wiley

NEWSLETTER

No Duty to Defend Lawsuit Alleging Intentional Act

March/April 2002

A federal district court recently ruled that an insurer does not have a duty to defend a lawsuit alleging intentional conduct by the insured under an Employee Benefits Liability Endorsement because the conduct does not constitute a "negligent act, error or omission." *Group Voyagers, Inc. v. Employers Ins. of Wausau*, 2002 U.S. Dist. LEXIS 3674 (N.D. Cal., Mar. 1, 2002).

The case arose out of an underlying action in which a group of present and former Group Voyager ("GVI") tour directors filed a class action suit against GVI, alleging that the company had improperly denied them benefits under its 401(k) and pension plans, in violation of the Employee Retirement Income Security Act of 1974.

GVI provided its insurer, Wausau, with notice of the claim, but Wausau denied the claim on the grounds that the policy covered only "negligent acts, errors or omissions." According to the insurer, the policy did not cover GVI's intentional decision to exclude the class members from its retirement plans. GVI filed a declaratory judgment action against the insurer.

Based on its review of the class action complaint and operative policy provisions, the court concluded that the underlying complaint did not allege any "negligent acts, errors or omissions" on the part of GVI. It rejected the insured's argument that the word "negligent" modified only the term "act" and not the words "error" and "omission." According to the court, it would be "self-defeating" to limit coverage to "negligent acts" while covering intentional errors and omissions.