

Professional Liability Insurer has Duty to Defend Counterclaims in Suit Over Law Firm Split, but No Duty to Fund Affirmative Claims, and the Burden to Allocate is on the Insured.



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In a [blog post](#) last October, I discussed a District of Massachusetts decision denying a motion to dismiss a suit by a law firm against its professional liability insurer alleging wrongful denial of coverage. In that decision, the court ruled that a counterclaim by a group of departing lawyers against the firm for intentional interference with business relations could be read to allege a “Legal Services Wrongful Act” within the coverage of the firm’s policy. The counterclaim alleged that the insured refused to cooperate in notifying

clients of the split, and failed to transfer and release all client materials. The District Court stated that while this conduct had a business aspect, it also implicated professional rules and ethical duties specific to the legal profession, and could reasonably be interpreted as stating a covered claim.

The case, *Governo v. Allied World Ins. Co.*, United States District Court for the District of Massachusetts Civil Action No. 17-11672-RGS (August 27, 2019 Memorandum and Order), recently came before the District Court again on cross-motions for summary judgment. The court ruled, for the same reasons stated in the earlier decision on the motion to dismiss, that there was a duty to defend the intentional interference counterclaim. Under the “complete defense” rule, which provides that an insurer must defend the entire lawsuit if there is a duty to defend any of the counts, there was a duty to defend all of counts of the counterclaims, including the non-covered claims for a declaratory judgment and for ERISA benefits.

However, the District Court rejected the insured’s argument that the covered counterclaim was so intertwined with the firm’s affirmative claims against the departing lawyers that the insurer should also be required to pay the insured’s attorney’s fees for prosecuting those claims. The court observed that the insurer “has a duty to defend claims made *against* [the insured], not claims made *by*” it.

Finally, the court placed the burden to allocate the attorney’s fees and costs between the affirmative claims and the defense of the counterclaims on the insured. While acknowledging that the burden of allocation generally falls on the insurer, the court stated that in this circumstance, the insured’s counsel, who represented the insured in the coverage action and the underlying suit, “is in the unique position of knowing what work was done because they submitted the invoices.” Therefore, the court requested that the insured’s counsel allocate which costs are covered and which are not, subject to the court’s determination as to a reasonable allocation in the event of a dispute.