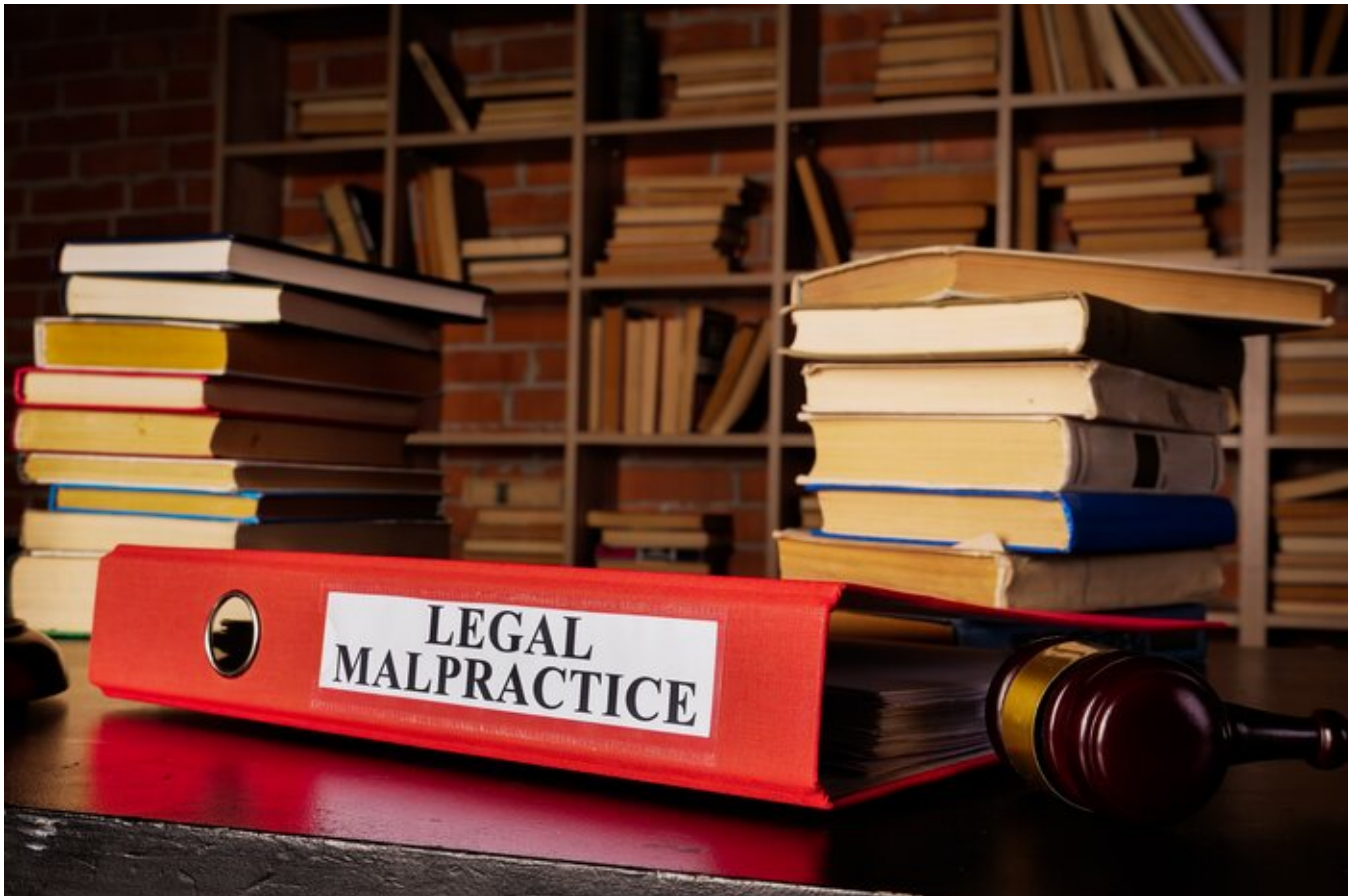


## 2nd Circ. Affirms No Coverage Ruling For Legal Insurer

By **Alexa Scherzinger**

Law360 (December 7, 2023, 10:02 PM EST) -- A Second Circuit panel ruled Thursday that an insurer need not cover a legal malpractice suit brought against an attorney and his former firm, rejecting the attorney's argument that some acts the underlying suit alleged circumvented the policy's exclusions.



A former Wachtel Missry attorney cannot get coverage for legal malpractice claims because of a policy exclusion for activities undertaken in the capacity of an officer of another business enterprise, the Second Circuit said. (iStock.com/designer491)

In a published order, the panel confirmed that the policy's explicit exclusion for activities undertaken in the capacity of an officer of another business enterprise applied due to former Wachtel Missry attorney Howard Kleinhendler's position with his private real estate firm, Virginia True Corp. The confirmation affirmed the judgment of a New York federal court, which granted Associated Industries Insurance Co. Inc.'s motion for judgment on the pleadings in September 2022.

AIIC originally sued both Kleinhendler and Wachtel Missry, but settled with the law firm in December 2022 after the district court's order, leaving Kleinhendler as the sole defendant. Kleinhendler, proceeding pro se in the case, appealed the district court's decision in January 2023, and the appeals court panel heard the case Nov. 20.

The insurer sought a declaration that it needn't cover Kleinhendler or Wachtel Missry in an underlying suit brought by Allan Applestein, an ailing Florida landowner who claimed that Kleinhendler, acting as his attorney, improperly served as his counterparty in a \$12 million 2019 Virginia land deal.

In 2013, at age 81, Applestein decided to sell a 1,000-acre plot of land in Richmond County, Virginia, and sought Kleinhendler and Wachtel Missry's assistance in handling the transaction and advising him on it. Applestein was later diagnosed with Alzheimer's disease and argued that Kleinhendler used that to convince him to rezone the land and pass on several offers, without disclosing the conflict of interest that came from Kleinhendler's ownership of Virginia True.

Applestein sought damages for legal malpractice, breach of fiduciary duty, elder abuse and fraud. He claimed that Kleinhendler and Wachtel Missry advised him poorly and failed to get his informed consent for the land's eventual sale to Virginia True and that Kleinhendler specifically misled and made false statements in order to get Applestein to sell him the land.

Kleinhendler asserted that AIIC had a duty to defend him in Applestein's suit because it alleged some acts that could be covered — namely, acts that occurred before Virginia True's formation and acts unrelated to Kleinhendler's position with the real estate firm.

"The issue, then, is whether the Applestein complaint brings claims that could potentially result in liability not arising out of Kleinhendler's position with Virginia True," the panel wrote in its judgment. "Upon review of the complaint, we conclude that it does not."

Though the complaint did contain some allegations predating Virginia True's creation, the panel wrote, it did not state any claim for liability that didn't at least partially arise from Kleinhendler's position with the company. Because of that, AIIC had no duty to defend him, the panel ruled.

Representatives of the parties did not immediately respond to requests for comment Thursday.

U.S. Circuit Judges Amalya L. Kearse, Guido Calabresi and Alison J. Nathan sat on the panel for the Second Circuit.

AIIC is represented by April Hope Gassler, Peter G. Thompson and Kim Hoyt Sperduto of Sperduto Thompson & Gassler PLC.

Kleinhendler represented himself in the case.

Wachtel Missry is represented by Evan Scott Weintraub of Wachtel & Missry LLP and Jeremy McGuire King of Olshan Frome Wolosky LLP.

The case is Associated Industries Insurance Co. Inc. v. Wachtel Missry LLP, case number 23-57, in the U.S. Court of Appeals for the Second Circuit.

--Editing by Nick Petruncio.