

No Coverage for Malpractice Claim Against Real Estate Broker When Claimant Threatened Suit Prior to Policy Inception

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The California Court of Appeals affirmed summary judgment for an insurer pursuant to a malpractice insurance policy's prior knowledge provision based upon the claimants' threat of a lawsuit against the insured prior to the inception of the policy. *Flanigan v. Tudor Ins. Co.*, 2009 WL 1682008 (Cal. Ct. App. June 16, 2009).

In 2003, an insured real estate broker represented the sellers in the sale of the property adjacent to the broker's home. Following the sale, the buyers asserted rights to an easement that spanned the property of the broker and another neighbor. The neighbor claimed that the easement had been extinguished by adverse possession. In March 2004, the buyers tendered a claim to their title insurer, but the title insurer failed to resolve the dispute. In November 2004, the buyers advised the broker's husband that "lawsuits might be on the horizon," and in March 2005, the buyers brought a quiet title action. Three months later, in July 2005, the buyers filed a malpractice suit against the broker, alleging that she failed to disclose relevant information regarding the property and intentionally interfered with the buyers' use of the easement.

The broker sought coverage for the malpractice suit under a professional liability policy issued to her agency for the May 1, 2005 to May 1, 2006 policy period. The carrier denied coverage based on a condition to coverage that "the [i]nsured had no knowledge prior to the effective date of this policy of such . . . circumstances likely to give rise to a claim" and an exclusion that barred coverage for "[a]ny act, error, or omission occurring prior to the effective date of the policy if . . . the insured at the effective date of the policy knew or could have reasonably foreseen that such act, error or omission might be the basis of a claim"

In the resulting coverage action, the appeals court affirmed the trial court's grant of summary judgment to the carrier based on the known circumstances condition. The court held that "[g]iven [the broker's] admission that she had been threatened with a malpractice suit over her conduct as a real estate agent" in 2004, "there can be no dispute" that she knew of circumstances likely to result in a claim against her prior to the applicable policy's May 1, 2005 effective date. The appellate court did not reach the insurer's alternative argument that

coverage was barred by the prior knowledge exclusion.