

Illinois Appellate Court Applies Breach of Fiduciary Duty and Intentional Fraud Exclusions

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An Illinois appellate court has held that an insurer had no duty to defend public officials, insured under a public officials E&O policy, where the underlying complaint alleged only breach of fiduciary duty and intentional fraud, which were expressly excluded in the policy. *Twin City Fire Ins. Co. v. Somer*, 2003 WL 21706831 (Ill. App. Ct. July 23, 2003).

The insurer issued a public officials E&O policy to a township. The policy contained exclusions for "[l]iability arising out of a dishonest, fraudulent, criminal or malicious act or omission of any insured" as well as "[l]iability arising out of any insured's activities in a fiduciary capacity or as a trustee or in any similar activity."

Taxpayers in the township filed a lawsuit against two supervisors of the township and the township's attorney, alleging that the three officials entered into a conspiracy whereby the township sold certain property to the attorney without following proper procedures. The attorney then allegedly entered into "sham transactions" to assign the properties to the township temporarily in order to waive the outstanding property taxes before the property was returned to the attorney. The insurer refused to provide a defense, citing a number of policy provisions. After the insured officials prevailed in the underlying lawsuit, they brought an action against the insurer.

The Illinois appellate court held that the insurer properly denied coverage. The court explained that, in evaluating coverage, the underlying complaint "must be read as a whole in order to assess its true nature." Although the complaint contained five counts, some of which went to relief (e.g., a count for an accounting and restitution of the unpaid property taxes), the court explained that "the underlying complaint essentially states two causes of action, breach of fiduciary duty and intentional fraud." Since the policy expressly excluded both of those causes of action, coverage was unavailable. The court reasoned that the fact that the complaint contained counts seeking various forms of relief was irrelevant because "all of the factual allegations of the complaint are premised upon only one theory of recovery, that of intentional fraud and a conspiracy to commit fraud."

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