Professional Liability Policy Does Not Cover for Intentional Bad Result or for Intentional Misconduct

By Jeffrey P. Lewis

Most conduct by attorneys is the result of an intentional decision-making process. And all professional liability insurance policies contain an exclusion for intentional conduct. But that exclusion does not apply to intentional conduct that resulted from "any actual or alleged negligent act, error, or omission in the rendering of or failure to render professional services." Instead, the exclusion generally applies where the harm was intentional and not where the decision to engage in the conduct that prompted the harm was intentional, but the resulting harm was unintentional. A recent appellate decision addresses the application of such a clause to the allegations contained in a complaint to determine whether an insurance company owed a duty to defend.

Insurance will not cover claims where the insured had willingly engaged in conduct that he or she knew would harm the client. The policy insures for risks, not for almost certain harms.

In *Illinois State Bar Association Mutual Insurance Company v. Leighton Legal Group LLC,* — N.E.3d — (Il. App. (4th) 2018), the beneficiaries under a trust sued the lawyer serving as the co-trustee for "unlawfully" decanting the proceeds into the trust from another trust ("Trust decanting refers to the act of 'pouring' the principal of an irrevocable trust into a new trust with different terms.") According to the complaint, the "receiving" trust contains "key differences" from the other trust, including, among others, the inclusion of an "in terrorem clause," which is a provision that "invalidates a gift to a beneficiary who unsuccessfully challenges the validity of the testamentary document." Moreover, the complaint alleges that the "receiving" trust also contains a provision that eliminates the requirement that a "qualified financial institution serve as a co-trustee," instead naming the defendant lawyer as the co-trustee. The complaint alleges that all of this wrongful conduct was intended to create for the defendant lawyer "a self-compensation scheme" and allow him to refuse to liquidate the assets of the trust to the benefit of the plaintiffs.

Plaintiffs allege several instances of "willful" wrongful conduct. These include, for example, self-dealing, "misinform[ing] the plaintiffs in bad faith that they are not entitled to distribution of the trust corpus," "disregarding the termination provision of the trust and refusing to distribute the trust assets."

The defendant lawyer tendered the defense of this matter to his carrier, which thereafter denied its duty to defend and instead filed a declaratory judgment action. The carrier conceded that its professional liability insurance policy insured the defendant lawyer, but denied that it owed a duty to defend this claim based upon the allegations in the underlying complaint, relying upon an exclusion of coverage for "any claim 'arising out of any criminal, dishonest, fraudulent or intentional act or omission.'" Accordingly, the carrier contended that this presents the variety of "intentional conduct that was excluded from coverage."

The defendant lawyer defended the declaratory judgment action contending that his carrier did owe him a duty to defend "if the 'allegations fall within, or potentially within, the policy's coverage.'" Although the allegations in the complaint in the underlying matter did not allege that the harm caused by the defendant lawyer's conduct was unintentional or the result of negligence, the defendant lawyer argued that "to the extent that the allegations have any merit, they are much more likely to be the result of mere negligence."

The trial judge in the declaratory judgment action granted the defendant lawyer's motion for judgment on the pleadings, finding that "the complaint herein in certain counts sounds in negligence such that [the carrier] has a duty to defend." The trial court also denied the carrier's cross-motion for judgment on the pleadings. This appeal ensued.

The appellate court reversed, finding that, based upon the allegations contained in the complaint, the defendant lawyer's conduct was excluded from coverage and that, therefore, the carrier did not owe a duty to defend. In the appellate court's view, the trial court should have considered only "the facts apparent from the face of the pleadings, attachments to the pleadings, judicial admissions in the record and matters subject to judicial notice," and "compare those allegations to the relevant provisions of the insurance contract." In the appellate court's view, it was clear "from the face of the underlying complaint that the allegations fail to state facts that bring the cause within, or potentially within, coverage." Under those circumstances, the court found that the carrier was able to carry its burden to show that the exclusion applies and therefore properly refused to defend.

The court held that "[t]he construction afforded to intentional act exclusions is to deny coverage when the insured has (1) intended to act and (2) specifically intended to harm a third party." Although the exclusion does not apply "when a claim arises, or could potentially arise, from a negligent act or omission," the court, in its view, could not support such a finding where the underlying complaint alleged phrases "such as mislead, conceal, scheme, deceive, intentionally or willfully are the 'paradigm of intentional conduct and the antitheses of negligent actions.'" The key to the implication of this exclusion is that the complaint alleges that the insured "desires to cause the consequences of his action or believes that the consequences are substantially certain to result from it." Even though the policy is subject to strict construction as against the carrier, the allegations in the underlying complaint, in this court's view, implicated the intentional act exclusion.

The court drew a distinction between merely intentional conduct and "intentional misconduct." Applying the doctrine of noscitur a sociis ("[A] court may determine the meaning of a word by examining the meaning and context of the surrounding words."), the court finds that "the policy…does not apply to a claim 'arising out of any criminal, dishonest, fraudulent or intentional act or omission' committed by the insured." By this means, the court finds that the phrase "intentional act or omission is within the broader context of an exclusionary clause seeking to deny coverage for criminal and dishonest acts."

Finally, the appellate court found support for this interpretation based upon the premise that it is "consistent with the type of insurance purchased, the nature of the risks involved and the overall purpose of the contract."

The lesson taught by this decision is that insurance will not cover claims where the insured had willingly engaged in conduct that he or she knew would harm the client. Stated differently, the policy insures for risks, not for almost certain harms.

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