

Fiduciary Liability Policy Affords No Coverage for Lawsuit that Did Not Allege Breach of Fiduciary Duty by Insured

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The New York Supreme Court, Appellate Division, has held that an insurer had no duty to indemnify its insured in connection with a class action lawsuit after determining that the lawsuit did not allege a Wrongful Act as defined in a fiduciary liability policy. *Fed. Ins. Co. v. Int'l Bus. Machs. Corp.*, 2010 WL 4540585 (N.Y. App. Div. 1, 2010). The court accordingly reversed a lower court decision granting summary judgment in favor of the insured on a count of breach of contract against the fiduciary liability insurer.

The insurer issued an excess policy to an insured company that followed form to an underlying fiduciary liability policy. The underlying policy afforded coverage for "all Loss for which the Insured becomes legally obligated to pay on account of any Claim first made against the Insured . . . for a Wrongful Act." The underlying policy defined "Wrongful Act," in relevant part, as "any breach of the responsibilities, obligations or duties by an Insured which are imposed upon a fiduciary of a Benefit Program by [ERISA]"

A class action lawsuit was filed against the insured company and its personal pension plan (the Plan) in which the plaintiffs alleged that certain amendments to the Plan violated age discrimination provisions of the Employee Retirement Income Security Act (ERISA). The parties to the class action lawsuit reached a settlement, and the excess insurer sought a declaratory judgment that the insured company and the Plan were not entitled to indemnification for any amounts incurred in connection with the class action lawsuit.

The appellate court agreed with the excess insurer that the class action lawsuit did not allege a breach of fiduciary duty or otherwise allege a Wrongful Act as defined in the underlying fiduciary liability policy because the insured company and the Plan were acting in a settlor capacity, not a fiduciary capacity, when they allegedly violated the age discrimination provisions of ERISA by making amendments to the Plan. The court therefore concluded that the excess insurer was entitled to a judgment that it was not obligated to indemnify the insured company or the Plan for any amounts incurred in connection with the class action lawsuit and held that the insureds' motion for summary judgment on a breach of contract claim in the trial court below should have been denied.