

Lawyer's Policy Does Not Respond to Services as Insurance Expert

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An intermediate appellate court in Illinois has held that a professional liability insurer had no duty to defend its insured attorney against allegations of intentional wrongdoing in his capacity as an insurance expert. *Illinois State Bar Ass'n Mut. Ins. Co. v. Mondo*, 911 N.E.2d 1144 (Ill. App. Ct. 2009).

The case arose out of a lawsuit filed by an insurance trust against the insured-attorney and others, including his father. The father and son allegedly operated a consulting firm and held themselves out as "experts in the field of insurance." The trust alleged that it contracted with the firm for advice concerning the medical benefit plans that the trust provided to its members. The consulting firm, through the insured-attorney, allegedly convinced the trust to become self insured and to retain a certain clearinghouse to assist in administering the transition. According to the trust's complaint, the insured "fraudulently, intentionally and willfully" concealed from the trust that he was a salaried employee of the clearinghouse. The trust asserted causes of action against the insured for purportedly breaching his fiduciary duties under ERISA, engaging in transactions prohibited by ERISA, providing unsound investment advice, fraud, negligence with respect to his fiduciary and contractual duties, and legal malpractice.

The insured tendered the defense of the lawsuit under his lawyer's professional liability policy, which provided specified coverage for damages and expenses arising out of a "Wrongful Act." The policy defined "Wrongful Act" as "any actual or alleged negligent act, error or omission in the rendering of or failing to render Professional Services." "Professional Services," in turn, was defined to mean "services rendered [by the insured] as a lawyer." The policy excluded coverage for claims "arising out of any criminal, dishonest, fraudulent or intentional act or omission committed by any [insured]." It also excluded coverage for claims arising out of an insured's capacity as a fiduciary under ERISA.

The court found that "the true nature of the complaint [was] related to the [insured's] performance of duties related to his capacity as an insurance expert and not in any capacity related to his status as an attorney despite" the count for malpractice. The court further found that it was "clear" from the allegations set forth in the complaint and incorporated into each cause of action asserted "that [the insured's] failure to disclose information was allegedly part of [an] overall scheme to mislead and defraud [the trust] and not based upon any negligent or potentially negligent conduct." Based on these findings, the court concluded that none of the claims asserted against the insured "[could] be said to fall, or even potentially fall, within the coverage of the

policy." The court further concluded that, in any event, coverage would be barred in its entirety by certain exclusions, including those for claims arising from an insured's intentional misconduct as well as for claims arising from an insured's misconduct as a fiduciary under ERISA. Accordingly, the court held that the insurer had no duty to defend the lawsuit.