

Wisconsin Court Applies Intentional Acts Exclusion, Rejects Application of Bodily Injury and Pollution Exclusions

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A Wisconsin appellate court has held that an exclusion for intentional acts precluded coverage for certain claims made against a real estate broker insured under an E&O policy but that the exclusion, as well as exclusions for bodily injury and pollution, did not bar coverage for other claims against the broker. *Droegkamp v. American S. Ins. Co.*, 2003 WL 21749514 (Wis. Ct. App. July 30, 2003).

The insurer issued an errors and omissions policy to a real estate broker. The policy contained exclusions for claims arising out of (1) any "dishonest, fraudulent, criminal or malicious act or omission or deliberate misrepresentation," (2) bodily injury and (3) pollution. The broker was sued in connection with the sale of a residence. The complaint included causes of action for intentional misrepresentation, fraudulent misrepresentation, strict liability misrepresentation and negligence. The complaint sought relief for, among other things, the cost of repairs, compensation for the diminished value of the property, personal injury and "mold problems."

The court held that the policy excluded coverage for the counts for intentional and fraudulent misrepresentation because they involved intentional acts. The court held, however, that the remaining counts were not excluded under any of the exclusions in the policy. It first reasoned that the allegations involving strict liability misrepresentation and negligence "can be established without proof of deliberate conduct" and therefore were not excluded as intentional acts. The court reasoned that the personal injury exclusion did not bar coverage because the complaint sought pecuniary damages, which were not excluded. Finally, the court held that the pollution exclusion did not bar coverage because "the mold language in the complaint appears only in the request for relief, not in the substantive portion of the complaint; thus it is not properly considered a substantive allegation." The court also stated that "there is some support for the argument that mold does not constitute pollution."

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