

# Employee Benefit Liability Endorsement Does Not Cover Intentional Acts

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An Ohio intermediate appellate court has affirmed a summary judgment ruling in favor of an insurer, determining that an employee benefit liability endorsement in a business owners' policy covering "any negligent act, error or omission" applied only to negligent acts. *Twin Maples Veterinary Hosp., Inc. v. Cincinnati Ins. Co.*, 2005 WL 280941 (Ohio Ct. App. Feb. 4, 2005). The court explained that "even though [the underlying plaintiff] has stated causes of action that could be supported by negligent behavior, she did not rely upon any negligent conduct as the basis for those claims."

The insurer issued a business owner's policy, which included veterinary professional liability and employee benefit liability, to two veterinarians and the clinic that they owned. A former owner and employee of the clinic filed suit against the doctors and the clinic alleging that she was "'squeeze[d] out' as a minority shareholder" without receiving compensation and that the policyholders did not pay bonus-pool money according to an option agreement. The complaint alleged counts for breach of contract, breach of fiduciary duty, conversion, theft and civil conspiracy. The insurer denied a defense and coverage litigation followed.

The business owner's policy included an employee benefit liability endorsement providing coverage for "those sums that the insured becomes legally obligated to pay as damages because of injury to: (1) An 'employee'; or (2) A person who was formerly employee [sic] by you; . . . caused by any negligent act, error or omission . . . arising out of the 'administration' of the insured's 'employee benefit programs.'" The policy included a defense obligation for a "'suit' seeking those damages." Claims "arising out of '[a]cts, errors or omission . . . that are dishonest, fraudulent, criminal or malicious'" were excluded.

The trial court granted the insurer's motion for summary judgment, finding that the underlying claims were "based on malicious conduct" and fraud. Specifically, the trial court found that the facts giving rise to the breach of contract claim also were based on fraudulent conduct and excluded under the policy. On appeal, the policyholders argued that the intentional acts exclusion did not apply because the underlying causes of actions could be based on either negligent or intentional conduct.

The appellate court found that the employee benefit liability endorsement only applied to negligent acts. The court rejected the policyholders' argument that "negligent act, error or omission" covered negligent acts and intentional or negligent errors and omissions. The court noted that the policy used "'acts, errors or omissions'

as a unit" and explained that there was "no logical basis to interpret the endorsement as covering intentional errors and omissions yet not covering intentional *acts*."

Applying these principles, the court explained that breach of contract and breach of fiduciary duty can arise from negligent or intentional conduct. The court then concluded that the underlying factual allegations were based on fraud. As such, "where the factual bases of the claims clearly do not support a cause of action within the scope of the policy's coverage and the insurer is not required to defend against 'groundless, false or fraudulent claims,' the insurer need not defend." Because the court could not "find an interpretation of [the underlying] facts that would support negligence," it concluded that the employee benefit liability endorsement did not provide coverage for the claim.

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