

# E&O Insurer Not Required to Speculate about Facts When Analyzing Underlying Complaint for Potential Coverage

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The California Court of Appeals, in an unpublished opinion applying California and Michigan law, has held that an E&O insurer did not have an obligation to defend a television company where the underlying complaint did not allege sufficient facts to raise potential claims for invasion of privacy, intentional infliction of emotional distress or outrageous conduct that were potentially covered by the policy. *Cont'l Cas. Co. v. Travelers Cas. & Sur. Co.*, 2004 WL 2750194 (Cal. Ct. App. Dec. 2, 2004). The television company was sued by the estate of a talk show guest for negligence, gross negligence and willful and wanton misconduct. The allegations resulted from an incident in which one guest on a television talk show shot and killed the victim, another guest, after the victim had revealed that he had a same-sex crush on perpetrator. The underlying complaint did not plead any cause of action that would have been covered under the policy.

The court held that the estate's complaint did not allege sufficient facts to establish potential claims for invasion of privacy, intrusion into seclusion and false light. Under California law, the court described, "the duty to defend upon unpleaded causes of action stems from the facts actually alleged, not from speculation about other facts that may or may not exist." According to the court, with respect to the victim, the complaint contained no allegations that the information sought by the company (the victim's same-sex crush) was either obtained through "objectionable" means or had placed the victim in a false light, which are required elements of the causes of action. Therefore, the court concluded that the E&O insurer was not required to speculate about additional facts that may have led to the potential for coverage. The court also noted that the estate was not seeking, nor did it have standing to seek, recovery for damages caused by invasion of the perpetrator's privacy.

For more information, please contact us at 202.719.7130.