

Insurer Has Duty to Defend Title Company Against Allegations of Excessive Fees for Closing Costs

November 2003

A federal district court, applying Minnesota law, has held that an insurer has a duty to defend a title company insured under an E&O policy against a consumer class action lawsuit alleging that the title company referred certain services to third-party vendors and then marked-up the charges without disclosing to its clients its relationship with the vendors or the markups. *Pac. Ins. Co. v. Burnet Title, Inc.*, 2003 WL 22283355 (D. Minn. Sept. 24, 2003).

The insurer issued an E&O policy to a real estate title company. The policy provided coverage for "a negligent act, error or omission in the rendering of or failure to render 'professional services.'" The policy defined professional services as "services performed or advice given in the Insured's capacity as Title Agent, Title Abstractor and Escrow Agent." "Damages" was defined as "the monetary portion of any judgments, awards or settlements which an insured becomes legally obligated to pay [but Damages does not include] the return or reimbursement of fees for 'professional services.'"

In the underlying action, a class of former customers of the title company filed suit against the company, alleging that the company violated the Real Estate Settlement Protection Act (RESPA) by fraudulently inflating the bills of third-party vendors, such as couriers, without disclosing the relationship with the vendors or the markups. Plaintiffs sought injunctive and declaratory relief, actual damages, prejudgment interest, penalties, treble damages, attorneys' fees, costs, expenses and other remedies. After the insurer declined to continue funding defense of the underlying litigation, coverage litigation ensued.

The district court rejected the insurer's argument that coverage was unavailable because the underlying complaint simply alleged improper billing, which does not constitute "professional services." The court cited with approval case law relied on by the insurer to support the contention that "even tasks performed by professionals are not considered 'professional services' if they are ordinary activities that can be performed by those lacking the relevant training and expertise." See *Med. Records Assocs. V. Am. Surplus Lines Ins. Co.*, 142 F.3d 512, 514 (1st Cir. 1998). However, in this case, the court reasoned that the allegations of the underlying plaintiffs involved improper disclosure of referrals, which were "closer to the core" of the services being provided by the broker. Thus, "[o]n the 'professional continuum,' the Court finds that making referrals is

close enough to the 'professional' end of the spectrum to be included in the E&O policy."

The court also rejected the insurer's argument that, because each of the counts of the underlying complaint included "intent" language, the insurer was not obligated to defend the title company under the E&O policy since the policy provided coverage only for negligence claims. The court reasoned that the "fundamental nature" of the title company's alleged misconduct included both intentional and negligent acts, that RESPA violations do not require "intent," and that when complaints do not distinguish between intentional and negligent misrepresentations, Minnesota courts have held that it is reasonable to assume that both are alleged.

Finally, the district court addressed which portion of the damages sought by the underlying plaintiffs was covered under the Policy. The court concluded "that the return of overcharged fees is not the type of 'damages' that triggers coverage under the policy." It also held that the trebling of those fees was excluded because the trebling "is clearly a penalty." The court, however, rejected the insurer's argument that the attorneys' fees sought by underlying plaintiffs did not constitute damages because they are part of costs. The court reasoned that RESPA authorizes courts to award to the prevailing party "the court costs of the action together with reasonable attorneys fees." 12 U.S.C. § 2607(d)(5). According to the district court, this language makes attorneys' fees distinct from costs.

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