IDENTIFYING AND RESPONDING TO PROFESSIONAL LIABILITY CLAIMS

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Claim Notification and Reporting Issues

A. What Constitutes a “Claim”?

What constitutes a “claim” will be determined by how “claim” is defined by the insurance policy. Although definitions will vary, almost all professional liability insurance policies will define “claim” to include a demand for money or services, or the commencement of a lawsuit, arbitration and/or other alternative dispute proceeding against the insured attorney. Some policies may also define a “claim” to include disciplinary proceedings against the insured attorney. To constitute a claim under a professional liability policy, the demand does not necessarily have to be in writing. Most professional liability policies require the insured to provide the insurer with notice of potential claims.

On occasion, an attorney may commit the same or similar act of negligence that will give rise to multiple claims by separate claimants. In such situations, a question arises as to whether the various claims should be considered a single claim (thereby subject to a single deductible, policy limit and policy period) or separate claims (involving separate deductibles, and in some situations, separate policy limits or policy periods). Several “claims” may be said to be “interrelated” within the meaning of a lawyers professional liability policy when: (1) there is a causal connection between the claims (i.e., one causes the other) or the claims arise from a single cause; or (2) the facts are such that the claims should logically be deemed “related.”

Most professional liability insurance policies will provide that all claims that arising out of the same act, error or omission or a series of related or continuing acts, errors or omissions are to be considered a single “claim” and are deemed to have been made at the time that the first “related” claim was made.

B. Responding to and Reporting of Potential Claims

Lawyers professional liability policies are “claims-made” or “claims-made and reported” policies, which means that the claim has to be made (and under some policies, reported) during the policy period and any extended reporting period that may apply. “Claims-made” policies provide coverage for claims made during the policy period regardless of when the wrongful act occurred.

Professional liability insurers require the insured to give written notice of claims or facts or circumstances that may reasonably be expected to give rise to a claim (i.e., a potential claim), as a condition precedent to coverage. Most insurers will deny coverage for professional liability claims that arise from circumstances that the insured knew or reasonably should have known would lead to a claim prior to the inception of the policy period, unless the insured notifies the insurer of the potential claim at the commencement of the coverage period.
The test for determining whether a notice provision has been triggered is whether circumstances known to the insured at the time would have suggested to a reasonable person the existence of a possibility that a claim will be made.1

In Am. Guaranty & Liab. Ins. Co. v. Cohen,2 defendant attorney Cohen held a large sum of investors’ money in escrow, which was lost due to a Ponzi scheme. The investors sued Cohen for malpractice. Cohen’s malpractice insurance company began defending the malpractice action subject to a reservation of rights, but also filed a declaratory judgment action seeking a determination that it was not obligated to defend or indemnify Cohen in the malpractice action. As a condition of his coverage, Cohen was required to notify the insurer immediately if he had reason to expect that a claim may be made against him for professional malpractice. The insurance company argued that Cohen was obligated to notify the company in February of 2006 when the investments were lost. Cohen advised the insurer of the claim only after he was served with a summons with notice in the malpractice lawsuit. The court found that the insurer could not demonstrate the existence of an attorney-client relationship between the investors and Cohen, nor any factors vitiating Cohen’s reasonable belief of non-liability for legal malpractice. As such, the court found Cohen was not required to have noticed the potential claim prior to the filing of the malpractice lawsuit.

In contrast, in Property & Cas. Ins. Co. of Hartford v. Levitsky,3 an attorney, on behalf of his client, sued the wrong corporation thinking that the corporation he sued was the owner of a mall where his client was injured. The attorney learned in December 2007, five days before the statute of limitations expired, that he had sued the wrong corporation. However, the attorney did not timely amend the complaint to name the proper party. In August 2008, after the client’s case had been dismissed, the attorney notified his malpractice insurer as to the potential malpractice claim. The insurer denied coverage for the malpractice action based on the insured’s failure to comply with a policy provision requiring notification of “any circumstance which may give rise to a claim.” In the ensuing coverage litigation, the court held that the expiration of the statute of limitations provided a reasonable expectation that a malpractice claim might be filed, and that the attorney’s self-professed belief of non-liability after December 2007 was not reasonable. Therefore, the insurance company was not obligated to defend or indemnify the insured attorney and law firm.

C. Representations in the LPL Application

Under New York law, an insurance policy issued in reliance upon a material representation is void from its inception.4 If an insurer can show that it was induced to accept an application that it might otherwise have refused it is entitled to rescind the

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2 44 Misc. 3d 1227(A) (Sup. Ct. N.Y. County 2013).
3 973 N.Y.S.2d 78 (1st Dept. 2013).
4 See N.Y. Ins. Law § 3105; Republic Ins. Co. v. Masters, Mater & Pilots Pension Plan, 77 F.2d 48, 52 (2d Cir. 1996).
Even an innocent misrepresentation, if material, will support rescission. The burden of establishing the existence of a material misrepresentation is on the insurer.

In *Kiss Constr. NY, Inc. v Rutgers Cas. Ins. Co.*, the Appellate Division outlined the contours of rescission in the context of an insurance policy: "For an insurer to be entitled to rescind a policy ab initio, it must show that the applicant made a material misrepresentation with an intent to defraud. 'No misrepresentation shall be deemed material unless knowledge by the insurer of the facts misrepresented would have led to a refusal by the insurer to make such a contract.' While the materiality of a misrepresentation is ordinarily a jury question, it becomes a matter of law for the court’s determination when the evidence concerning materiality is clear and substantially uncontradicted.”

In order to prove the materiality of a misrepresentation, the insurer must produce affidavits by the underwriters or other relevant employees, along with documentary evidence such as underwriting policies, guidelines, and manuals regarding similarly situated insureds (as compared to the applicant), to show that if the information omitted by the applicant was provided to the insurer, and if the applicant was truthful in the application process, the insurer would not have issued the policy in question.

In *Am. Guarantee & Liab. Ins. Co. v. Cohen*, the insurer argued that Cohen's failure to disclose the failed investment in his renewal application constituted a material omission in violation of the policy. The court disagreed, holding that the insurer had failed to demonstrate materiality in connection with the alleged misrepresentations. "To establish materiality of a misrepresentation as a matter of law, plaintiff must present evidence, such as an affidavit from one of plaintiff's underwriters and corroborating documentary evidence of its underwriting policies, that plaintiff would not have issued the renewed policy if [the Insured] had disclosed the omitted information in his application." The insurer offered an affidavit by the Assistant Vice President of its Programs Business Unit, which stated she would have declined to renew Cohen’s policy had he disclosed the circumstances of the failed investment. The court found the affidavit to fall short of the proof needed to establish a material misrepresentation as a matter of law. The court noted, “[the insurer] provides no evidence of an underwriting policy or practice of denying coverage to similarly situated insureds based on potential liability for failed investments made through an IOLA.” Therefore, Cohen had no duty to disclose any potential claim arising from the failed investment when he renewed his insurance policy.

In *Liberty Ins. Underwriters, Inc. v. Goberdhan*, Liberty issued Goberdhan a lawyer’s professional liability policy on January 29, 2009. In the insurance application, Goberdhan circled “No” in response to the question “[a]fter inquiry, has any lawyer to be insured under this policy … D. Knowledge of any circumstance, act, error, or omission that could result in a professional liability claim?” In July 2009, the FDIC, in its capacity as receiver of IndyMac bank brought an action against Goberdhan in federal court alleging

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8 61 A.D.3d 412 (1st Dept. 2009).
10 2013 WL 2329537 (Sup. Ct. N.Y. County 2013).
misconduct in connection with a series of loans made during 2006 and 2007. Goberdhan had represented IndyMac as its closing agent and attorney for the loans that were the subject of the FDIC action. By January 2011, Goberdhan pleaded guilty to multiple counts of criminal conduct. The court held that Goberdhan’s misrepresentation on the application was material because an affidavit from Liberty’s underwriter established that Liberty would not have issued the policy if Goberdhan had answered the question truthfully. Therefore, Liberty was entitled to rescission of the policy.

In Chicago Ins. Co. v. Kreitzer & Vogelman, the insurer brought an action against an insured law firm and its partners seeking a declaration that the insurer properly rescinded two policies based on a lawyer’s (Kreitzer) material representations on his applications regarding his past disciplinary problems and potential claims filed against him by clients. During the two relevant policy periods, Kreitzer failed to disclose on two renewal applications that he and his firm were subject to nearly thirty potential claims, and that the Disciplinary Committee of New York’s First Judicial Department had filed twenty-six charges against Kreitzer for the neglect of twelve client matters. The insureds filed a counterclaim alleging that the insurer had a duty to defend and indemnify them, arguing that the insurer had waived its ability to rescind the policies by accepting a premium after it had knowledge of a number of actual claims filed against the insured.

After a bench trial, the court found that Kreitzer’s failure to list his disciplinary problems and the potential claims against him on his insurance application amounted to material misrepresentations. Based on testimony from several of the insurer’s employees, the court found that the insurer would not have issued the policies had they known of Kreitzer’s misrepresentations. The court determined that the insurer properly rescinded the policies and was not estopped from such rescission on account of its acceptance of premiums, which it tendered back to the insured upon rescission. The insurer also did not waive its ability to rescind the policies, since it acted reasonably in engaging coverage counsel just a few weeks after receiving notice of the large number of potential claims against the insured. The court held that the insurer had no duty to defend or indemnify the insured.

In Holloway v. Sacks and Sacks, Esqs., the insurer failed to offer any evidence establishing that the law firm had either actual or constructive knowledge of a former associate’s mishandling of a plaintiff’s case when the law firm represented in its insurance application that it knew of no circumstances which would result in a claim for malpractice. The court held:

While an innocently made material misrepresentation may serve to void an insurance contract (Tennenbaum v. Ins. Corp of Ireland, Ltd., 179 A.D.2d 589, 592, 579 N.Y.S.2d 351 (1st Dept. 1992), the precise issue here is whether the defendants should have had actual or constructive knowledge of the former associate’s misconduct. There was no actual knowledge on the part of the inquiring partner and there is insufficient evidence on which he or the firm could be deemed to have had constructive knowledge. The former associate concealed his misconduct

13 Id. at 626.
and there is no basis for either imputing his knowledge to the defendants
or for finding that they should have known of such misconduct. 14

While an action to rescind a policy is pending, the insurance policy will remain in effect
and the insurer continues to owe its insured a duty to defend. 15 An insurer must take
action to rescind a policy in a timely manner. 16 An insurer's undue delay in exercising its
right to rescind a policy may result in a waiver of the right of rescission as a matter of
law. 17 If an insurer rescinds a policy, it must repudiate the contract and return the
insurance premium to its insured. 18

D. Notification of Claims

The requirement that an insured notify its professional liability carrier of a claim is a
condition precedent to the insurer's obligation to defend and indemnity the insured. 19
Virtually all professional liability policies require the insured to notify the insurer of a
claim or potential claim in writing “as soon as practicable,” “promptly” or “immediately,”
and if the insured fails to do so, it will often result in the insurer denying coverage. Even
a relatively short delay by an insured to notify the insurer of a claim can violate the notice
requirements of a policy. 20

Under New York law, an insured's failure to comply with a notice provision is generally a
complete defense to actions against the insurer for coverage. 21 This holds true even if
the insurer was not prejudiced by the untimely notification. 22 Where the receipt of timely
notice of a claim is a condition to an insurer's obligation to defend or indemnify an
insured, the insurer may disclaim coverage for late notice without having to demonstrate
prejudice. 23

The burden of proving timely notice of a claim falls on the insured. 24 Under New York
law, an insured must provide notice “within a reasonable time under all the

14 Id.
15 See In re Worldcom, Inc. Securities Litigation, 354 F.Supp.2d at 466; Wedtech Corp. v. Federal
(2003).
(more than 10–day delay is not immediate); Rushing v. Commercial Casualty Ins. Co., 251 N.Y.
302, 304, 167 N.E. 450 (1929) (22–day delay); Goodwin Bowler Assoc., Ltd. v. Eastern Mutual
v. Fairchild Indus., Inc., 56 F.3d 435, 440 (2d Cir.1995) (“Under New York law, delays for one or
two months are routinely held 'unreasonable' ”); American Home Assurance Co. v. Republic Ins. Co.,
984 F.2d 76, 78 (2d Cir.), cert. denied, 508 U.S. 973, 113 S.Ct. 2964, 125 L.Ed.2d 664 (1993)
(same); Martinson v. Massachusetts Bay Ins. Co., 947 F.Supp. 124, 131 (S.D.N.Y.1996) (same);
satisfy requirement to notify “as soon as practicable”).
22 Id.
circumstances.”

This reasonableness standard holds true for notice provisions that specify notice “as soon as practicable” as well as those that are silent as to when notice must be given.

The notice requirement may be triggered by the discovery of an actual or potential claim. An insured must provide notice to the insurer upon discovery of facts and circumstances that would lead an objectively reasonable person to believe in the possibility of a claim. “Reasonability appears to pertain to both whether the insured party should have been able to recognize that an occurrence could give rise to liability and whether upon such discovery, the insured notified the insurer within a reasonable time.”

Failure to give timely notice of a claim may be excused if the insured either had no knowledge of the occurrence or reasonably believed that he was not liable. “[T]he fact that an injured party does not tell the insured that a claim will be made is an insufficient excuse for failing to give timely notice. Indeed even if the injured party tells the insured that no claim will be made, that does not excuse a notice delay.”

What is Covered Under the Typical LPL Policy

A. The Scope of Professional Services

Professional liability policies provide insurance coverage for liability claims arising out professional services and activities performed on behalf of others. Professional liability insurance does not cover claims that may arise from operation of a law practice, such as a commercial dispute, breach of contract, property damage or bodily injury claims such as a slip and fall. On the other hand commercial general liability policies will typically exclude coverage for claims arising out of professional services.

The insurance policy will define “professional services.” Therefore, whether or not the alleged negligent act arises from “professional services” is a matter of contractual interpretation of the particular professional liability policy at issue. Where an ambiguity exists within the policy language, the policy’s language will be construed in favor of the insured.

A definition of “professional legal services” in one professional liability policy reads as follows:

25 Olin, 966 F.2d at 723.
26 Id. (“[A] policy stating that notice of an occurrence be given ‘as soon as practicable ... requires that notice be given within a reasonable time under all the circumstances.” (quoting Security Mut. Ins. Co. v. Acker-Fitzsimons, 340 N.Y.S.2d 902, 906)); Sirignano v. Chi. Ins. Co., 192 F.Supp.2d 199, 203 (S.D.N.Y.2002) (“If the policy is silent as to when notice must be given, ‘the law implies a duty to give timely notice within a reasonable time...’” (citation omitted)).
27 Agway, 1993 WL 771008, at *10-12.
30 See Int'l Flavors, 822 F.2d at 271.
31 Sirignano, 192 F.Supp.2d at 205.
Professional legal services means legal services and activities performed for others as:

a. a lawyer;
b. a notary public;
c. an arbitrator;
d. a mediator;
e. a title insurance agent;
f. a designated issuing lawyer to a title insurance company;
g. a court-appointed fiduciary;
h. a member of a bar association, ethics, peer review, formal accreditation or licensing, or similar professional board or committee;
i. an author, strictly in the publication or presentation of research papers or similar materials and only if the fees generated from such work are not greater than ten thousand dollars ($10,000); and/or
j. an administrator, conservator, receiver, executor, guardian, or any similar fiduciary capacity, or court-appointed trustee, however, no coverage shall apply to any loss sustained by you as the beneficiary or distribute of any trust or estate.

Services performed by you in a lawyer-client relationship on behalf of one or more clients shall be deemed for the purpose of this section to be professional services in your capacity as a lawyer, although such services could be performed wholly or in part by nonlawyers.

An insurer’s duty to defend is broader than its duty to indemnify. In determining whether an insurance carrier has a duty to defend under a professional liability policy, the court will compare the allegations in the complaint with the language of the insurance policy. The duty to defend exists unless “there is no possible factual or legal basis on which the insurer will be obligated to indemnify the insured.”32 The Court of Appeals for the Second Circuit has stressed that the duty to defend continues “until it is determined with certainty that the policy does not provide coverage.”33

The insurer bears a “heavy burden” to show that the allegations of the complaint cast the pleadings wholly within the exclusions and that there is no possible factual or legal basis for finding liability covered by the policy.34 Even if only one claim in the complaint potentially falls within the indemnity coverage, the insurer will be required to defend the entire action.35

In *Shorenstein v. Pacific Ins. Co.*,36 the Appellate Division, First Department held that there was no coverage under a lawyers professional liability policy for the claims against the lawyer and his wife, who were both sued in connection with certain business transactions with a family member. The court found that since the business transactions

at issue were unrelated to the insured law practice, there was no reasonable possibility that the claims fell within the insured’s policy.

In contrast, in *Lombardi, Walsh, Wakeman, Harrison, Amodeo & Davenport, P.C., v. American Guarantee & Liability Ins. Co.*, the insured law firm was contacted by an individual purporting to be the CEO of a Taiwanese corporation seeking legal assistance. The individual sent the law firm a check for $384,700, which they deposited. The law firm then, at the request of the individual, wired the value of the check minus a legal fee in two wire transfers to an alleged supplier in South Korea. After the money was wired, the law firm’s bank notified the firm that the check provided was a counterfeit and that the firm’s account was overdrawn. The bank sued the law firm due to the overdraft, and the firm sought indemnification and defense from its lawyers professional liability insurer. The insurer denied coverage, arguing that the bank’s claim against the insured was not based on its provision of “Legal Services,” defined by the policy as “those services performed by an Insured as a licensed lawyer in good standing ... or in any other fiduciary capacity but only where the act or omission was in the rendition of services ordinarily performed as a lawyer.” Specifically, the insurer argued that the insured was not truly performing legal services for a client because the individual who contacted the firm was an imposter and never intended to receive legal services, and that, in any event, the bank’s claim was not “based on” any “Legal Services” (assuming any were actually performed for the imposter client). The court held that the policy does not require an actual “client,” but just the rendering of legal services for others, and the imposter fell within this broad category. Moreover, the court found that the connection between such “Legal Services” and the bank’s allegations was sufficient to trigger the broad duty to defend.

### B. Non-Covered Acts, Errors or Omissions

Attorneys often times wear multiple hats. However, unless the services that form the basis of a claim fall within the definition of professional services, it is not likely that the claim will be covered by professional liability insurance. Professional liability insurers expressly exclude certain acts, errors or omissions from coverage. Lawyers professional liability policies will usually exclude coverage for claims against an insured that are based on the attorney’s conduct as a director or officer of a corporation or other entity that is not specifically named as an insured in the insurance policy declarations. Most policies also exclude coverage for wrongful conduct committed by the insured in their capacity as a fiduciary under the Employment Retirement Income Security Act of 1974 or as a beneficiary or distributee of a trust or estate. In addition, claims arising from professional services rendered by the insured to an entity or organization where the insured has a certain percentage of equity interest in the entity or organization are often excluded under a professional liability policy.

In *Admiral Ins. Co. v. Adges*, the plaintiff insurance company (Admiral) filed a complaint against its insured (Adges) seeking a declaratory judgment concerning Admiral’s duties under the lawyers professional liability policy. Adges sought coverage under the policy for an underlying lawsuit in which he and his company, “Silver Lining Realty,” were sued for his alleged actions in a real estate transaction. The policy excluded from coverage claims related to an insured’s business activities other than the

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37 924 N.Y.S.2d 201 (3d Dept. 2011),
practice of law. Under the policy’s business enterprise exclusion, “Admiral shall not be liable to defend, or make any payment for any Damages or Claims Expense in connection with a Claim made against any insured (E) based upon, arising out of, directly or indirectly resulting from or in consequence of, or in any way involving any Insured’s activities or their capacity as: (1) an officer, director, partner, trustee, or employee of a business enterprise, not named in Item 1. of the Declarations [within the Policy], a nonprofit organization, or a pension, welfare, profit sharing, mutual or investment trust or fund…” The court found that the exclusion applied whether or not Adges’ activities or capacity also involved professional services, and, therefore, held that Admiral had no duty to defend or indemnify Adges.

In contrast, in *Lee & Amtzis, LLP v. American Guarantee and Liability Ins. Co.*, a law firm sought coverage from its insurer for an underlying action in New Jersey. The underlying complaint alleged that one of the law firm’s partners (Lee), who was also a managing member at Astoria Station LLP, guaranteed a loan made by the plaintiff to Astoria, and that a few years later, the plaintiff made a loan directly to Lee. The underlying plaintiff claimed to have made these two loans based on the law firm’s professional advice. The insurer denied coverage on the grounds that since Lee’s business interests (by virtue of his ownership and management of Astoria) were adverse to the underlying plaintiff’s, there was no coverage pursuant to the policy’s business enterprise exclusion. The insurer also argued that the claim was not covered by the policy because it did not arise from an act or omission by the insured in the rendering or failing to render legal services for others. The court disagreed, determining that just because Lee was an owner of Astoria or might have been acting in Astoria’s interests instead of those of the underlying plaintiff, did not change the essence of the malpractice causes of action. The court found that the policy did not exclude coverage for all conduct occurring while Lee was an owner of Astoria, but only for claims arising out of his capacity as such.

Finally, in *K2 Inv. Grp., LLC v. Am. Guarantee & Liab. Ins. Co.*, the plaintiff obtained a default judgment in an underlying legal malpractice action against their attorney (Daniels). Daniels assigned his rights to the plaintiffs who then sued his professional liability insurer for failing to defend and indemnify Daniels. Daniels had represented the plaintiffs as lenders in a transaction with a borrower company (Goldan), of which he was a principal. Daniels failed to record the mortgages that Goldan had given to the plaintiffs resulting in a malpractice claim against him. The insurer denied coverage based on the “Insured’s Status” and the “Business Enterprise” exclusions contained in policy. The exclusions respectively stated that the policy did not apply to claims arising out of the insured’s capacity or status as “an officer, director, partner, trustee, shareholder, manager or employee of a business enterprise” or “the alleged acts or omissions by any Insured…for any business enterprise…in which any Insured has a Controlling Interest.” The New York Court of Appeals noted that “it is at least possible, however, that the alleged malpractice occurred because Daniels was serving two masters—plaintiffs, his clients, and Goldan, the company of which he was a principal. If that is the case, it can fairly be said that the malpractice claims arose partly out of Daniels’s law practice and partly out of his status with or activity for Goldan—precisely the situation that the insured’s status and business enterprise exclusions seem to contemplate.” The court

39 2013 WL 146276 (Sup. Ct. N.Y. County 2013).
40 22 N.Y.3d 578 (2014).
41 Id. at 588.
therefore held that whether the exclusions applied presented an issue of fact sufficient to defeat the plaintiffs’ motion for summary judgment, which sought to bar the insurer from relying on the policy exclusions.

C. Damages Excluded from Coverage

Professional liability policies will identify (usually in the “Definitions” section of the policy) the types of damages, sanctions or awards against the insured that are not covered under the policy. A sample lawyers professional liability policy limiting the definition of damages reads as follows:

Damages do not include:

A. legal fees, costs and expenses paid or incurred or charged by any Insured, no matter whether claimed as restitution of specific funds, forfeiture, financial loss, set-off or otherwise, and injuries that are a consequence of any of the foregoing;

B. civil or criminal fines, sanctions, penalties or forfeitures, whether pursuant to law, statute, regulation or court rule, including but not limited to awards under 18 U.S.C. §1961, et. seq., Federal Rules of Civil Procedure 11 or 28 U.S.C. §1927 and state statutes, regulations, rules or law so providing, and injuries that are a consequence of any of the foregoing;

C. punitive or exemplary amounts;

D. the multiplied portion of multiplied awards;

E. injunctive or declaratory relief;

F. any amount for which an Insured is absolved from payment by reason of any covenant, agreement or court order.

In McCabe v. St. Paul Fire and Mar. Ins. Co., the insured attorney neglected to handle a client’s insurance claim resulting in the client losing their ability to recover on the claim. The client filed a malpractice action against the attorney and eventually obtained a judgment, including an award of treble damages. The insured sought indemnity coverage from his insurer for the damages award. The court found that coverage was partially available, but that the insurer was not required to indemnify the insured with respect to the treble damages award. New York public policy prohibits an insurance company from paying punitive or treble damages awards against their insured.

D. **Intentional Acts/Fraud Exclusions**

Although fraud and other intentional wrongful acts are sometimes alleged against attorneys along with a claim for legal malpractice, dishonest, fraudulent, malicious and criminal acts will be expressly excluded under a professional liability policy because it would be against public policy, if not outright illegal, for insurance companies to insure against this type of conduct. However, the duty to defend is broader than the duty to indemnify, and if covered claims are alleged in a complaint along with claims expressly excluded by the insurance policy, the insurer will have to defend the entire complaint.

In *Admiral Ins. Co. v. Weitz & Luxenberg, P.C.*,[^44] the insurer brought an action against the insured law firm seeking a declaratory judgment regarding its obligation to defend and indemnify the law firm in an underlying action for fraud, tortious interference with contract, and tortious interference with economic advantage. The insurer denied coverage based on a fraud exclusion in the policy. Construing the policy in favor of the insured, the court held, "because the Policy does not explicitly define Professional Services to exclude such acts, and because the exclusions section implies that coverage applies to such acts, the Policy must consider “dishonest, fraudulent, criminal or malicious acts” that are performed solely as an attorney to be Professional Services. If it did not, such a provision in the Exclusions section would be superfluous and unnecessary.”[^45] The insurer argued that the insured did not perform the fraudulent acts solely in their roles as attorneys. However, the court found the complaint also included allegations based on the law firm’s filing amended complaints with the wrong date, negotiating settlements, and advising clients on whether they should file suit despite a settlement. These acts, according to the court, were not ancillary to the alleged fraud, but rather, the alleged fraud was ancillary to the professional services rendered. Therefore, the court held that the insurer had to defend the insured against the entire complaint.[^46]

E. **Typical Exclusions**

All insurance policies have exclusions. In addition to intentional acts/fraud exclusions, other typical exclusions in lawyers professional liability policies include claims for bodily injury or property damage, claims made by one or more insured against another insured (i.e., “Insured v. Insured” exclusion), and claims arising from acts committed before the initial policy period, which the insured knew about or reasonably should have known about, but did not disclose to the insurer (i.e., prior knowledge exclusion).

1. **Bodily Injury and Property Damage**

Claims for bodily injury or property damages do not usually constitute covered claims under a professional liability policy because the injury (to person or property) typically does not arise from or is caused by the rendering of professional services as defined by the policy. Those claims will customarily be addressed under a commercial general liability policy.

[^46]: Id at *5.
2. Insured v. Insured

Claims brought by one insured against another insured, although rare, will be excluded from coverage under a professional liability policy. An exception to the “Insured v. Insured” exclusion would likely exist if one insured, acting as an attorney rendering professional services as defined by the policy, represented another insured.

3. Prior Knowledge Exclusion

Professional liability policies typically will exclude coverage for acts committed before the effective date of the policy where, prior to that date, the insured had a reasonable basis to believe that they breached a professional duty or committed some wrongful act that could give rise to a claim.

In Coregis Ins. Co. v. Lewis, Johs, Avallone, Aviles and Kaufman, the insurer filed an action against its insured seeking a declaration that a prior knowledge exclusion precluded coverage for a legal malpractice claim brought against the insured, and permission to rescind the policy due to a material misrepresentation in the insured’s insurance policy application. In the underlying medical malpractice action that the insured was defending, the insured relied on wrong placenta slides in defending the case. The error was not discovered until the insured’s expert was cross-examined. During a motion for a mistrial brought by the insured, the insured said in open court, “If, indeed, a verdict comes in against [my client] in excess of this policy, he may decide to sue my office for legal malpractice.” The jury returned a verdict against the insured’s client in excess of the client’s insurance policy.

After the hearing on the insured’s motion for a mistrial, the insured submitted an insurance application, which asked, “Is the Applicant, its predecessor firms or any lawyer proposed for this insurance aware of any circumstance, act, error, omission or personal injury which may result in a claim against them?” The insured responded “no” to the question and the insurer approved the insurance application. The court held:

when evaluating the applicability of [the prior knowledge exclusion] to claims arising from the Medical Malpractice Action, the Court must disregard [the insured’s] subjective beliefs regarding whether [the insured’s client] would file suit, as such beliefs are irrelevant. Instead, the Court must engage in an objective inquiry, namely, whether or not, under the circumstances of this case, a reasonable lawyer would know or could reasonably foresee that [her client] might file a legal malpractice claim.

The court found that the insured lawyer’s statement in open court unequivocally confirmed her knowledge of the possibility of being sued for legal malpractice, and, therefore, the prior knowledge exclusion precluded coverage for the insured.

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48 Id. at *3.
49 Id. at *4.
50 Id. at *10 (citations omitted).