

No Duty to Defend Where Claim Would Not Exist But for Excluded Conduct

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The United States District Court for the Eastern District of Texas has held that an insurer did not have a duty to defend claims under an errors and omissions policy where those claims "would not exist but for conduct explicitly excluded by the policy." *Baldwin, et al. v. Nutmeg Ins. Co.*, No. 9:07-CV-84-TH (E.D. Tex. Jan. 29, 2009).

The policyholder was an insurance broker that also acted as a risk manager for an investment firm. In its capacity as a risk manager, the broker purchased a property insurance policy that covered the investment firm as well as its affiliated companies. In order to reduce the investment firm's premiums, the insurance broker sold property insurance coverage to real estate owners and operators at low prices and then included the purchasers under the investment firm's property insurance policy as affiliated entities. Two lawsuits were filed against the insurance broker when the scheme was discovered. The insurance broker sought coverage under a professional liability policy that provided coverage for the named insureds "when they act in the capacity of 'risk managers' or 'insurance administrators,'" but excluded coverage "'arising from' the named insured acting as 'insurance agents' or 'insurance brokers.'"

The court granted the insurer's motion for summary judgment. Although the claims for which coverage was sought alleged "some facts related to covered activity," the purchase of property insurance for the investment firm, the claims would not have been filed "but for the scheme to sell coverage to unrelated entities." Because the claims would not exist absent the broker's sale of coverage to unaffiliated entities, the court found that the claims arose from actions as an insurance broker.