

## Duty to Defend Arises Even if Professional Services Are Tainted with Fraud

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A federal district court in New York recently held that, under New York law, an insurer had a duty to defend a law firm under a claims-made professional liability policy against allegations of fraudulent professional services. *Admiral Ins. Co. v. Weitz & Luxenberg, P.C.*, No. 02-2195(RWS), 2002 WL 31409450 (S.D.N.Y. Oct. 24, 2002).

The insured, a law firm, was sued in the underlying litigation based on facts that are not set out clearly in the opinion. The insurer provided coverage to the law firm until a series of motions to dismiss and amendments to the complaint narrowed the allegations against the law firm to tortious interference with economic advantage, tortious interference with contract, breach of contract and common law fraud. At that point, the insurer withdrew its defense, arguing that the remaining allegations, which involved "acts of extortion, backdating of documents and the like," did not involve "professional services" and were not performed by the lawyers "solely" in their capacity as lawyers. Coverage litigation followed, and the court held that the insurer had a duty to defend.

The policy defined "Professional Services" as services "rendered by [the law firm] solely as a lawyer, mediator, arbitrator or notary public for others." The policy also contained an exclusion providing that the insurer was not required to indemnify the insured for any "dishonest, fraudulent, criminal, or malicious act," but required the insurer to provide a defense for such claims.

The court reasoned that the definition of "Professional Services" did not explicitly exclude criminal, fraudulent or dishonest acts and that, construing the definition in favor of the law firm, a duty to defend existed even though the insurer would not be required to indemnify such acts. The court also rejected in part the insurer's argument that the lawyers did not perform the alleged acts "solely" as attorneys because their actions were merely "setting the stage" for non-attorney acts. The court agreed with the insurer with respect to allegations of extortionate threats and witness tampering, which it held were too far removed from performing professional services to qualify for coverage. The court reasoned, however, that allegations involving misdating pleadings, negotiating settlements and providing advice about whether to file suit despite a settlement were not "ancillary to fraud." The court concluded that "the fact that the services are alleged to be tainted with fraud does not render them not Professional Services when construing the policy in favor of the policyholder." The court further held that because the insurer had to defend against several of the allegations

in the complaint, it had to defend against the entire complaint. The court also noted that, to the extent the plaintiff in the underlying lawsuit obtained restitution, no indemnification would be required because under New York law, "damages" does not include a claim for restitution of money wrongfully obtained by the insured.

For more information, please contact one of WRF's Professional Liability Attorneys at 202.719.7130