

Insurer Has a Duty to Defend against Federal Trade Commission Investigation Even Absent Claim for Damages

July/August 2003

In an unpublished decision, a trial court in Maine has held that an insurer has a duty to defend an insured non-profit corporation in an investigation by the Federal Trade Commission (FTC) even though the investigation notice did not contain a claim for damages. *Maine Health Alliance v. Med. Mut. Ins. Co.*, 2003 WL 21387158 (Me. Super. Ct. May 20, 2003).

The insurer issued a professional liability policy to a non-profit corporation that provided healthcare services. The claims-made policy obligated the insurer to "pay on behalf of the Insureds all Loss for which the Insureds shall be legally obligated to pay as a result of any Claim or Claims made against any Insured due to a Wrongful Act" and to defend "any Claim against the Insureds seeking damages for Loss, even if any of the allegations are groundless, false or fraudulent." The Policy defined a claim as "any demand made upon an Insured for damages, whether formal or informal, written or oral, or any occurrence which the Insured believes may subsequently give rise to a Claim as a result of a Wrongful Act." The Policy defined loss as "any amount including Claims Expense, in excess of the applicable retention and not exceeding the Limit of Liability, which [the Plaintiff is] legally obligated to pay or which the [Plaintiff] shall be required or permitted by law to pay for any Claim or Claims made against them for Wrongful Acts." Claims expense was defined to include "legal fees and all other fees or costs incurred in the defense of any covered Claim including post-judgment interest and expenses for investigation, adjustment and appeal."

The FTC sent the non-profit corporation a formal notice that it was conducting a non-public investigation into certain contractual relationships of the company. The company sought coverage under the policy, contending that the investigation could give rise to a claim for damages. The insurer denied a defense, arguing that the FTC investigation was not a claim for damages. Coverage litigation ensued.

The court held in favor of the non-profit corporation. It first concluded that the FTC investigation constituted a claim under the policy language because evidence in the record established that the plaintiff "believed" that the investigation could give rise to a claim. The court then held that the corporation had suffered a "loss" because it incurred a "Claims Expense"—legal fees—in defending against the FTC investigation. The court explained that "[a]lthough the Policy's definition section and description of coverage is clear, when read

along the 'duty to defend' clause, the Policy is reasonably susceptible of multiple interpretations and therefore ambiguous." The court further noted that the insurer could have employed more precise language in defining terms so as to differentiate between actual claims for damages and occurrences that could potentially give rise to claims in the future.

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