

Duty to Defend Not Triggered by Allegations Outside Professional Services Coverage

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The United States District Court for the District of Colorado, applying Colorado law, has held that allegations in several lawsuits brought against a real estate investment trust did not trigger the insurer's duty to defend the trust under miscellaneous professional liability policies that covered the provision of professional services. *Apartment Investment & Mgmt. Co. (AIMCO) v. Nutmeg Ins. Co.*, 2008 WL 901547 (D. Colo. March 31, 2008).

The seven lawsuits for which the trust sought coverage arose out of an alleged fraudulent scheme in which the trust assertedly obtained financing for insurance premiums and procured insurance for non-existent entities. After discovering the alleged scheme, the financial institutions that had funded the premiums sued the trust. When the insurer refused to defend the trust, the trust sued the insurer, seeking coverage.

Because coverage under the policies at issue was limited to claims based on "any actual or alleged act, error or omission in the rendering of or failure to render Professional Services," the court first addressed the meaning of the term "Professional Services." The policy defined the term as "those services . . . requiring special learning or intellectual skills, performed by the Insured in the ordinary conduct of its profession for others for a fee, remuneration or other consideration; or as otherwise defined by endorsement to this Policy." The trust argued that an endorsement to the policy that amended the definition of Insured to include "any independent contractor" eliminated the requirement that such services be rendered "for others for a fee" because the amending endorsement did not contain that language. Thus, under the trust's interpretation, services performed for the trust by an independent contractor in its employ could constitute "Professional Services." The court rejected this interpretation as unreasonable, citing the fact that the endorsement contained no indication that it amended the definition of "Professional Services." Accordingly, as a starting point to its analysis, the court held that the policy did not afford coverage for any services provided by one Insured to another Insured.

The court next considered three arguments by the insurer as to why the seven underlying lawsuits did not trigger the duty to defend. The insurer first argued that the policy did not afford coverage for the lawsuits because none were brought by the recipient of the trust's professional services and, therefore, none arose out of a covered "Wrongful Act." The court disagreed, and, relying on *Administaff, Inc. v. American International Specialty Lines Insurance Co.*, 75 Fed. App'x 239 (5th Cir. 2003), reasoned that a claim did not have to be

brought by a client of the trust for it to "arise out of" the provision of services to a client.

The insurer also contended that four of the lawsuits arose entirely from allegations that the trust had failed to pay its debts and the trust could not "transfer its liability for those debts" to the insurer under the professional liability policies. The court agreed in part with the insurer, holding that most of the allegations in the four lawsuits were based on the trust's failure to repay loans, which "involved, at best, a 'business decision' by [the trust] that did not require [special learning or intellectual skill] under the Policies." The court determined that, for those suits where the only identified "Wrongful Act" was the asserted failure to pay a debt otherwise owed, coverage was precluded, as such failure did not arise from the provision of Professional Services.

The court also accepted the insurer's argument that several of the lawsuits involved allegations that arose out of the trust's procurement of its own insurance, which did not constitute the provision of professional services "for others for a fee." The court held, however, that some of the allegations in the lawsuits did relate to the trust's procurement of insurance for others. With respect to those actions, however, the court determined that coverage was precluded by the policies' exclusion for claims "for, based upon, or arising from the performance of or failure to perform services as an insurance agent [or] insurance broker."

Finally, the court addressed the trust's contention that the insurer was estopped from raising the agent or broker exclusion because the insurer had failed to raise it prior to summary judgment. The court explained that, while an insurer may waive a defense to coverage such as lack of notice, it may not waive application of a policy exclusion "because the doctrines of waiver and estoppel cannot be used to create coverage where none previously existed under the terms of the policy." The court thus held that the insurer did not have a duty to defend the trust because all of the allegations in the seven lawsuits were precluded from coverage either by the terms of coverage for professional services or by exclusion for services performed as an insurance agent or broker.