

Realtor's Failure to Disclose Settlement Costs Constitutes "Professional Services"

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The U.S. Court of Appeals for the Eighth Circuit, applying Minnesota law, has held that an insurer that issued an E&O policy to a real estate firm had a duty to defend the firm in a suit alleging that it overcharged its clients for closing costs and failed to disclose material information in settlement statements during real estate transactions. *Pacific Ins. Co. v. Burnet Title, Inc.*, 2004 WL 1846271 (8th Cir. Aug. 19, 2004).

The insurer issued an E&O policy to a real estate firm. The policy provided coverage for negligent acts, errors or omissions 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 a Title Agent, Title Abstractor and Escrow Agent." By endorsement, the policy also included loan origination, loan processing, loan underwriting and loan closing services within the definition of "professional services."

During the policy period a client brought a class action lawsuit against the firm, alleging that it routinely overcharged for courier services incurred in loan closings and violated the Real Estate Settlement Procedures Act (RESPA) by failing to disclose the actual cost of the courier services and charging an unearned fee. After defending the insured for more than a year, the insurer withdrew from the defense and filed the instant action.

The Eighth Circuit held that the insurer had a duty to defend, rejecting its argument that billing practices do not involve "professional services." The court distinguished this case from cases such as *Medical Records Associates v. American Empire Surplus Lines Insurance Co.*, 142 F.3d 512 (1st Cir. 1998), in which other courts have held that overbilling patients was not a "professional service," on the grounds that the complaint in the underlying litigation "alleges more than overcharging." The court opined that the underlying complaint alleged that the firm owed "'real estate fiduciary duties'...and violated RESPA by failing to disclose material facts on settlement statements."

Because Congress intended RESPA to protect consumers by imposing obligations on professionals, the Eighth Circuit concluded that the failure to fulfill the statutory mandate was more in the nature of a professional service covered by the E&O policy than the ministerial act of overcharging for services. The court also rejected the insurer's contention that the underlying complaint alleged only intentional acts, holding that RESPA may be violated negligently and that the underlying complaint could be read to allege such negligent violations of the statute. Finally, the court rejected the insurer's contention that the underlying complaint did not seek

"damages" as defined in the policy, since the policy did not afford coverage for the stated of fees or for fines or penalties. The court stated that the complaint also sought attorneys' fees under the statute, which constitute damages under the policy.

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