

Intentional Acts Exclusion Does Not Bar Coverage for Consumer Fraud Action

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The First Circuit has held that Maine law governed a declaratory judgment action concerning an insurer's duty to defend a travel agency, and that, under Maine law, the intentional acts exclusion in the policy did not relieve the insurer of its duty to defend a lawsuit alleging consumer fraud. *Auto Europe, LLC v. Conn. Indem. Co.*, 321 F.3d 60 (1st Cir. 2003).

The insurer issued a policy to a travel agency that provided coverage for "any negligent act, error or omission of the 'insured'...in the conduct of 'travel agency operations' by the 'named insured.'" The policy excluded coverage for "liability arising out of any act, error or omission which is willfully dishonest, fraudulent or malicious, or in wilful violation of any penal or criminal statute or ordinances, and is committed (or omitted) by or with the knowledge or consent of the 'insured.'" The travel agency was sued in a purported class action lawsuit, alleging that the travel agency committed fraud by increasing its commissions in the guise of a charge it claimed was a foreign tax. The complaint alleged a deliberate "fraudulent scheme of overcharges." The insurer refused to defend the suit based on the intentional acts exclusion in the policy. The insured filed suit.

The court held that Maine law should be used to resolve the dispute. Unless an insurance policy specifies the governing law, Maine courts apply the most significant relationship test. The court found that the most significant relationship was with Maine because "a Maine business with offices only in Maine, is alleged to have committed consumer fraud by its conduct in Maine." The court rejected the argument that Florida law was applicable because the pertinent insurance contract was negotiated and delivered in Florida, reasoning that the policy covered numerous related companies located in different states and is therefore deemed a multiple risk policy, which, under Maine law, is viewed as if a separate policy was issued to cover each entity. The court also rejected the argument that Illinois law should be applied because the named plaintiffs lived there, reasoning that Maine's interests in the dispute were greater because Maine is "the principal location of the insured risk."

The court then held that, under Maine law, the insurer had a duty to defend and rejected the insurer's argument that because the underlying complaint only alleged intentional fraud, the exclusion for willfully dishonest or fraudulent acts applied. The court reasoned that "not only does the cause of action at issue—the Maine [Unfair Trade Practices Act]—permit liability in the absence of an intent to deceive, but Maine law also

broadly extends the duty to defend to claims that could be developed either legally or factually at trial so as to fall within the policy's coverage." The court concluded that coverage could be implicated because a jury in the underlying case could reject plaintiff's theory of deliberate fraud but still find liability under the applicable statute. Accordingly, the insurer had a duty to defend.

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