

Insurer Off Hook For Late-Reported Malpractice Claim

By **Julie Manganis**

Law360 (September 20, 2024, 4:52 PM EDT) -- An insurance carrier had no obligation to defend or indemnify a Massachusetts attorney who failed to report a malpractice lawsuit for more than a year, the First Circuit said, affirming a lower court's decision to vacate a \$1.1 million jury verdict against the insurer.

The appeals court on Thursday rejected a bid by Massachusetts resident Joan Stormo to hold State National Insurance Co., a subsidiary of Markel Group Inc., liable for a state court jury's malpractice verdict against lawyer Peter T. Clark. In that case the jury found Clark had botched a real estate deal in 2004.

State National relied on late notice and prior knowledge provisions of Clark's "claims made" policy in denying coverage, and in Stormo's subsequent lawsuit against State National, a federal district judge ultimately agreed, setting aside the jury's verdict finding State National liable for breach of contract.

The First Circuit on Thursday agreed with the district judge's view, finding that Clark's 14-month delay in notifying the insurer of Stormo's lawsuit let the company off the hook. The court rejected Stormo's argument that the insurer was aware of Clark's 2004 acts and potential claims based on prior litigation and was therefore not prejudiced by the delay.

The court found that the question of prejudice was irrelevant under Massachusetts law.

The court also concluded that Stormo had failed to adequately address whether State National would still have a duty to defend even if the insurer received late notice.

Stormo failed to adequately address that issue, effectively waiving it, both in the lower court and before the First Circuit, the appeals court ruled.

"Her opposition motion mentioned the duty to defend only once, in service of an argument that she was entitled to damages beyond the remaining policy balance," Judge William Kayatta wrote for the court. "She never suggested — much less argued — that even if Clark's late notice defeated his indemnity coverage, State National was still liable for its failure to defend him."

"Even on appeal, Stormo does not argue that the jury verdict can stand based on a breach of the duty to defend even if there was no duty to indemnify," Judge Kayatta wrote, saying the issue came up only briefly, in the context of the district court's decision to grant summary judgment on a claim against State National alleging violation of the state's unfair settlement practices law.

In a partial dissent, Chief Judge David Barron urged his colleagues to report the question of whether a separate "within the policy period" provision of Clark's policy would lead the state Supreme Judicial Court to take a different view on the policy's notice requirements.

The original plaintiffs, Stormo and her siblings Stephen Prosky and Karen Moteiro, co-owned 46 acres of land in the southeastern Massachusetts town of Norton, which they wanted to sell to a developer for housing. They entered a purchase and sale agreement with KGM Custom Homes in 1999, contingent upon the town issuing permits for the project, a process that took five years, according to the ruling.

Clark was hired by the siblings in 2004 to handle the closing, but allegedly derailed it. He at one point falsely claimed to the developer that his clients had a better offer on the table and contended,

wrongly, that the purchase and sale agreement included a liquidated damages provision allowing his clients to back out, according to court documents.

Multiple lawsuits in state and federal court followed over the next two decades.

KGM sued the siblings, winning a judgment against them in 2014, and also sued Clark, who settled the case for an amount covered by his malpractice policy.

The siblings then sued Clark in 2014 for malpractice, eventually winning the \$5 million judgment.

State National Insurance said it would not cover the award, however, citing a prior knowledge exclusion and Clark's 14-month delay in reporting the lawsuit, according to the decision. The policy also had a \$1.1 million cap on liability arising from the same wrongful act — which had already been tapped to cover Clark's defense and settlement with KGM to the tune of more than \$600,000.

Stormo sued State National in federal court, alleging that the insurer was obligated to cover the award and arguing that while Clark had failed to notify his insurer in a timely manner, the insurer had suffered no prejudice because it was already on notice of Clark's acts based on the prior litigation involving the developer.

A federal jury last year awarded Stormo \$1.1 million on a breach of contract claim, but a federal district judge, "with considerable sympathy" for the plaintiffs, said last year he was forced to set it aside based on Clark's late notice to his insurer.

"In sum, we agree with the district court that prejudice is irrelevant to this case given that all parties agree that notice of Stormo's claim against Clark was not timely given under Clark's claims-made policy," Judge Kayatta wrote for the appeals court Thursday.

Counsel for Stormo and State National did not immediately respond to requests for comment Friday.

Chief Judge David Barron and Judges William Kayatta and Sandra Lynch sat on the panel for the First Circuit.

Stormo is represented by Zaheer A. Samee of Frisoli Associates PC.

State National Insurance Co. is represented by Sean P. Mahoney, Joanna L. Young and Erica Sanders of Kennedys Law LLP.

The case is Stormo v. State National Insurance Co., case number 23-1792, in the U.S. Court of Appeals for the First Circuit.

--Editing by Bruce Goldman.