbia law. Plaintiff provided no notice to the claimant, Gilbert, until it filed its initial declaratory judgment action.

The court then applied the multi-factor "governmental interests" or "more substantial interests" test and concluded that District of Columbia law applied to control the interpretation and enforcement of the insurance contract at issue. Plaintiff had issued an insurance policy to Attorney Defendants in the District of Columbia, one of the individual Attorney Defendants was a resident of D.C., the law firm was organized under D.C. laws, the firm's principal place of business was in D.C., and the Attorney Defendants engaged in the practice of law in D.C.

Policy Did Not Obligate Plaintiff to Defend or Indemnify

Applying District of Columbia law, the court found that the Attorney Defendants failed to report the potential legal malpractice claim to Plaintiff on a timely basis; therefore, Plaintiff was not obligated to defend or indemnify them against those claims.

The court held that the Attorney Defendants had a reasonable basis to believe they had breached a professional duty prior to the inception of the insurance policy. The court rejected the Attorney Defendants' argument that failing to name a "next friend" in Gilbert's suit was simply a "misnomer" such that there was no basis for them to believe they had breached any duties to Gilbert. The court noted that failing to correct the naming mistake before the limitations period expired was fatal to Gilbert's claims.

Using an objective standard to determine what a reasonable attorney would have done in the same circumstances, the court held that the Attorney Defendants had a reasonable basis to believe that they had breached a professional duty to Gilbert no later than June 18, 2007 when the Virginia court dismissed the medical malpractice complaint as untimely. Because they should have reasonably known about the potential claim prior to the inception of the policy on June 24, 2007, they failed to meet a prerequisite for coverage by

¹² Plaintiffs initially filed the case in the United States District Court for the Eastern District of Virginia, but it was dismissed for lack of subject matter jurisdiction.

not notifying Plaintiff of the potential claim. The policy obligated the Plaintiff to provide coverage to incidents that arose prior to the policy's inception if there was proper notice of the potential claim.¹³

Insurer Did Not Waive Defense to Coverage, Nor Was it Estopped from Asserting it

In addition, the court found that although the Plaintiff could have reserved its rights with respect to its prior knowledge defense sooner, Plaintiff did not waive the defense and was not estopped from asserting it.

Under District of Columbia law, an insurer waives its right to disclaim coverage under a policy by undertaking the defense of an insured against a "litigious assertion of unprotected liability," without a disclaimer of contractual responsibility and a reservation of rights. Similarly, an insurer can only be estopped from denying coverage if his participation in the case prejudices the insured by impacting its ability to defend itself.

In this case, however, Plaintiff issued a letter reserving its rights with respect to its prior knowledge defense three months before Gilbert filed her legal malpractice action. Therefore, it had not waived its defense to coverage. Although Plaintiff could have learned of the facts giving rise to its defense nearly two years before it issued the reservation of rights letter, there was no prejudice to the Attorney Defendants because Plaintiff did not hinder the Attorney Defendants' ability to defend themselves. Additionally, the Attorney Defendants were on notice of Plaintiff's defense while it defended them in the legal malpractice suit.¹⁴

Conclusion

The court granted Plaintiff's motion for summary judgment, concluding that under D.C. law, the Attorney Defendants failed to report the legal malpractice claim to Plaintiff in a timely manner and that Plaintiff was not barred from asserting such a defense to coverage.

¹³ The court also rejected the Attorney Defendants' contention that expert testimony was required to establish when they should have reasonably foreseen that Gilbert would bring a legal malpractice claim.

¹⁴ The Attorney Defendants also argued that if Plaintiff reserved its rights earlier, they would have notified and pursued other potential insurers, including their immediately prior insurer. However, the court found that the prior policy expired in July 2007; therefore, it was not clear that such a claim could have been successful since the earliest date on which Plaintiff could have discovered its defense was March 2010 when the insurer received documents from the underlying medical malpractice case.