

OPENING STATEMENT

An embarrassing mistake at trial in the questioning of an expert witness is something every lawyer fears. A seven figure award against his or her client is something every lawyer dreads. A denial of coverage by his or her insurer in a multimillion dollar malpractice action is every lawyer's worst nightmare.

All three of these converged, like the perfect storm, in a case recently decided in the United States District Court, Eastern District of New York.

That case and the lesson it teaches is the subject of our lead article.

ATTORNEYS' MALPRACTICE COVERAGE AND THE "KNOWN LOSS" EXCLUSION — (a/k/a "THE PERFECT STORM")

By Michael E. Gorelick

Coregis Insurance Company v. Lewis, Johs, Avallone, Aviles & Kaufman, LLP., et al., 2006 WL 213482 (EDNY, July 28, 2006) involved the applicability of the "known loss" exclusion in a lawyers' professional liability policy. In that case the insurer brought a declaratory action against the insured law firm (Lewis, Johs) and its trial partner, seeking a declaration that the "prior knowledge" exclusion (Exclusion "B") in the law firm's malpractice policy precluded coverage for a legal malpractice claim brought against the firm and one of its trial partners by a doctor and the mother of an infant who had been a plaintiff in a medical malpractice action.

The background facts giving rise to the action are as follows.

On October 18, 1994, a medical malpractice action was brought in State Court against an obstetrician and gynecologist by an infant plaintiff and her mother. The plaintiff suffered from cerebral palsy and severe periventricular leukomalacia (brain matter softening) and alleged that these injuries were caused by the doctor's departures from accepted standards of medical practice, most notably, allowing her premature labor to occur in a labor room without the appropriate obstetrical and neo-natal personnel or equipment.

Lewis Johs was assigned by the obstetrician's medical malpractice carrier, MMIA, to defend him in the lawsuit.

The case was tried in January and February of 1998. At the request of the medical malpractice insurer, Lewis Johs' trial partner called a placental pathologist as an expert witness to show that contrary to the plaintiff's allegations, the plaintiff's injuries were actually caused by intra-uterine insult and not by the obstetrician's negligence.

In her testimony, the expert relied on certain pathology slides to support her opinion. Her cross-examination revealed, however, that the slides she had reviewed were not those of the plaintiff but of the plaintiff's younger brother, who was born at full term and did not suffer from cerebral palsy. After the error was discovered, the hospital determined that a clerk at its pathology department inadvertently sent the wrong slides to defense counsel who, in turn, sent the slides to the expert witness without first reviewing them.

On February 10, 1998, after the error had been brought to light, the trial attorney moved for a mistrial to afford her an opportunity to obtain the correct records. She argued that there had been no reason to believe that the expert had reviewed incorrect slides because hospitals have different labeling procedures and, without knowing the hospital's procedures, both she and the expert had every reason to rely on the hospital's representations that the slides pertained to the infant plaintiff. That application was denied.

On February 11, the jury returned a verdict against the obstetrician in the amount of \$15 million. On March 27, 1998 defense counsel filed a post-trial motion asking the Court to vacate the judgment, order a new trial or reduce the jury amount.

Before the post-trial motions in the medical malpractice action had been decided, the law firm submitted a lawyers professional liability claims-made insurance application to Coregis. The application contained the following question: "Is the applicant, its predecessor firms or any lawyer proposed for this insurance aware of any circumstances, act, error, omission or personal injury which may result in a claim against them?" The firm's response to that question was "no".

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AGF&J

One Battery Park Plaza
4th Floor
New York, New York 10004
Phone: 212 422-1200
Fax: 212 968-7573

www.agfjlaw.com

Coregis ultimately approved the law firm's insurance application and issued its policy. The policy provided, in relevant part, coverage for "claims first made against any insured, and reported to (Coregis) during the policy period" which ran from September 2, 1998 to September 2, 1999. The policy expressly stated, in Exclusion B, that it did not apply to:

"Any claim arising out of any act, error, omission, or personnel injury occurring prior to the effective date of this policy if any insured at the effective date knew or could have reasonably foreseen that such an act, error, omission, or personal injury might be expected to be the basis of a claim or suit".

On December 9, 1998, the Trial Court ruled on the post-trial motions, denying defendant's request for a new trial but reducing the \$15 million jury award to \$7.5 million. That decision was affirmed on appeal by the Appellate Division. On December 17, 1998, after reviewing the December 9, ruling, the law firm reported the existence of a potential legal malpractice claim to Coregis. The insurer denied coverage, because:

"on the inception date of the policy [the insured] either knew or could have reasonably foreseen that the circumstances of the trial and the act (or error) of utilizing the wrong pathology slides might be the basis of a claim".

It then commenced a declaratory judgment action seeking a declaration that the claim was not covered and that it need not defend nor indemnify the law firm in a malpractice action arising out of that claim.

In granting summary judgment to the insurer, the Court held that, as a matter of law, the firm's trial partner was, at the very least, aware of the possibility that a legal malpractice claim might ensue from the slide review error as a result of her statements on the record (on February 11, 1998) in support of defendant's application for a mistrial that "if, indeed, a verdict comes in against (the doctor) in excess of his policy, he may decide to sue my office for legal malpractice".

The Court found that the trial attorney's on the record remarks during the trial regarding the possibility of a legal malpractice action against the firm or herself unequivocally confirmed her knowledge of the possibility that her acts, errors, or omissions could give rise to a legal malpractice claim.

Thus, the Court found that Exclusion B applied, as a matter of law, and granted summary judgment to the insurer finding that it had no duty to afford coverage to or to defend or indemnify the law firm or its partner in connection with the medical malpractice action.

The mistake at trial concerning the slides provided to the expert witness was unfortunate, but understandable. However, the failure to disclose the incident to the prospective insurer constituted a major mistake with potentially dire consequences. For more information on professional liability coverage, contact Mike Gorelick at mgorelick@agfjlaw.com.

Recent Cases of Interest

• Professional Liability

New York's Court of Appeals was recently called upon to determine the extent of an insurance broker's obligation to its client. In Hoffend & Sons, Inc. v. Rose & Kiernan, Inc., 7 N.Y.3d 152 (decided June 8,

pellate Division which dismissed its Complaint against the defendant, insurance broker, because the client had received the policy prior to the loss and was therefore charged with knowledge of its contents. Accordingly, the Appellate Division held that a cause of action for negligence or breach of contract was precluded. On appeal, the Court of Appeals affirmed the Appellate Division's dismissal of the Complaint, although for different reasons.

In Hoffend, the Court found that the Record showed that the client's recollection of events was so vague that it failed to raise a question of fact as to whether a request for specific coverage was involved.

In December, 1998, the broker ("R&K") gave its client, Hoffend, a written proposal for insurance coverage for one year starting December 12, 1998. The proposal included descriptions of two policies: (1) a builder's risk policy (provided by Travelers) to cover property damage to domestic construction projects and (2) a foreign exporter's package policy issued by Great Northern to cover general liability, non-owned auto coverage and worker's compensation for foreign projects. It did not cover property damage incurred during construction abroad.

The loss in question arose out of a construction project in Argentina. Hoffend was the subcontractor, providing an Argentine general contractor with materials, engineering and design expertise, as well as supervision. The client's principal claims that he and the broker's employee discussed the project at the December 11, 1998 meeting and that he made it clear to the broker that the project should be covered.

In December, 1999, R&K gave the client a written insurance proposal for the period from December 12, 1999 through December 12, 2000 which was essentially the same as the previous year. The new proposal, however, did not specifically state the foreign coverage under the Travelers' business risk policy which would have to be negotiated on a project-by-project basis.

An accident occurred on October 5, 2000 when a lighting bridge at the Argentina project collapsed, damaging Hoffend's work and causing consequential damage. Hoffend filed claims with Travelers and Great Northern. Great Northern agreed to defend and indemnify Hoffend against third-party liability claims. Travelers disclaimed, citing the territorial limitation in its policy. As a result, the property damage in Argentina was not covered by either policy.

Hoffend seeks to impose liability on its broker for having failed to acquire the coverage that Hoffend claims to have specifically requested for foreign projects. Hoffend also asserts that it had a special relationship with the broker who reviewed the insured's operations, provided advice regarding insurance, bonding, banking, contracts and product development, and aided the insured in creating its business plan. Hoffend argued that that special relationship imposed a continuing duty to advise and guide, obligating the broker to procure the additional coverage that would have included the loss in question.

In affirming the Appellate Division's dismissal of the Complaint, the Court of Appeals found no question of fact as to either of Hoffend's contentions.

The Court noted that the Record showed that the insured's recollection of events was vague, at best. Hoffend's principal admitted that he could not remember asking for additional coverage for any specific projects at any of the annual meetings with his broker. Nor did he provide details of discussions between the December 1998 meeting regarding the insurance proposal and his execution of the contract for the Argentina project in February 1999, nor could he say if the broker had assured him as to specific coverage for any aspect of the Argentine project.

In affirming the dismissal of the Complaint, the Court noted that an insurance broker has a common-law duty either to obtain the coverage that a customer specifically requests or to inform the customer of an inability to do so. However, the duty is upon the insured to establish that a specific request for a particular coverage was made. Furthermore, a general request for coverage will not satisfy the requirement of a specific request for a certain type of coverage. Moreover, the Court found that the services provided by the broker did not rise to the level of a special relationship and that the insured, a sophisticated commercial entity, did not compensate the broker for its insurance advice apart from its payment of premiums, nor did it delegate its insurance decision-making responsibility to the broker. The Court found that, as in any ordinary broker-client relationship, the insured simply told its broker in general what insurance it had decided to purchase and did not ask what that insurance should be. Thus, the Court found that no special relationship existed and no breach had occurred. For more information on insurance agents' and brokers' defense, contact Dan Friedman at dfriedman@agfjlaw.com.

• **Duty to Defend – Intentional Acts Exclusion**

Can an insured who is indicted and tried for intentional and depraved indifference murder be entitled to a defense and indemnification by his homeowner's insurer when he is sued by the family of the victim in a civil action? That was precisely the question before the Court of Appeals in Automobile Insurance Company of Hartford v. Cook, 7 N.Y.3d 131 (decided on June 8, 2006).

In Cook, the Court of Appeals stated the issue in the case as follows: whether the insurer has a duty to defend its policyholder under his homeowner's insurance policy in an underlying wrongful death action, resulting from a shooting committed in self-defense.

The Court answered the question in the affirmative and found that the insurer was obligated to provide the insured with a defense under its policy.

The facts in this unusual case are as follows: on February 20, 2002, the insured, Alfred Cook, shot and killed Richard Barber inside his home. The men had known each other for many years but had become involved in a dispute relating to their business relationship. Barber weighed approximately 360 pounds and was nearly three times Cook's size. Barber had previously attacked the smaller man, causing him to sustain a leg injury.

On the morning of February 20, Barber and another man were outside Cook's home hurling objects at the house. They left without further incident. Barber returned later that day with two other men.

When Cook saw them approaching he asked the person who was visiting him to leave because he expected trouble. He returned inside, locked the door and, anticipating a confrontation, retrieved a 25 caliber hand gun from his bedroom.

The group burst into Cook's home. They gathered in the kitchen where Barber began demanding money from Cook while pounding his fists on the kitchen table. Cook drew his gun and demanded that they leave the house. Barber was apparently unimpressed at the small size of the pistol. Cook withdrew to his bedroom and returned with a loaded 12 gauge shotgun. He stood in his living room at the far end of his pool table and again ordered Barber to leave the house.

As Barber started to head for the door with his companions, he stopped at the opposite end of the pool table, turned to face Cook and told his companions to take anything of value and that he would meet them outside because he had some business to attend to. When Barber menacingly started advancing toward Cook, Cook warned him that he would shoot if he came any closer. Cook aimed his gun towards the lowest part of Barber's body that was not obscured by the pool table – his navel. When Barber was about one step away from the barrel of the gun, Cook shot Barber in the abdomen. Barber died later that day at a hospital.

Cook was indicted for intentional and depraved indifference murder. At trial he claimed self-defense and justification. A jury acquitted him on both murder counts and of the lesser included offenses of manslaughter in the first and second degree.

Subsequently, the administrator of Barber's estate commenced a wrongful death action against Cook. The first cause of action alleged that the injury to Barber and Barber's death were caused by the negligence of Cook and allege that the negligence consisted of "playing with a loaded shotgun; negligently pointing that shotgun at the abdomen of the decedent; negligently discharging the shotgun into the decedent's abdomen and engaging in unruly behavior". In a separate cause of action, the Complaint alleges that Cook intentionally shot Barber causing his death.

At his Examination Before Trial in the civil action, Cook testified that "I knew the [shot from the] shotgun would injure Mr. Barber because I had to stop him, but I did not anticipate it killing him".

Cook sought coverage from his homeowner's insurer, Automobile Insurance Company of Hartford. Hartford disclaimed coverage on the ground that the incident was not an "occurrence" and further because the injury inflicted upon Barber was excluded as it was "expected or intended" by Cook.

The insured commenced a declaratory judgment action and after depositions moved for summary judgment. The insured, Cook, cross-moved seeking a declaration that the insurer was required to defend and indemnify him in the underlying tort action.

The trial Court denied Hartford's motion and granted Cook's cross-motion to the extent of declaring that the insurer had a duty to provide a defense to him in the wrongful death action. The Appellate Division reversed, concluding that since Cook intentionally shot Barber, his actions could not be considered an accident or "occurrence" and thus, were not covered. The Court also found that the acts came within the policy exclusion for bodily injury "expected or intended" by the insured.

On appeal, however, the Court of Appeals reversed, reinstated the decision of Supreme Court, and granted summary judgment to the insured, Cook, finding that Hartford was obligated to provide him with a defense in the underlying tort action.

After reviewing the general rules applicable to the insurer's broad duty to defend, the Court held that when an insurer seeks to disclaim coverage on the basis of an exclusion, the insurer will be required to provide a defense unless it can "demonstrate that the allegations of the complaint cast that pleading solely and entirely within the policy exclusions, and, further, that the allegations, *in toto*, are subject to no other interpretation".

The Court then observed that an examination of the wrongful death Complaint leads to the conclusion that Cook's claim is covered by the policy. The Court noted that the Complaint alleges that Cook negligently caused Barber's death and that if such allegations can be proven, they would fall within the scope of the policy as a covered occurrence. The Court also noted that the policy defines "occurrence" as an accident and that it has previously defined that term "to pertain not only to an unintentional or unexpected event which, if it occurs, will foreseeably bring on death, but equally to an intentional or expected event which unintentionally or unexpectedly has that result". Thus, the Court held that if Cook accidentally or negligently caused Barber's death, such event may be an occurrence within the meaning of the policy and coverage would apply.

Furthermore, the Court found that Hartford had failed to demonstrate that the allegations of the Complaint are subject to no other interpretation than that Cook "expected or intended" the harm to Barber. Thus, the Court found that under these circumstances a reasonable insured would have expected coverage under the policy and that, as a result, the insurer is under a duty to provide a defense to Cook. The Court held that the ultimate duty to indemnify Cook was a determination which will abide the trial of the underlying tort action. For more information on the duty to defend, contact Michael Gorelick at mgorelick@agfjlaw.com.

- **Labor Law**

Sections 240 and 241 of New York's Labor Law continue to provide the most fertile ground for civil appellate litigation in New York. This summer, alone, in excess of 30 cases interpreting those sections of the Statute have been decided by New York's Court of Appeals and Appellate Divisions. The following are brief synopses of but a few of those appellate decisions:

Armentano v. Broadway Mall Properties, Inc., 817 N.Y.S.2d 132 (2nd Dept. June 13, 2006) - to prevail under §240(1) of the Labor Law, plaintiff must establish that a third-party had the authority to supervise and control plaintiff's work;

Pearl v. Sam Greco Construction, Inc., 819 N.Y.S.2d 193 (3rd Dept., July 20, 2006) - plaintiff's proof of defendant's improper storage of safety equipment on a slippery roof was sufficient to establish that plaintiff's conduct was not the sole proximate cause of his injuries;

Rodriguez v. Industry Associates, LLC., 816 N.Y.S.2d 383 (2nd Dept., June 20, 2006) - an injury which occurred while plaintiff was pulling a cable from the ceiling did not result from a "significant physical change to the configuration or composition" of the building, and thus, does not fall under Section 240(1);

Berardi v. Coney Island Avenue Realty LLC., 819 N.Y.S.2d 298 (2nd Dept., July 18, 2006) - plaintiff's fall while cleaning leaves from the gutters of defendant's building was routine cleaning in a "non-construction context" and thus, was not within Section 240(1).

Those cases are only a sampling of recent New York appellate Labor Law decisions. For more information on New York State Labor Law contact Steven DiSiervi at dsiservi@agfjlaw.com.

- **AGF&J Developments**

- On September 11, 2006, AGF&J moved to its new offices at One Battery Park Plaza (4th Floor). Our telephone and fax numbers and e-mail addresses remain the same.

- Len Kamlet recently obtained summary judgment on behalf of AGF&J's client in a products liability action involving the death of one passenger and serious injuries to 9 passengers and the driver of a Ford van which rolled over after one of its tires failed. AGF&J's client, a Ford dealership, allegedly sold the van to a rental company which then rented it to plaintiff. Len successfully argued that, as a business accommodation, AGF&J's client merely facilitated the purchase of the van by the rental company at a Ford used vehicle auction open only to Ford dealerships. The Court agreed that despite documents which evidenced that our client purchased the van at auction and sold it to the rental company, it should not be subjected to products liability as a "seller in the chain" since the van was never in our client's possession. The Court agreed that our client had no duty to inspect the tires, and thus, was not negligent. For more information on products liability defense contact Len Kamlet at lkamlet@agfjlaw.com.

- Barry Jacobs was successful in overturning an award of sanctions assessed against an attorney by a Supreme Court trial Judge. AGF&J was retained by the attorney's malpractice insurer to prosecute an appeal from a sanction award in the amount of \$118,456. In Sakow v. Columbia Bagels, Inc., the Appellate Division, First Department, unanimously reversed and accepted our arguments that the conduct did not satisfy the implementing statute (22 N.Y.C.R.R. 130-1.D) and that as a result, the conduct was not sanctionable. For more information on the Sakow case or attorney malpractice defense, contact Barry Jacobs at bjacobs@agfjlaw.com.

- We are pleased to report that Justice Briganti-Hughes of the Supreme Court, Bronx County granted our motion for summary judgment declaring the AGF&J's clients were not obligated to defend or indemnify the insured in an underlying tort action on the basis of the independent contractor's exclusion in Underwriters' policy (Underwriters at Lloyds v. Gray). For more information on the independent contractors exclusion, contact Michael Gorelick at mgorelick@agfjlaw.com.

- We are also pleased to report that Justice Schafer of the Supreme Court, New York County, granted AGF&J's motion for summary judgment in another declaratory action (152-154 Second Avenue Corp. v. Lumbermens, et al.) and held that defendants must defend and indemnify our client (the owner) in the underlying tort action pursuant to the terms of the premises lease and the additional insured provision of the tenant's policy. For more information on this case, contact Allison Leff at aleff@agfjlaw.com.

- Dan Friedman presented a paper entitled "How to Avoid Being Impaired By Your Own Claim File" before the Nassau-Suffolk Adjusters' Association on September 7, 2006 and made a similar presentation at the International Association of Special Investigation Units National Annual Convention in Palm Springs, California on September 13.

PUBLIC EDUCATION SERVICE

It is our policy to appear as speakers at seminars, business and professional meetings, as well as before industry groups. In addition, whenever possible we attempt to fulfill requests for articles from industry publications. We will also make presentations on a variety of legal issues to claim and risk management departments. For further information, please contact Michael Gorelick at (212) 422-1200.

AGF&J's *Cases and Points* is published as a service to our friends and clients. It is only a summary of, or commentary upon, case law and should not be relied upon as authoritative support. Also, the opinions expressed herein are ours, and do not necessarily reflect those of our clients.