

## Court Finds Duty To Defend Based on Insurer's Knowledge of Facts Outside Complaint

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Applying New York law, a federal district court has held that an insurer has a duty to defend an insured when the insurer has actual knowledge of facts that may trigger coverage even when those facts are not addressed in the underlying complaint. *Westport Ins. Co. v. Napoli, Kaiser & Bern*, 2010 WL 3749242 (S.D.N.Y. Sept. 27, 2010).

The case involved coverage under a lawyers professional liability policy for a suit alleging that the insured had improperly manipulated diet drug settlements to the detriment of a number of plaintiffs. In November and December 2001, the insured tendered the initial lawsuits to the insurer, and the insurer denied coverage pursuant to the fraud exclusion in the policy. Shortly thereafter, the insured successfully sought a coverage declaration against the insurer, obtaining a determination that the insurer owed a duty to defend the initial lawsuits. In November 2003, another lawsuit was filed against the insured in connection with the same alleged wrongdoing, and the insurer provided a defense. An intervenor complaint was filed in the November 2003 litigation, and the insured tendered the complaint to the insurer. The insurer denied coverage for the intervenor complaint on the grounds that it only contained allegations of fraudulent conduct and was thus not covered under the policy. The insurer then filed suit seeking a declaration that it had no coverage obligation with respect to the intervenor complaint.

The court rejected the insurer's contention that no duty to defend existed because the allegations in the intervenor complaint were based solely on fraudulent and intentional misconduct. According to the court, the determination of an insurer's duty to defend under New York law extends beyond the allegations of the complaint to an insurer's "actual knowledge of facts that indicate the lawsuit does involve a covered event." The court held that a duty to defend existed even though "the [i]ntervenor [c]omplaint . . . appears to allege exclusively fraudulent claims" because the insurer was aware of negligence and breach of fiduciary duty allegations in the earlier lawsuits. Specifically, the court determined that the insurer had "actual knowledge that there are other possible claims the Intervenor may bring in connection with the factual allegations against [the insured] and that any negligence or breach of fiduciary duty claims will be covered by the insurance policy" pursuant to the earlier coverage determination.