WALKER WILCOX WINS JUDGMENT ON THE PLEADINGS IN PROFESSIONAL LIABILITY ACTION

Christopher J. Shannon and Kaitlin M. Calov secured judgment on the pleadings for their client in the United States District Court for the Northern District of Illinois. *Those Certain Underwriters at Lloyd's, London v. Karris*, No. 20 C 2660, 2021 WL 493038 (N.D. Ill. Feb. 10, 2021). The district court held the professional liability insurer has no duty to defend or indemnify the president of the insured real estate management company, in connection with underlying claims for fraud, breach of contract and breach of fiduciary duty, notwithstanding factual allegations containing tangential references to acts which could imply negligence.

The underlying lawsuit, filed by the president's sister, centers on a family dispute over the administration of a $300 million family trust established by the president's late father for the benefit of himself, his sister and his mother. The complaint alleges the president, his mother and the corporate trustees of the subject trust engaged in a fraudulent scheme to divert approximately $150 million of trust assets to themselves for personal gain and to the detriment of the sister.

In particular, the scheme is alleged to have involved replacing the professional trustees with a trustee who agreed to circumvent the estate plan by eliminating inherent protections in place to protect the beneficiaries, including the sister, in order to advance the president and his mother's interests. Next, the president and his mother delayed the transfer of title and trust assets to the new trustee to allow the president to have sole control over discretionary decisions regarding the administration of the trust without fiduciary oversight. The president and his mother then proceeded to divert trust assets to themselves by transferring the title of trust-owned businesses with prominent assets to themselves, financing or selling trust-owned properties and transferring the proceeds to themselves, issuing deceptive financial reports to conceal these transactions and economically pressuring the sister not to challenge their conduct by terminating her employment and cutting off her trust distributions.

The president sought coverage for the lawsuit under a professional liability policy issued to the insured real estate management company, an asset of the trust. The insurer denied coverage on several bases and filed a declaratory judgment action. The president filed a counterclaim for declaratory judgment and bad faith.

In granting judgment on the pleadings for the insurer, the court held there was no potential for coverage for two separate and independent reasons.

First, the court held the underlying lawsuit did not implicate the insuring agreement of the policy because it did not seek any relief against the president for negligent conduct performed in the course of professional real estate management services. Instead, the court held, the underlying lawsuit sought damages based on the president's alleged intentional and tortious conduct in diverting trust assets from his sister to his benefit. The court rejected the president's argument that ancillary factual allegations in the underlying complaint sound in negligence and thus created a potential for coverage, notwithstanding the absence of any theory of liability based on non-intentional conduct:

> The fact that the complaint contains tangential references to acts that could possibly imply negligence (Holly's allegation that she told KeyBank that there were various "problems" with Nick's management of the businesses and that Nick was in over his head with respect to the Apple lease, and her characterization of some of his actions as "ill-conceived") does not mean that her claims against Nick in the suit are based on negligence. They are not. Nor are Holly's claims based on negligent conduct with respect to any "professional services" Nick performed with respect to any property as an employee of WTRM.

In further support, the court found the result comported with the purpose of the professional liability policy at issue, namely to cover damages for an insured's negligent acts in providing professional services with respect to property. The court noted the policy was clearly not intended to cover an individual's intentional conduct performed while participating in a scheme to divert trust assets from a family member for his own benefit.

Second, the court held the misappropriation of funds exclusion, which precludes coverage for damages arising out of theft, misappropriation and/or conversion, among other things, precluded coverage for the underlying lawsuit as each legal theory sought damages resulting from the alleged scheme to divert trust assets.