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NEWSLETTER

No Duty to Defend under E&O Policy Where Underlying Complaint Alleges Only Intentional Acts

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Applying Florida law, a Florida District Court of Appeal held that an insurance carrier had no duty to defend or indemnify a health maintenance organization (HMO) under an errors and omissions policy for liability that arose from the HMO's allegedly intentional plan to breach a marketing agreement with its insurance agent and interfere with the relationship between the insurance agent and its customers. *Wellcare of Florida, Inc. v. Am. Int'l Specialty Lines Ins. Co.*, 2009 WL 2341644 (Fla. Dist. Ct. App. July 31, 2009).

The HMO had entered into a marketing agreement with an insurance agent under which the agent was authorized to market the HMO's products on a commission basis. When the HMO refused to allow the agent to sell a certain product, the agent sued the HMO alleging that the HMO breached the marketing agreement by refusing to allow the agent to sell the particular product and further that the HMO "embarked upon a deliberate plan to interfere in the relationship between [the agent] and its customers, designed to drive those customers away."

The HMO was insured under an errors and omissions policy that covered liability that arose from a "wrongful act" that occurred "solely in the performance of professional services for others for compensation." The policy defined "wrongful act" as "any actual or alleged negligent act, error or omission."

The court held that the HMO's insurer had no duty to defend the HMO. The court stated that whether the insurer had a duty to defend depended on "whether the allegations in the [agent's] complaint bring the action within the scope of coverage under the [errors and omissions] policy." The court found that no allegation in the complaint could potentially give rise to a claim covered under the policy because the actions in the complaint were not done in the performance of professional services and were not negligent.