

Seventh Circuit Holds No Duty to Defend Where Complaint Alleges only Intentional Conduct

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The U.S. Court of Appeals for the Seventh Circuit, applying Illinois law, has held that an insurer that issued a travel agents' professional liability policy to a car rental company has no duty to defend a complaint alleging that the company intentionally overcharged customers, even though the underlying plaintiffs could have—but did not—allege negligent conduct. *Conn. Indem. Co. v. DER Travel Serv.*, No. 02-3302, 2003 WL 2010723 (7th Cir. May 2, 2003).

The insurer issued a professional liability policy to a car rental company. The policy provided coverage for "[a]ny negligent act, error, or omission" of the agency. It excluded coverage for "liability arising out of any act, error, or omission which is willfully dishonest, fraudulent, or malicious, or in willful violation of any penal or criminal statute or ordinance, and is committed (or omitted) by or with the knowledge or consent of the 'insured.'"

The car rental company was named as a defendant in a class action lawsuit alleging that the company overcharged consumers on car rentals in European countries by improperly applying the value added tax (VAT) to booking fees they charged consumers, even though the VAT was not applicable to such fees. The complaint alleged that the company violated the Consumer Fraud Act through "deceptive pricing and other deceptive acts" which were "intentionally and willfully effected in disregard of law." The insurer denied coverage based on the exclusion for intentional acts, and litigation ensued.

The Seventh Circuit ruled in favor of the insurer. It noted initially that the policy provides coverage only for negligent acts. The court then reviewed the relevant allegations in the complaint and concluded "[a] review of these paragraphs reveals not a hint of negligent conduct alleged. The complaint lucidly sets forth that [the company] purposefully engaged in a scheme to deceive consumers."

The court rejected the company's argument that the underlying plaintiffs could have asserted a negligence claim under the Consumer Fraud Act, reasoning that they did not do. The court explained, "it is the actual complaint, not some hypothetical version, that must be considered."

Finally, the court acknowledged the "well-settled doctrine" that a complaint must be construed in favor of the insured. The court concluded, however, in this case that there was "no evidence that the [] complaint alleged [that the company] acted in a negligent fashion. Phrases such as 'mislead and conceal,' 'scheme or device,' and 'intentionally and willfully' are the paradigm of intentional conduct and the antithesis of negligent actions. "

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