

No Coverage Under E&O Policy Where Only Intentional Conduct Is Alleged; Insurer May Be Estopped from Withdrawing from Defense

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The United States District Court for the Middle District of Pennsylvania, applying Pennsylvania law, has held that an E&O policy does not provide coverage where the complaints in the underlying suits against the insured alleged only intentional acts. *Northland Ins. Co. v. Stranieri*, 2007 WL 4300643 (M.D. Pa. Dec. 6, 2007). The court nevertheless denied the insurer's motion for judgment on the pleadings, finding a question of material fact as to whether the insurer's withdrawal from the defense would prejudice the insured and thereby estop the insurer from withdrawing.

The insured real estate appraiser faced lawsuits brought by the Attorney General of Pennsylvania and by home purchasers alleging that the insured falsely appraised homes at higher than their true values in furtherance of schemes with developers and mortgage companies. The insurer provided a defense under a reservation of rights and later sought a declaratory judgment that it had no duty to defend or indemnify the appraiser in the underlying actions. The insurer argued that the policy did not provide coverage because it covered liability resulting only from "a negligent act, error or omission in the rendering of or failure to render 'appraisal services,'" whereas the underlying actions alleged intentional, rather than negligent, conduct. The appraiser maintained that the complaints alleged improper conduct by error or omission as well as intentional acts. The appraiser also argued that the insurer was estopped from requesting the declaration that it had no duty to defend because the insurer had been defending the appraiser for several years and its withdrawal would prejudice the appraiser.

The court held that the insurer had no duty to defend or indemnify the appraiser because "the factual allegations in all . . . of the underlying complaints would, if found to be true, demonstrate that [the appraiser] acted intentionally, but not that he acted negligently," and that "those complaints do not contain ambiguities as to whether the claims are based in negligence or intentional tort." The appraiser argued that certain allegations of the appraiser's omissions, such as his failure to physically appraise homes or failure to follow industry standards, constituted allegations of negligence. The court rejected this argument, finding that the complaints alleged that the appraiser made these omissions intentionally rather than negligently.

The court nevertheless denied the insurer's motion for judgment on the pleadings based on the appraiser's affirmative defense of estoppel. The court acknowledged that, under Pennsylvania law, an insurer ordinarily is entitled to withdraw from the defense of an insured when it becomes clear that no claim against the insured falls within policy coverage. The court further determined, however, that an insurer's withdrawal "must be accomplished in an orderly manner, in order to avoid prejudice to the insured and comply with the insurer's duty of good faith." The court pointed out that the insured has the burden of showing estoppel, which is not an easy showing. However, the court held that the appraiser, having raised estoppel as an affirmative defense, was entitled to offer such proof. The court concluded that, although there was no coverage under the policy, it would not grant the insurer's motion for judgment on the pleadings due to a question of material fact raised by the appraiser's affirmative defense that he would face severe prejudice should the insurer withdraw from the defense.