

# Insurer Must Provide Separate Counsel to Town Board Members

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A New York appellate court has held that an insurer that issued a professional liability policy to a town has a duty to defend five former town board members where the underlying complaint contained a count for negligence even though the policy "clearly" excluded coverage for the other allegations in the complaint. *Murphy v. Nutmeg Ins. Co.*, 2004 WL 383485 (N.Y. App. Div. Mar. 1, 2004). The court also held that each board member was entitled to separate counsel since each had made a claim for contribution against the others, creating a potential conflict of interest.

The insurer issued a professional liability policy to a town. Although the appellate court did not quote the policy language in its opinion, it stated that the duty-to-defend policy "clearly excluded coverage for, among other things, dishonest, fraudulent, and criminal or malicious acts of the insured, as well as acts arising out of an insured's activities in a fiduciary capacity." The town brought the underlying action against five former members of the town board alleging RICO violations, breach of fiduciary duty and negligence based on their participation in the purchase of a building to house local police and court facilities.

The appellate court held that the insurer had a duty to defend the board members because the underlying complaint included a negligence count. The court noted that the insurer would not have a duty to defend if the only counts had been for RICO violations and breach of fiduciary duty. However, the court explained that the insurer had a duty to defend "as long as there remains a pending claim sounding in negligence, since the allegations set forth in that claim for relief fall squarely within the scope of the risks covered by the subject policy." The court also held that each of the board members is entitled to separate counsel "since each made a claim for contribution, and thus, the possibility of conflict exists."

For more information, please contact us at 202.719.7130.