

# Insurance Company Prevails after Denying Coverage for Attorney's Wrongful Conduct

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In *Gandor v. Torus Nat'l Ins. Co.*, 2015 WL 6043621 (D. Mass. Oct. 15, 2015), the U.S. District Court for the District of Massachusetts granted an insurer's motion for summary judgment finding there was no professional liability coverage for two underlying claims stemming from an attorney's alleged malpractice in handling his client's appeal of a zoning decision.

## Factual and Procedural History

Alan Shocket was a principal of the law firm Shocket & Dockser, LLP, which employed Adam Lowenstein as an associate attorney. *Id.* at \*1. In 2009, Lowenstein mishandled a real estate litigation matter in Massachusetts Superior Court for Samer Gandor, the Plaintiff in this action. *Id.* In particular, Lowenstein failed to comply with certain procedural requirements for appealing a zoning decision that was adverse to Gandor. *Id.* The appeal was dismissed with prejudice in September 2009 and Lowenstein left the firm that same year. *Id.* A few months later, Shocket & Dockser dissolved and a new law firm called Shocket Law Office, LLC was formed. *Id.* In early January 2010, Alan Shocket received a letter from Lowenstein describing his error in handling Gandor's appeal. *Id.* A few weeks later Shocket sent a letter to Gandor expressing his opinion that Lowenstein's errors did not amount to malpractice. *Id.* Also in 2010, Torus National Insurance Company issued a professional liability policy to Shocket Law Office with a policy period of November 27, 2010 to November 27, 2011 (the 2010-11 Policy). *Id.*

In July 2011, Gandor filed a malpractice suit against Lowenstein and Shocket Law Office for Lowenstein's mishandling of the zoning appeal. *Id.* Shocket Law Office, in turn, filed a notice of claim, which Torus denied in part because Lowenstein was not named as an attorney under the policy, and the underlying conduct was subject to an exclusion. *Id.* The lawsuit against Lowenstein settled in March 2013 and as part of the settlement, Lowenstein and Gandor executed an agreement whereby Lowenstein assigned to Gandor any rights against Shocket, Shocket & Dockser, and Shocket Law Office. *Id.* Two months later, Gandor filed suit against Alan Shocket individually seeking relief for Shocket's failure to insure Lowenstein under his law firm's malpractice insurance policy. *Id.* At the time of this lawsuit, Shocket Law Office was covered by a malpractice insurance policy with a policy period of November 27, 2012 to November 27, 2013 (the 2012-13 Policy). *Id.* Shocket Law Office again filed a claim with Torus and was denied coverage because coverage could not be created by recasting a previously reported claim as "new and distinct." *Id.* Ultimately, the lawsuit against Alan Shocket settled and he agreed to assign to Gandor all rights to collect on the underlying judgments. *Id.*

Gandor filed the instant action against Torus in November 2013 alleging Torus breached the insurance contract and the implied covenant of good faith and fair dealing by denying coverage. *Id.* Gandor's complaint also alleged Torus's coverage denials violated the Massachusetts Consumer Protection statute, Mass. Gen. Laws ch. 93A. *Id.* Torus counterclaimed for declaratory judgment, seeking to establish it properly denied coverage on both claims. *Id.*

#### **Analysis: Torus Properly Denied Coverage for the Two Claims at Issue**

In its dispositive motion Torus argued coverage under the 2010-1 Policy was precluded by Exclusion II(B) in the policy. That exclusion precluded insurance coverage for:

[A]ny claim arising out of any wrongful act occurring prior to the effective date of this policy if ... the insured at or before the effective date knew or could have reasonably foreseen that such wrongful act might be expected to be the basis of a claim. However, this paragraph B does not apply to any insured who had no knowledge of or could not have reasonably foreseen that any such wrongful act might be expected to the basis of a claim.

*Id.* at \*3. The Court determined that November 27, 2010 was the effective date of the 2010-11 Policy and that Lowenstein's mishandling of Gandor's appeal occurred in 2009. *Id.* Therefore, to determine whether Exclusion II(B) applied, the question to be answered was whether Shocket knew or could have reasonably foreseen, before November 27, 2010, that Lowenstein's mishandling of Gandor's appeal might be expected to be the basis of a claim. *Id.*

Relying on the letter Lowenstein wrote to Shocket in January 2010 (10 months before the effective date of the 2010-11 Policy) and the letter Shocket wrote to Gandor, the court determined Shocket, as the insured, knew or could have reasonably foreseen that the mishandling of Gandor's appeal might be the basis of a future claim. *Id* . Specifically, the letter Shocket sent to Gandor revealed Shocket agreed to refund the legal charges incurred for time spent drafting and filing the appeal in exchange for a release from Gandor. *Id*. When Shocket was asked at his deposition why he sought a release from Gandor at that time his response was that it was clear Gandor was making a claim of malpractice and he was not willing to provide any type of relief without receiving a release. *Id* .

The court concluded these letters and Shocket's testimony showed he could not only reasonably foresee but actually did foresee Gandor's malpractice claim as early as January 2010. *Id*. Therefore, the unambiguous language of Exclusion II(B) applied and the 2010-11 Policy did not cover Lowenstein's mishandling of Gandor's zoning appeal. *Id*.

Gandor's allegation that Torus erroneously applied the 2010-11 Policy to the claim made in 2013 proved equally unsuccessful. The court found the wrongful conduct underlying both claims to be identical. *Id*. at \*4. Examining the language of both the 2010-11 and 2012-13 Policies, the court found the second claim was made alongside the first. *Id*. As a result, the court held application of the 2010-11 Policy was appropriate and Exclusion II(B) applied to the second claims as well as the first. *Id*. As a result, coverage was appropriately denied. *Id*.

Additionally, because the court determined Torus properly denied coverage for the two claims at issue in this case, it concluded there was no violation of Mass. Gen. Laws. Ch. 93A.

#### **Concluding Thoughts**

This case serves as a reminder that when an applicant seeks malpractice insurance, an objective standard generally applies regarding whether the applicant knows or reasonably could know of any acts or omissions that might be expected to be the basis of a claim. Here, testimony revealed the firm actually did foresee a malpractice claim before the effective date of the 2010-11 Policy. As such, there was no coverage for that claim.

**By Jasna Dubo**

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