

## **Eighth Circuit Holds that Knowingly Wrongful Acts Exclusion Is Ambiguous**

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The United States Court of Appeals for the Eighth Circuit, applying Missouri law, has held that an insurance policy's knowingly wrongful acts exclusion is ambiguous and does not bar coverage for liabilities resulting from an insured psychologist's negligent failure to warn the victim that her father, who was the insured's client, posed a future risk of sexual abuse to the victim. *Am. Home Assur. Co. v. Pope*, 591 F.3d 992 (8th Cir. 2010).

The psychologist counseled the victim and her father in connection with the father's sexual abuse of the victim. The father eventually quit his therapy sessions and continued to sexually abuse the victim. The psychologist, however, never notified government officials about the abuse. Nor did he warn anyone capable of protecting the victim that the father had stopped attending therapy or that the father was still a threat to the victim's safety. The victim eventually sued the psychologist for negligence per se for violating Missouri's mandatory reporting statute by failing to notify government officials about the abuse, and for breach of a common law duty to warn of the father's continued threat to her safety.

The professional liability policy at issue stated that the insurer would pay "all sums which the Insured shall become legally obligated to pay as damages because of any wrongful act committed" in the course of the insured's "professional services." The policy defined a "[w]rongful act" as "any actual or alleged negligent act, error, or omission, or any actual or alleged defamation." The policy also contained exclusions for liabilities resulting from "any wrongful act committed with knowledge that it was a wrongful act" and for criminal acts. Based on these policy exclusions, the insurer denied coverage and filed an action seeking a declaration that it had no duty to defend or indemnify. Shortly after the filing of the coverage action, the victim agreed with the estate of the psychologist, among other things, to pursue recovery only from the insurer and to submit the underlying dispute to binding arbitration.

In the coverage action, the plaintiff conceded that the criminal act exclusion barred coverage for her first cause of action because the psychologist's failure to report the father's abuse to the proper authorities constituted a criminal act under the mandatory reporting statute. However, the victim maintained that the policy afforded coverage for her duty to warn cause of action. The court noted that it previously had concluded that the knowingly wrongful acts exclusion did not apply in the duty to defend context because the victim's complaint alleged only negligence. The court, however, explained that it still had to decide whether the exclusion applied to the insurer's duty to indemnify.

The insurer argued that the insured committed a knowingly wrongful act, and therefore his conduct fell within the exclusion. In rejecting this argument, the court held that the knowingly wrongful act exclusion was ambiguous and "reasonably subject to different interpretations." According to the court, "[t]he ambiguous nature of the contract becomes apparent when the conduct expressly covered by the policy is compared and contrasted with the conduct expressly excluded. First, the contract states it will insure damages resulting from a 'wrongful act,' defined, in relevant part, as 'any actual or alleged negligent act, error, or omission.' Then, the contract excludes coverage for liabilities resulting from a knowingly wrongful act." Noting that ambiguous contract provisions should be interpreted using the construction most favorable to the insured, the court held that the exclusion for knowingly wrongful acts reasonably could be interpreted as excluding only coverage for intentional conduct. In concluding that the victim's duty to warn negligence count did not fall within the policy's knowingly wrongful act exclusion, the court noted that the fact-finding body in the agreed-upon arbitration proceeding concluded that the psychologist's conduct was merely negligent. Moreover, the court declared that there was no finding that would satisfy Missouri's requirement that the "policyholder intend, not only the act itself, but also the consequences." Accordingly, the court held that the knowingly wrongful act exclusion did not apply and, thus, the policy afforded coverage.