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ALERT

Malpractice Complaint and Previous Counterclaim in Fee Dispute Constitute Single Claim Made in Prior Policy Period

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The United States District Court for the District of New Jersey, applying New Jersey law, has held that a malpractice complaint brought against the insured attorney in 2009 constituted a claim deemed first made in a prior policy period when certain clients counterclaimed for malpractice in defending a previous collection action by the insured. *Gladstone, et al. v. Westport Ins. Corp.*, 2011 WL 5825985 (D. N.J. Nov. 16, 2011). Additionally, the court found that a Prior Firm Endorsement does not provide carte blanche coverage for any claim arising from the insured attorney's activities at a prior firm.

The insurer issued a claims made and reported professional liability insurance policy to the insured's law firm for the policy period July 4, 2008 through July 4, 2009. The policy included a Prior Firm Endorsement, which amended the policy's definition of insured to include the insured attorney "as respects legal services rendered by [him] while associated with a prior firm." In 2007, while with a prior firm, the insured attorney had sued a number of clients for unpaid fees in connection with a single joint representation. One of the clients had filed a counterclaim alleging that the insured attorney negligently performed the legal services for which he sought payment. The insured attorney had settled with the client who filed the counterclaim but dismissed his lawsuit against another client who had made similar allegations in his answer to the collection action. That client later filed the 2009 malpractice complaint alleging virtually identical claims of malpractice as had been alleged in the counterclaim and answer to the 2007 collection action.

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The insurer denied coverage on the ground that the 2009 complaint and the 2007 counterclaim and answer were considered one "claim" that originally arose in 2007, before the applicable policy incepted. The policy included a related claims provision that stated:

Two or more CLAIMS arising out of a single WRONGFUL ACT, as defined in each of the attached COVERAGE UNITS, or a series of related or continuing WRONGFUL ACTS, shall be a single CLAIM. All such CLAIMS whenever made shall be considered first made on the date on which the earliest CLAIM was first made arising out of such WRONGFUL ACT . . . .

The court held that the allegations and demands in the 2007 counterclaim and the 2009 complaint arose from the same or related wrongful acts regarding the insured attorney's negligence in the handling of the matter that was the subject of the 2007 collection action. The court therefore found that the 2009 complaint constituted a claim first made in February 2007, and was not a claim first made during the policy period.

Alternatively, the insureds contended that the Prior Firm Endorsement required coverage for any claim arising out of the insured attorney's activities at his prior firm and trumped any policy terms that would limit such coverage. The court rejected this argument and found that the Prior Firm Endorsement did not supercede or supplement any policy provisions except to amend the definition of "insured." Accordingly, the court granted the insurer's motion for summary judgment.