

Personal Profit Exclusion Does Not Bar Coverage in Absence of Evidence of Receipt of Personal Profit or Advantage

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In an unpublished decision, the Michigan Court of Appeals has held that the personal profit exclusion in an E&O policy did not relieve an insurer of its duty to defend a school district in an underlying action seeking to avoid an allegedly fraudulent transfer of funds to the school district because the record did not include any evidence establishing that the school district received any personal profit or advantage from receipt of the funds. *Yale Public Schools v. MASB-SEG Prop. Cas. Pool*, 2004 WL 2881889 (Mich. Ct. App. Dec. 14, 2004).

The policyholder, a public school district, was insured under an E&O policy pursuant to which the insurer had "the right and duty to defend any action or suit brought against the Insured alleging a Wrongful Act, even if such action or suit is groundless, false or fraudulent." The term "Wrongful Act" was defined as "any actual or alleged breach of duty, neglect, error, misstatement, misleading statement or omission committed solely in the performance of duties for" the policyholder. The policy excluded coverage for "any claim arising out of the gaining in fact of any personal profit or advantage to which the Insured is not legally entitled."

The school district entered into an agreement with a third party for investment advice. An affiliated company of the third party ultimately paid \$1.7 million to the school district for claims against the third party. The bankruptcy trustee of the affiliated company sued the school district seeking return of the funds to the estate as a fraudulent transfer. The school district sought a defense from the insurer under its E&O policy. The insurer denied coverage, relying on the personal profit exclusion. The school district filed the instant declaratory judgment action, seeking a declaration that the insurer's denial constituted a breach of contract.

The appellate court agreed that the insurer had breached the policy. The court, relying on a previous unpublished opinion in a case involving almost identical facts, held that "[n]o evidence showed that [the school district] gained any profit or advantage as a result of receiving funds from [the affiliated company]." The court also held that allegations of receipt of funds to which the school district was not entitled fell within the policy's definition of "Wrongful Act" and thus triggered a duty to defend the school district.

For more information, please contact us at 202.719.7130.