

The "Complaint Rule" Is Not a Shield; Insurers Must Consider Allegations of Parallel Complaints Against Insured in Determining Duty To Defend

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The United States Court of Appeals for the Tenth Circuit, applying Colorado law, has held that, in determining its duty to defend, an insurer must consider facts alleged in parallel complaints of which it is aware rather than comparing the facts in a single complaint to the terms of the policy to determine if there is potential for coverage. *Apartment Inv. & Mgmt. Co. v. Nutmeg Ins. Co.*, 2010 WL 348032 (10th Cir. Feb. 2, 2010).

The insurer issued a duty-to-defend professional liability policy to the insured that provided coverage for claims arising from specified professional services as an apartment manager. The policy excluded coverage for claims arising from the performance of services as an insurance broker. In the course of providing real estate management services, the insured hired an independent contractor to place appropriate property insurance coverage. The independent contractor engaged in a Ponzi scheme to increase premium funds and kept the excess premiums for itself. After the scheme became known, seven lawsuits were filed against the insured. The insurer denied coverage for all seven claims, and the insured sued for breach of the duty to defend.

The court held that the trial court improperly limited its analysis to comparing the allegations of each complaint separately with the language of the insurance policies. The court noted that the Colorado Supreme Court previously had ruled that an insurer was limited to the allegations of the complaint in seeking to avoid a duty to defend, and that an insured could not use extrinsic evidence of which the insurer was not aware to establish a duty to defend. However, the Colorado Supreme Court had never addressed the issue in this case, whether an insurer may avoid its duty to defend by ignoring factual allegations in parallel complaints of which it is aware.

The court held that the Colorado Supreme Court likely would adopt a rule requiring an insurer to consider allegations in parallel complaints of which it is aware if such facts tend to establish a duty to defend. The "complaint rule was never meant to be used by insurers as a shield in order to avoid a legitimate duty to defend." The court opined that permitting an insured to rely on facts alleged in other complaints would

protect the insured's "legitimate expectation of a defense" without forcing the insured to establish whether, as a matter of fact, any of the allegations were true. The court held that since four of the complaints arguably alleged the provision of professional services as a property manager, all seven complaints, taken together, potentially fell within the policy's coverage. As a result, the insurer would be obligated to defend three claims that, individually, did not allege claims potentially within the policy's coverage.