

No Coverage When Insured's Counsel Acknowledged Impending Claim Prior to Effective Date of Policy

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The Supreme Court of Nebraska has upheld summary judgment on behalf of an insurer where the insured's counsel, prior to the effective date of the insurance policy, acknowledged circumstances likely to give rise to the lawsuit for which coverage was sought. *Mortgage Express, Inc. v. Tudor Ins. Co.*, 2009 WL 2634071 (Neb. Aug. 28, 2009).

The insurer issued a claims-made professional liability policy for the policy period of April 20, 2003 through April 20, 2004. The insuring agreement provided that coverage would apply with respect to any act, error or omission only if the insured had no knowledge prior to the policy's effective date that the act, error or omission was likely to give rise to a claim. The insured was involved in a dispute with the claimant over the value of a mortgage. The insured's counsel faxed a letter to the claimant's counsel on March 4, 2003, acknowledging receipt of a message that the claimant was going to file suit against the insured and agreeing that the matter would have to be resolved in court. The insured was named in an amended complaint in June 2003.

The court found that "[a] condition precedent to coverage under the . . . policy is that the insured have no knowledge prior to the effective date of the policy of the actual or alleged negligent act, error, omission, or circumstance likely to give rise to a claim." The court opined that the insured had knowledge of its alleged negligent act giving rise to a claim no later than March 4, 2003, when its counsel faxed the letter to the claimant's counsel. The insured argued that the letter was merely "sparring between attorneys," but the court found that it "clearly and definitely expressed the intentions of [the claimant] to settle the dispute with [the insured] in court."