

**New York Appellate Court Prevents Insurer From
Altering the Test for Application of the “Known
Claims and Circumstances” Exclusion**

By Linda J. Karpel

The New York Appellate Division recently confirmed that a lawyer’s own subjective knowledge of the possible consequences of his or her acts or omissions continues to be a major factor in determining whether his or her professional liability insurer may deny coverage for a malpractice claim on the basis of a policy exclusion for “known claims and circumstances.” In *Liberty Insurance Underwriters Inc. v. Corpina Piergrossi Overzat & Klar LLP*, 78 A.D.3d 602, 913 N.Y.S.2d 31 (1st Dep’t 2010), the Appellate Division refused to permit an insurer to turn the accepted test for application of the “known claims or circumstances” exclusion on its head by arguing for consideration of purely objective factors.

Lawyers sued for malpractice often receive disclaimers of insurance coverage that rely on the “known claims and circumstances” exclusion. Typically, that exclusion bars coverage for “any claim arising out of a wrongful act occurring prior to the policy period if . . . you had reasonable basis to believe that you had breached a professional duty, committed a wrongful act, violated a Disciplinary Rule, engaged in professional misconduct, or to foresee that a claim would be made against you.”

The test applied by courts in New York and elsewhere to determine whether the “known claims and circumstances” exclusion applies is a two-part test, which has *both* a subjective and an objective element: (1) what was the subjective knowledge of the insured, and (2) on the basis of those facts, would a reasonable attorney understand that a claim could be made against the insured.

In *Corpina*, the insured and the insurer both moved for summary judgment on the issue of whether the “known claims and circumstances” exclusion applied to bar coverage for a malpractice claim against the Corpina law firm. The insurer contended that a reasonable lawyer, in the shoes of the Corpina firm, objectively would have known that the firm’s failure to file timely an administrative claim under the federal National Vaccine Injury Compensation Program (42 U.S.C. §§ 300aa-10 *et seq.*) (the “NVIP”) also foreclosed the filing of a state court medical malpractice action for its client. Therefore, a reasonable lawyer objectively would have expected that the failure to file the NVIP claim could result in a malpractice action being filed against the firm.

On the other hand, the Corpina firm argued that the exclusion did not bar their insurance coverage, as a matter of law, because at the time the Corpina firm failed to file the NVIP claim (through the time it purchased its insurance), the firm did not know that a failure to file an administrative claim under the NVIP would preclude a subsequent malpractice action in court. Hence, that fact could not be considered by a reasonable lawyer in determining whether a malpractice action against the Corpina firm could be expected.

The Appellate Division was not fooled by the insurer's approach of trying to turn the test for the "known claims and circumstances" exclusion into a "purely objective test." The Appellate Division made clear that, in order to show that the exclusion applied, the insurer had the burden of proving that the Corpina firm had actual, subjective knowledge that its failure to file the administrative NVIP claim would result in the preclusion of a medical malpractice action. The Appellate Division then proceeded to deny both parties' motions for summary judgment because the factual record showed that a question of fact existed as to whether or not the Corpina firm was aware of the full consequences of not filing a claim under the NVIP.

As the Appellate Division noted, lawyers buy insurance in order to obtain protection from the consequences of *their own* ignorance at the time of their acts or omissions. If the coverage they purchase could be denied by simply assessing the knowledge or ignorance of some hypothetical reasonable attorney, there would be little reason to purchase such coverage and coverage would be illusory. Furthermore, if lawyers had to run the gauntlet of proving all facts a reasonable attorney would have known or not known as a condition of coverage, they would likely file fewer insurance claims. For all these reasons, lawyers and other professionals should be grateful that the insurer in *Corpina* was unsuccessful.

[Editor's Note: Linda "Lin" Karpel is an Associate at Fried & Epstein LLP, which regularly represents policyholders in insurance coverage disputes. Information concerning Fried & Epstein's Insurance Coverage Practice Group may be obtained by visiting the firms' website at www.fried-epstein.com. The opinions expressed in this article are solely those of the author and do not necessarily reflect the views of Fried & Epstein or its clients. Responses to this article are welcome. Copyright 2011 [Linda J. Karpel](#).]