

BAD FAITH BLOG

Insurer Required to Defend California Unfair Business Practices Suit

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Summary: Landy Insurance Agency is a broker selling insurance to real estate professionals. Landy purchased a professional liability insurance policy from Utica Mutual Insurance Company.

Utica Mut. Ins. Co. v. Herbert H. Landy Ins. Agency, Inc.

Landy's targeted market included California. In California Landy sold policies from surplus insurers. One of Landy's competitors in the California real estate professional liability insurance market, CRES Insurance services, filed suit against Landy in California state court claiming violations of California's unfair business practices statute and negligent interference with its prospective economic advantage. Specifically, CRES alleged Landy improperly sold surplus lines coverage in California.

After the suit was filed, Landy demanded Utica defend it. Utica filed a declaratory judgment action against Landy, seeking a determination that CRES's claims against Landy did not fall within the policy's coverage for errors or omissions in "rendering or failure to render professional services" and the claims fell under the policy's exclusion for "unfair competition of any type." Applying Massachusetts law, the United States District Court for the District of Massachusetts entered summary judgment in favor of Landy.

The First Circuit Court of Appeals affirmed on appeal. Landy conceded the claim under the unfair business practices statute did not trigger Utica's duty to defend, and Utica conceded it would have to defend the entire lawsuit if the negligence claim triggered the duty. Thus, the dispute centered around the negligence claim, which alleged Landy's failure to act with reasonable care in soliciting and placing insurance policies.

Utica's first argument was CRES's negligence claim does not arise from errors in Landy's professional services, but from Landy's business practices. Although the gravamen of the complaint alleged unfair practices, the Court of Appeals looked to the nature of the underlying conduct to find coverage. The underlying conduct was Landy's failure to conduct due diligence into the market of admitted insurers before offering policies from surplus insurers.

Activities such as soliciting and placing insurance policies, searching the market of admitted insurers and filing related documentation are part of an insurance professional's job. This market research and solicitation are typically performed only by an insurance agent. In fact, such conduct is criminalized in California if performed by someone other than a licensed insurance agent. The court found these activities require the professional expertise of an insurance agent, unlike routine business decisions such as renting a building, purchasing supplies, or contracting to expand the company. Therefore, because CRES's negligence claim alleged conduct that fell within the scope of an insurance agent's duties, the claim fell within the policy's coverage of Landy's professional services according to the court.

Utica next argued that the policy's exclusion for "unfair competition of any type" barred coverage. The Court of Appeals again disagreed. Massachusetts courts have interpreted "unfair competition" as used in an insurance policy according to the term's common law meaning: "conduct that causes confusion on the part of consumers." This definition is notably narrower than the type of conduct that is contemplated by unfair business practices statutes. While some Massachusetts courts have slightly expanded the definition, the essential element of unfair competition revolves around consumer confusion.

CRES's claim did not allege any type of confusion. Nonetheless, Utica maintained that "any type" of unfair competition was excluded and argued that this modifier expands the exclusion's scope. Acknowledging that the phrase "*any type*" requires the noun it modifies to be interpreted expansively, the Court of Appeals also recognized that the phrase does not transform the noun's meaning. The Court explained that a reasonable construction of the exclusion meant "every kind of conduct leading to consumer confusion." Because that was not what CRES had alleged, the exclusion did not apply.

Utica owed its insured a duty to defend. The professional liability policy issued to its insured, an insurance broker, was triggered when the insured's competitor brought a claim against it for unfair business practices arising from the insured's failure to adequately investigate the market of admitted insurers in California. Because the lawsuit stemmed from errors in the insured's professional services and did not allege any consumer confusion, the lawsuit fell within the limited scope of the policy and the exclusion for unfair competition was not implicated. Utica, therefore, had a duty to defend its insured.

By Aaron French & Brett Simon

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