

No Coverage for Contractual Liability for Independent Agent's Misconduct

March 2014

The United States Court of Appeals for the Sixth Circuit, applying Ohio law, held that a title insurer's professional liability policy did not cover the title insurer's contractual obligation to reimburse escrow funds stolen from its clients by an independent issuing agent. *Entitle Ins. Co. v. Darwin Select Ins. Co.*, 2014 WL 304497 (6th Cir. Jan. 29, 2014).

The title insurer used an independent issuing agent to offer title insurance to its clients. The independent agent also performed closing and escrow agent services on its own behalf. For some clients, the title insurer offered a closing protection letter, agreeing to reimburse the client if the issuing agent engaged in fraud, dishonesty or negligence in handling the clients' closing or escrow funds. When the issuing agent misappropriated \$3.9 million in client escrow funds, the title insurer reimbursed the 14 clients to whom it had issued such letters. The title insurer disclaimed responsibility to the others on the grounds that the issuing agent was not its agent with respect to escrow and closing funds.

The title insurer's professional liability policy covered wrongful acts of entities for whom the title insurer was "legally responsible." The title insurer argued it was "legally responsible" for the issuing agent's misappropriation from those customers it had agreed to reimburse, which therefore should have been covered under the professional liability policy.

The court held that no coverage was available because the issuing agent was not an entity for whom the title insurer was legally responsible. The fact that the title insurer acquired contractual liability to certain clients did not change the analysis of coverage. The court therefore refused to interpret the policy to "allow [the title insurer] to secure business by making contractual guarantees to its clients regarding the performance of third-party business partners that are not its agents and then force its insurer to foot the bill when that third-party fails to perform according to [the title insurer]'s guarantee, despite [the title insurer]'s disavowal of all noncontractual responsibility, legal or otherwise."