

Fraud Exclusion Applicable Where Policyholder Found Negligent

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A Massachusetts appellate court, in an unpublished opinion, held that coverage was not available to a policyholder under a fraud and dishonesty exclusion where the policyholder had been found negligent in a separate action. *New England Ins. Co. v. Stewart Title Guar. Co.*, 782 N.E.2d 557 (Mass. App. 2003).

The insurer issued a professional liability policy to a three-person law firm that was structured as a professional corporation. The policy stated that it would not apply "to any claim arising out of any dishonest, fraudulent or malicious act, error or omission of any insured committed with actual dishonest, fraudulent or malicious purpose or intent." One of the attorneys at the law firm was sued and subsequently held liable for certifying two first mortgages on the same property to two different lenders. The finding of liability was based on theories of negligence, breach of fiduciary duty and statutory violations, but not fraud. The insurer then filed suit seeking a declaration that no coverage was available under the fraud exclusion in the policy.

The appellate court reasoned that fraud could properly be found based on evidence from the trial that the attorney had a ten-year relationship with the borrower, there was a very short interval between the two mortgages and the attorney failed to take any of the reasonable steps he should have taken when dealing with the second lender. The court also held that the actions of the attorney could properly be imputed to the entire firm since at the time of the transactions the attorney was the sole proprietor of the corporation. Finally, the court held that the insurer was not bound by the legal and factual determinations in the underlying case even though the insurer had provided the lawyer with a defense because "the defense was not directed or controlled by the insurer, and the fraud issue was not even raised [by the law firm]."

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