

Alleged Wrongdoing in Connection with Attempted Real Estate Mergers Held Not To Constitute Professional Services

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The United States Court of Appeals for the Eleventh Circuit, applying Alabama law, has held that actions allegedly taken in connection with attempted real estate mergers do not constitute professional services under a professional liability policy issued to a real estate company. *St. Paul Fire & Marine Ins. Co. v. ERA Oxford Realty Co. Greystone, LLC*, 2009 WL 1757162 (11th Cir. June 23, 2009).

The insurer issued a "Real Estate Agents or Brokers Professional Liability Protection Policy" to the insured real estate company. The policy provided specified coverage for loss that "results from the performance of, or failure to perform, real estate professional services by you or on your behalf." The policy defined "real estate professional services" as "those professional services performed, or failed to be performed, for others as duties as notary public and in [the capacity of a r]eal estate agent or broker." The policy further defined the term "real estate agent or broker" to mean "a properly licensed real estate agent or broker, including the duties of such agent or broker" in the following capacities: member of a real estate accreditation or standards board; mortgage broker; real estate consultant or counselor; real estate leasing agent; or real estate referral agent. The insured purportedly approached multiple real estate companies regarding the prospect of merging with the insured, and made certain representations to the companies to induce the companies to enter into the mergers. After the proposed mergers failed, the other real estate entities and their principals filed suit against the insured, alleging various bad acts in connection with the attempted mergers.

In the coverage litigation that followed, the insurer sought a declaratory judgment that there was no duty to defend or indemnify the insured in the underlying suit because the suit did not assert any claims resulting from the performance of real estate professional services. Instead, the insurer argued, the claim arose from common business transactions, *i.e.*, mergers, "which any professional might perform." The policyholder disagreed, arguing that the policy's professional services language was ambiguous and that at least some of the underlying allegations were based on the insured's performance of supervisory professional duties as qualifying brokers. The court agreed with the insurer, concluding that there was no duty to defend the underlying lawsuit.

The court considered whether the term "real estate professional services" is ambiguous. In this regard, the court noted that the majority of courts to address the issue have concluded that the term "professional services" "unambiguously refers to services unique to a specific profession and excludes the business aspects of a professional practice that a professional happens to perform." The court rejected the lower court's conclusion that Alabama does not follow the majority rule, and distinguished an earlier Alabama Supreme Court case in which the policy at issue did not define or limit the term professional services, but instead broadly designated the insured entity as the "covered profession."

The court went on to conclude that "professional services" under the insured's policy applied only "to those services which require the specialized knowledge of a real estate agent or broker in performing his or her professional duty for others." Accordingly, the policy obligated the insurer to provide a defense only for losses resulting from errors or omissions by the policyholder while acting as a real estate agent or mortgage broker. In this regard, the court concluded that, based on the underlying complaint, the claimants' alleged losses did not result from the insured's performance of real estate professional services. On the contrary, the claimants alleged that the policyholder induced them to enter into merger agreements and that, in this connection, the insured committed various tortious acts, breached the terms of the merger agreements, converted the claimants' real estate commissions, interfered with business relationships between the claimant entities and their real estate agents and engaged in civil conspiracy. The court concluded that none of the alleged acts were dependent upon the insured's use of expertise as real estate agents, and that "the risk of committing a tort or breaching an agreement" in the course of a merger "is certainly not one specific to the practice of the real estate profession."

The court rejected the insured's argument that its alleged mishandling of a claimant's real estate license and withholding of commissions constituted professional services under the policy. In reaching this conclusion, the court noted that, although certain allegations referred to real estate matters such as agent licensing and commissions, the allegations pertained to the claimants' injury, which resulted from the insured's alleged wrongful conduct in connection with the unsuccessful mergers.

Based on its interpretation of the policy language, and a comparison of the policy's intended scope of coverage with the facts alleged in the underlying complaint, the court concluded that the insurer had no duty to defend the insured. Nevertheless, the court noted that, in the event that evidence presented in the underlying litigation were to establish that the claimants' losses resulted from the provision of real estate professional services, the insurer would, at that point, owe a duty to defend.