

ALERT

Massachusetts Appellate Court Affirms Trial Court Finding of No “Wrongful Act”

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Applying Massachusetts law, a Massachusetts appellate court has held that a lawsuit regarding the fraudulent issuance of insurance policies did not allege a “wrongful act” and thus did not trigger a duty to defend or indemnify under an E&O policy. *Utica Mut. Ins. Co. v. Amity Ins. Agency, Inc.*, 2013 WL 5177167 (Mass. App. Ct. Sept. 17, 2013).

The insurer issued an E&O policy to an insurance brokerage, which provided specified coverage for “loss arising out of wrongful acts . . . in rendering or failing to render professional services.” “Wrongful act” was defined in the policy to mean “any negligent act, error, or negligent omission to which this insurance applies.” The brokerage was named as a defendant in a lawsuit alleging that its former employee accepted premiums and issued fraudulent insurance policies. The brokerage settled the underlying action and sought defense and indemnity coverage from the insurer. The insurer denied coverage, concluding that the underlying action alleged only intentional and criminal conduct by the brokerage’s employee and thus did not allege a “wrongful act” involving “professional services.” Coverage litigation followed, and the trial court granted summary judgment in favor of the insurer, concluding that the underlying action did not allege a “wrongful act” and was not the result of “professional services.” The insured brokerage appealed.

The appellate court affirmed and concluded that no duty to defend or indemnify existed under the terms of the E&O policy. According to the appellate court, the underlying action did not allege a “wrongful act” because the source of the allegations in the underlying complaint was “intentional, criminal conduct, which cannot be viewed as a negligent act, error or omission.” As such, “losses arising from that

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conduct are not covered under the policy.” In so holding, the appellate court rejected the brokerage’s reliance on the fraud exclusion in the policy, the terms of which only applied “to insureds who participated in, acted with knowledge of, or acquiesced to such conduct.” The brokerage contended that it was entitled to coverage because it was unaware of the former employee’s misconduct. The appellate court rejected the argument, noting that the exclusionary language is “irrelevant” because the alleged misconduct “did not amount to ‘wrongful acts’ within the coverage of the policy.”