

Insurer Has Duty to Defend Where Accountants Allegedly Used Professional Services Recklessly to Provide False Information to Authorities

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Applying Florida law, the United States District Court for the Middle District of Florida has held that a professional liability insurer has a duty to defend insured accountants against claims alleging malicious prosecution and civil conspiracy where the underlying complaint alleged, *inter alia*, that the accountants used their professional services recklessly to provide false information about their clients to authorities. *Phila. Indem. Ins. Co. v. Hamic*, 2012 WL 3835088 (M.D. Fla. Sept. 4, 2012). In light of the existence of the duty to defend, the court denied the insurer's motion for summary judgment on its duty to indemnify prior to the resolution of the underlying action.

An insured accounting firm provided services to a small real estate brokerage firm, which was partly owned by one of the insured accountants. After a dispute arose concerning the value of the accountant's interest in the brokerage firm, the accountants analyzed the brokerage firm's records and provided the state attorney's office with information asserting that the remaining brokerage firm owners had stolen money from the brokerage firm, which resulted in such owners' arrest. The remaining brokerage firm owners, in turn, filed suit against the accountants alleging, *inter alia*, malicious prosecution and civil conspiracy, arguing that the accountants had used their professional skills and access to the brokerage firm's business records to fabricate false criminal charges against them. The accountants sought coverage for the complaint under their professional liability policy, which provided coverage for liability "by reason of a negligent act, error or omission in the performance of professional services." The policy defined "professional services" as any "services performed or advice given by any insured to others for a fee or otherwise in the conduct of the insured's practice as an accountant." The insurer filed suit and a motion for summary judgment seeking a declaration that it did not have a duty to defend or indemnify the accountants on the grounds that the underlying suit only sought damages for intentional torts.

The court denied the insurer's motion, holding that, under Florida law, the facts alleged in the complaint included negligent conduct in the performance of professional services. The court explained that Florida law provides that malice may be inferred from gross negligence in a claim for malicious prosecution and that the

complaint alleged that the accountants acted in reckless disregard of the truth or falsity of the information they provided to the state attorney's office. Further, the court noted that there was no question that the accountants had performed professional services—running spread sheets, reviewing tax returns, analyzing financial documents and performing forensic accounting—in order to gather the information. The fact that the accountants did not perform the services for a fee, the court reasoned, was irrelevant because the policy defined professional services to include services rendered “to others for a fee or otherwise.” Finally, the court opined that the complaint alleged liability “by reason of” professional services because the services performed by the accountants were the legal cause of the malicious prosecution.