

ALERT

Real Property Investment Transaction Does Not Constitute a “Covered Product” Under an Insurance Agents E&O Policy

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A federal court in West Virginia, applying West Virginia law, has found that allegations regarding a fraudulent real estate deal did not fall within the coverage grant of an insurance agency's E&O policy, as the underlying real estate transaction did not constitute a “Covered Product” as defined by the policy. *American Automobile Insurance Co. v. Smith*, 2013 WL 3327918 (S.D.W.Va. July 1, 2013). Accordingly, the court entered a default judgment against the insureds, who had failed to contest the insurer's declaratory judgment action.

The insureds presented a property investment to the claimant. The claimant alleged that the insureds breached their fiduciary duty to the claimant by failing to use reasonable care in their investigation of the subject property. According to the claimant, the insureds should have known that the actions of others involved in the transaction were fraudulent because the purchase price, appraisal and subsequent loan were in excess of the actual value of the land. The claimant filed suit, for which the insured sought coverage under an insurance agents E&O liability insurance policy.

Although the insureds did not contest the insurer's subsequent motion for a default judgment, the court nevertheless reviewed the motion on the merits and determined that no coverage was available under the policy, which provided coverage only for claims for a “Wrongful Act in the rendering or failure to render Professional Services in connection with a Covered Product” “Covered Product” was defined as “property and casualty insurance coverage,” “life insurance . . . , accident and health insurance, disability income insurance or fixed

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annuities . . . , "group employee benefit plans or disability plans," or "group or ordinary Pension or Profit Sharing Plans, Individual Retirement Accounts . . . , and fixed retirement annuities." The policy was amended to add "variable products . . . , "Mutual Funds," and "any Securities sold by the Insured as a Registered Representative" to the definition of Covered Product.

According to the court, the policy did not provide coverage for the underlying action because the suspect real estate transaction did not constitute a "Covered Product." The court explained that, while the underlying action loosely could be characterized as involving an "investment," it did not involve securities and was instead a "tort claim related to the purchase of real property." As such, the court concluded that the claim was "entirely foreign to the risk covered" by the policy and entered judgment in favor of the insurer providing that it had no duty to defend or indemnify the insureds.