

Federal Court in Idaho Holds Coverage Barred under Real Estate Liability Policy, But Insurer Not Entitled to Reimbursement of Defense Expenses

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The United States District Court for the District of Idaho has held that a real estate liability policy afforded no coverage for an underlying action brought against the insured real estate listing agent by real estate purchasers. *St. Paul Fire & Marine Ins. Co. v. Holland Realty, Inc.*, 2008 WL 3255645 (D. Idaho Aug. 6, 2008). More specifically, the court held that the insurer had no duty to defend or indemnify the real estate agents because exclusions for (a) loss that results from alleged violations of antitrust or trade laws and (b) loss that results from fees or commissions both applied to bar coverage for the underlying action. Although the court held that the policy afforded no potential for coverage, it rejected the insurer's request for reimbursement of underlying defense costs incurred prior to the determination of no coverage.

The agent was the exclusive listing agent for the sale of undeveloped lots in a subdivision in which the plaintiffs, a couple, purchased a lot and built a home. The agent allegedly charged the plaintiffs an improper commission, which was based on the value of both the lot and the home contract purchase price. Based on these allegations, the plaintiffs asserted that the agent violated the Sherman Act, the Idaho Competition Act, the Idaho Consumer Protection Act (ICPA) and the Real Estate Settlement Practices Act (RESPA). The insurer agreed to defend the agent pursuant to a reservation of rights, including the right to seek reimbursement of defense costs upon a determination that there was no duty to defend. The insurer subsequently brought this declaratory judgment action and moved for summary judgment, arguing that it had no duty to defend or indemnify based on the application of two separate exclusions.

The first exclusion relied on by the insurer barred coverage for "loss that results from any actual or alleged violation of any securities, anti-trust, or restraint of trade laws." The court held that this exclusion applied to the Sherman Act, the Idaho Competition Act and the ICPA counts because the complaint expressly asserted "restraint of trade, price fixing and anti-trust violations . . . which are the type of claims that the policy expressly excludes [from] coverage." The court rejected the agent's argument that the exclusion was ambiguous and did not cover the ICPA count, holding that the ICPA count "fits squarely within the Policy's anti-

trade laws exclusion."

The second exclusion, which the court addressed because it concluded the RESPA count was not otherwise excluded, barred coverage for "loss that results from fees, deposits, commissions or other charges for [the agent's] real estate professional services." The agent first argued that this exclusion did not apply because the plaintiffs sought not just a return of the commission they were charged but also other damages, including increased costs and fees, attorneys' fees and other, non-specified damages. The court rejected this argument, noting that the exclusion focused on "loss that results . . . from commissions," and, thus, it held, "any loss resulting from improperly charged commissions, regardless the form," falls within the scope of the exclusion. Because "the gravamen" of the complaint was the alleged improper commission, the other alleged damages were "all a result of the improperly charged commission" and thus excluded from coverage. The agent further argued that the exclusion did not apply to the RESPA count because that count was based not only on the alleged improper commission but also on other alleged ethical violations. The court rejected this argument as well, holding that, like the plaintiffs' other counts, "the basis of [the agent's] alleged ethical violations were a result of the improperly charged commission." Lastly, the court rejected the policyholders' argument that the exclusion was ambiguous because the policy did not "define what is meant by loss that 'results from' fees." According to the court, the policy language is not ambiguous and applied here, because the "whole case centers around commissions charged on the lot and how this caused a loss for the [plaintiffs]."

Having determined that the insurer owed no duty to defend or indemnify in connection with the underlying action, the court next addressed whether the insurer was entitled to reimbursement of the underlying defense costs it paid prior to the court's adjudication of the coverage dispute, which it had unilaterally reserved the right to recover. Noting that the Idaho courts have not yet addressed this specific issue, the court concluded that decisions from other jurisdictions refusing to allow reimbursement unless an agreement to the contrary is found in the insurance policy, such as *General Agents Insurance Co. of America v. Midwest Sporting Goods Co.*, 828 N.E.2d 1092 (Ill. 2005), were most consistent with Idaho law. As such, because the policy at issue here did not contain a provision calling for the reimbursement of previously incurred defense costs, the court rejected the insurer's request for reimbursement.