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## Unreported Claims Against Former Lawyers Could Expose your Firm to Liability

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In *Berry & Murphy, P.C. v. Carolina Casualty Insurance Company*, 586 F.3d 803 (10th Cir. 2009), a recent malpractice insurance coverage decision, the Tenth Circuit held that there was no coverage under a lawyers' professional liability policy where a claim against a former shareholder was made prior to the policy period.

Lawyer Seth Murphy, one of two shareholders of the firm Berry & Murphy, undertook a personal injury representation and filed a complaint for his clients in January 2005. In March 2006, Murphy left the firm and took the personal injury suit to another firm. Shortly thereafter, he filed a motion to withdraw, which the district court granted. At the same time, the district court granted defendant's motion to dismiss the case for failure to prosecute.

Plaintiffs in the personal injury case hired new counsel and moved to reinstate their case. In January 2007, Cindy Tester, plaintiffs' new lawyer, sent a letter to Murphy at his new firm in which she advised him of a forthcoming legal malpractice claim. Murphy notified Carolina Casualty Insurance Company, his firm's carrier, but did not immediately send the letter to Timothy Berry, the other shareholder in his former firm Berry & Murphy, so that Berry could notify his firm's carrier (also Carolina Casualty).

In January 2008, plaintiffs filed a legal malpractice claim against Murphy and his former firm, Berry & Murphy. In July 2008 – over a year and a half after Tester put Murphy on notice – Berry first learned of the Tester letter and the malpractice lawsuit when he accepted service of the complaint on behalf of the Berry & Murphy firm. He then gave notice to Carolina Casualty, which in turn denied coverage on the ground that the policy was effective from February 2008 to February 2009 and the alleged malpractice claim was first made against an insured (Murphy) prior to the inception of the policy (in the Tester letter), therefore falling outside the scope of coverage.

In the ensuing coverage dispute, Berry argued that because the policy was effective when he notified the carrier in July 2008, the carrier improperly denied coverage. The district court disagreed and entered summary judgment in Carolina Casualty's favor, reasoning that Murphy, an insured, had notice of the claim and the fact that he failed to notify his former co-

shareholder was not a burden that should fall on the carrier.

The Tenth Circuit affirmed, noting that the policy defined a claim as a "written demand for monetary or non-monetary relief," and that a claim was deemed made when "first received by any Insured." The court concluded that the Tester letter and the malpractice lawsuit involve a single "claim" under the policy because the lawsuit flowed from the acts alleged in the letter. The court further concluded that Murphy was an insured when he received the Tester letter even though he was not acting on behalf of the Berry & Murphy firm when he received it. Because notice of the "claim" was provided to an "insured" a month before the policy period, Carolina Casualty had no duty to indemnify Berry or the Berry & Murphy firm.

The Tenth Circuit acknowledged that this was a harsh result for Berry, especially because Murphy failed to notify Berry of the claim, which in turn precluded Berry from notifying Carolina Casualty in a timely manner. But the parties bargained for the terms of the insurance policy and the court found no basis to deprive Carolina Casualty from the benefit of that contract.

Might Murphy be liable to Berry in tort? Possibly. But this opinion opens the door to uninsured firm liability when a former firm lawyer is notified of a claim and fails to forward that notice to his or her former firm in a timely manner. To avoid this harsh result, lawyers must understand the importance of notifying the malpractice carrier immediately when a claim or threatened claim arises. Equally important, firms should put in place a policy requiring that outgoing lawyers receive written notice that any claims or demands received after their departure must be forwarded immediately to the former firm.

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