

The American Bar Association's Insurance Coverage Litigation Section

“Some Courts Expect All Defense Attorneys to be Experts in Insurance Law”

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Many litigators consider themselves specialists in particular subject areas rather than generalists. Indeed, it could be argued that general litigators have practically become extinct. Nevertheless, some courts have concluded that, at least under some circumstances, defense attorneys might have a duty to investigate, advise their clients regarding, and take steps to preserve their clients' rights under potentially applicable insurance policies, and that a failure to do so could constitute legal malpractice.

In *Shaya B. Pacific, LLC v. Wilson, Elser, Moskowitz, Edelman & Dicker, LLP*, 827 N.Y.S.2d 231, 236 (N.Y. Sup. App. Div. 2006), for example, the Appellate Division of the New York Supreme Court held that a trial was required to determine whether a defense lawyer was negligent for failing to investigate his or her client's insurance coverage or notify his or her client's insurance carrier of a potential claim. Similarly, in *Tush v. Pharr*, 68 P.3d 1239, 1244-47 (Alaska 2003), the Alaska Supreme Court held that a question of fact existed as to whether the defense attorney had a duty to further investigate whether his client had liability insurance for claims that had been asserted against him or her.

While such rulings, on their face, seem to offer certain protections to policyholders, they may, for a number of reasons, present logistical and even ethical challenges for the underlying defense lawyers. First, these cases purport to require, or at least encourage, defense attorneys to practice in an area that may be outside their areas of expertise, which can be particularly problematic where the insurance issues are novel or complex and the amounts at stake are high. Second, defense attorneys must consider the various potential conflicts of interest that can arise when they advise their clients on coverage issues—for example, where an insurer disclaiming or reserving its rights to disclaim coverage appointed, and is paying the invoices of, the defense attorney, and/or the defense attorney is employed by a law firm with an insurer-side insurance practice, and at least one of the potentially implicated insurance carriers led defense attorneys to assert “no coverage” arguments as a defense to malpractice claims, which is harmful to the interests of their (former) clients.

Cases Regarding the Duty to Investigate, Advise, and/or Preserve

In *Wilson, Elser*, the court addressed whether “a law firm, retained by a primary carrier to defend its insured in a pending action, has any obligation to investigate whether the insured has excess coverage available and, if so, to file a timely notice of excess claim on the insured's behalf.” *Wilson, Elser*, 827 N.Y.S.2d at 232. In the underlying personal-injury action, the plaintiff sought \$52.5 million in damages. Shaya B. Pacific's primary carrier, Lloyd's of London, had issued a \$1 million primary policy and sent Shaya B. Pacific a letter advising that the damages demand exceeded policy limits, noting that Shaya B. Pacific “may wish to engage counsel of your own choice at your own expense to act on your behalf in regards to any potential excess judgments”

and informing that Lloyd's was continuing the defense of the matter through Wilson, Elser. *Wilson, Elser*, 827 N.Y.S.2d at 232–33. After the underlying plaintiff obtained a summary judgment on liability, Wilson, Elser tendered the case to the excess carrier, National Union Fire Insurance Co. It denied coverage, asserting a late notice coverage defense. The underlying plaintiff subsequently obtained a judgment in excess of \$5.5 million. *Wilson, Elser*, 827 N.Y.S.2d at 233.

Shaya B. Pacific sued Wilson, Elser for malpractice. Wilson, Elser moved to dismiss the complaint, arguing, inter alia, that, as the defense counsel appointed by Shaya B. Pacific's primary carrier, it had no duty to investigate coverage issues. *Wilson, Elser*, 827 N.Y.S.2d at 236. Although the trial court had granted the motion, the appellate division reversed in part, concluding that "whether an attorney can be found negligent for failing to investigate insurance coverage would turn primarily on the scope of the agreed representation—a question of fact" and on whether the attorney's conduct fell below the relevant standard of care. *Wilson, Elser*, 827 N.Y.S.2d at 236. The court thus held that it "cannot say, as a matter of law, that a legal malpractice action may never lie based upon a law firm's failure to investigate its client's insurance coverage or to notify its client's carrier of a potential claim." *Wilson, Elser*, 827 N.Y.S.2d at 236 (footnote omitted).

In *Tush v. Pharr*, 68 P.3d 1239, 1244–47 (Alaska 2003), the Alaska Supreme Court also reversed the trial court's grant of summary judgment in favor of the underlying defense attorney and held that a genuine issue of material fact existed as to whether he had a duty to further investigate whether his client had liability insurance that might cover claims that had been asserted against her. During depositions in the underlying case, Tush was asked questions about insurance, and her responses were ambiguous as to whether she in fact had purchased liability insurance. *Tush*, 68 P.3d at 1245–46. Tush's attorney, however, never asked to review Tush's insurance policies and never investigated or directed his client to investigate whether her insurance policies would cover any of the underlying claims. *Tush*, 68 P.3d at 1243.

Tush ultimately fired her original attorney for other reasons, and her replacement counsel tendered the underlying counterclaim to State Farm. *Tush*, 68 P.3d at 1242–43. State Farm disclaimed coverage in part based on its late-notice defense. *Tush*, 68 P.3d at 1243. The court held that "reasonable minds could differ as to whether Pharr had a duty to further investigate whether Tush had liability insurance" for the claim at issue, and that summary judgment was therefore inappropriate. *Tush*, 68 P.3d at 1246–47.

In contrast, in *Darby & Darby, P.C. v. VSI International, Inc.*, 739 N.E.2d 744, 745 (N.Y. Ct. App. 2000), the court found that the law firm had no such duty to investigate. In this case, the law firm sued its former client, VSI, for unpaid legal fees, and VSI asserted counterclaims for legal malpractice and breach of fiduciary duty based on the law firm's failure to advise of possible liability coverage for VSI's underlying patent-litigation expenses. VSI noted that its successor counsel, by contrast, had secured coverage for its litigation expenses (except for those incurred during Darby's representation of VSI). *Darby*, 739 N.E.2d at 746. The court held that Darby had no duty to advise under the circumstances because the client's claim was "based on a then novel theory that patent insurance coverage was available under an 'advertising liability' clause in general liability policies." *Darby*, 739 N.E.2d at 746. At the time, the relevant jurisdictions "had

rejected coverage for similar claims,” and the “theory of such coverage remained largely undeveloped.” *Darby*, 739 N.E.2d at 747. The court thus held that the law firm “should not be held liable for failing to advise defendants about a novel and questionable theory pertaining to their insurance coverage.” *Darby*, 739 N.E.2d at 748.

Concerns Raised

Attorneys Are Encouraged to Practice Outside Their Expertise

The cases encourage—and arguably require—attorneys to practice insurance law, which may be outside their areas of expertise. As an initial matter, determining the universe of potentially applicable insurance policies can be challenging. For example, depending on the nature of the underlying allegations and relationships, a defendant may have coverage under both current and historical insurance policies of its current employer and/or predecessor employers. Defendants may also have coverage rights under the “additional insured” provisions of other companies’ and individuals’ policies.

Additionally, as *Darby* makes clear, insurance disputes can be nuanced and complex. Even when a claim may appear to be barred under the controlling case law, an insurance specialist may succeed in demonstrating that subtle differences in facts or policy language dictate a different result in a particular case. Although the court found that *Darby* had not committed malpractice in failing to advise its client on coverage issues, the client was plainly better served when its new counsel stepped in and secured coverage for its litigation expenses.

Potential Conflicts

Highlighting the potential for conflicts that the imposition of a duty to investigate a client’s insurance coverage creates, defense attorneys in several cases have asserted that their failure to investigate, advise regarding, and/or take steps to preserve insurance coverage did not constitute malpractice because their clients were not entitled to coverage in any event. For example, in *Ross v. Briggs & Morgan*, 540 N.W.2d 843, 846 (Minn. 1995), the law firm successfully argued that the underlying allegations were “framed in terms of a breach of contract,” which fell within an exclusion of the potentially applicable liability and outside the policy’s enumerated grants of coverage. *Ross*, 540 N.W.2d at 846–48.

Boyson, Inc. v. Archer & Greiner, P.C., 705 A.2d 1252 (N.J. Super. App. Div. 1998) addressed another malpractice dispute in which the client brought suit against its former law firm and its liability insurer, ITT Hartford Insurance Group, to recover the costs of defense and settlement of the underlying matter. The law firm sought summary judgment, arguing that the products hazard exclusion in the potentially applicable liability policy applied and that the law firm was therefore not negligent in failing to notify Hartford of the underlying products liability claim. *Boyson*, 705 A.2d at 1253. The parties agreed that if Pennsylvania law applied, then the exclusion would not be enforceable, but if New Jersey law applied, the exclusion would be enforceable and *Boyson* would thus have no cause of action for malpractice. *Boyson*, 705 A.2d 1252–53. The court ultimately remanded the case for a determination of which state’s law would govern the coverage question under Pennsylvania’s choice of law rules. *Boyson*, 705 A.2d at 1252-53, 1258.

Such arguments appear to conflict with the interests of the law firms’ (presumably) former clients. Asserting such arguments can be particularly problematic when, as in *Boyson*, the

coverage action is pending concurrently with the malpractice action. Even in situations in which only a malpractice action is pending, the lawyer's interest in defending himself or herself may result in adverse rulings on coverage issues that may harm his or her client, or other firm clients, in future cases. It is bad enough that policyholders have to engage in coverage disputes with their insurance companies. It is even worse when they are forced to engage in coverage disputes with their own lawyers.

The *Wilson, Elser* case illustrates another potential conflict that may be created by the imposition of a duty to investigate insurance coverage. In defending against the former client's malpractice claim, the law firm argued that it represented both the primary carrier, Lloyd's, and the policyholder, Shaya B. Pacific, and that, "with respect to insurance coverage, the interests of its two clients were in conflict." 827 N.Y.S.2d at 237. Although the court declined to address whether Wilson, Elser had an attorney-client relationship with Lloyd's, it found "no conflict of interest in the circumstances at bar," noting that both had an interest in defeating the underlying claim, and that while Shaya B. Pacific had an interest in the "existence, availability, and amount of excess coverage, Lloyd's did not." *Wilson, Elser*, 827 N.Y.S.2d at 237. The court did acknowledge, however, that a conflict could arise "had the issue concerned the scope or nature of the coverage afforded" to the policyholder "by Lloyd's primary policy." *Wilson, Elser*, 827 N.Y.S.2d at 237.

One can easily imagine other scenarios in which Wilson, Elser would have had a conflict of interest. If, for example, Wilson, Elser happened to represent the policyholder's excess carrier, National Union, in other matters and there was a dispute regarding the existence or scope of the policyholder's National Union coverage, then Wilson Elser would have had a conflict. Such conflict would presumably be waivable, but even asking for or attempting to negotiate such waivers could be politically sensitive and jeopardize existing attorney-client relationships.

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