

No Estopping E&O Insurer's Coverage Defenses

Insurance Law Update

April 2011

By: [Matthew Ferguson](#)

U.S. District Court for the Eastern District of Michigan

In *Tudor Ins. Co. v. Associated Land Title, LLC*, 2011 WL 901993 (E.D. Mich. March 15, 2011), the U.S. District Court for the Eastern District of Michigan held that the doctrines of waiver and estoppel did not preclude an errors & omissions insurer from seeking summary judgment on its coverage defenses because such doctrines cannot be used to broaden the scope of insurance coverage available.

Tudor Insurance Company issued a professional liability insurance policy to Associated Land Title, LLC (ALT). ALT, as an agent of Fidelity National Title Insurance Company, provided title insurance as well as closing and escrow services on real estate transactions.

Following the issuance of the policy, Tudor discovered that Fidelity National had asserted claims against ALT for alleged errors and omissions in the handling of real estate transactions prior to the effective date of the policy. Tudor filed a declaratory judgment against ALT to rescind the policy, and later added Fidelity National as a result of its underlying claims against ALT.

In its motion for summary judgment, Tudor sought to rescind the policy based upon alleged material misrepresentations in ALT's application for coverage. While the court found that ALT had misrepresented the existence of the claims made by Fidelity National in its application for the policy, the court denied Tudor's motion on the grounds that there was a genuine issue of material fact as to whether the misrepresentation was material to justify rescission.

Tudor then filed an amended complaint against the same defendants alleging additional coverage defenses. Tudor’s renewed motion for partial summary judgment argued that even if the policy was not rescinded or declared void, there was no coverage for the claims asserted by Fidelity National on two grounds. First, Tudor raised the policy’s requirement that the insured “had no knowledge prior to the effective date of this policy of such actual or alleged negligent act, error, omission or circumstance likely to give rise to a claim.” Second, Tudor raised the applicability of the prior knowledge exclusion, which excludes coverage for “[a]ny act, error or omission occurring prior to the effective date of this policy if ... the insured at the effective date of this policy knew or could have reasonably foreseen that such act, error or omission might be the basis for claim or suit.” In its opposition, Fidelity National argued that Tudor waived its other coverage defenses when it filed a declaratory judgment action seeking only a declaration that the policy is rescinded and void *ab initio*. Fidelity National also argued that ALT did not have sufficient knowledge of the claims to implicate the prior knowledge exclusion.

The court disagreed with Fidelity National, holding that Tudor properly raised the coverage defenses in its initial letters to ALT. In addition, the court held that even if such defenses were not previously raised by Tudor in its coverage correspondence or in its initial pleadings, the application of the doctrines of waiver and estoppel in this coverage dispute would improperly “reform the insurance policy by extending coverage beyond its terms.”

The court then examined the remaining claims that were in excess of the applicable deductible and found that ALT possessed “knowledge of foreseeable or actual claims arising from its alleged acts, errors, or omissions” prior to the policy’s effective date. As such, the court granted Tudor’s renewed motion for partial summary judgment.

Related Practices:

[Insurance Practices](#)

[Professional Liability Coverage](#)