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# The Docket: Federal Court Denies E&O Coverage for Agent's Misappropriation

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*The Docket is a monthly TitleNews Online feature provided by ALTA's Title Counsel Committee that reviews significant court rulings and other legal developments, and explains the relevance to the title insurance industry.*

Today's review of a recent U. S. district court case denying recovery to a title insurance company for its agent's malfeasance was provided by Lance Pomerantz, a sole practitioner who focuses on land title issues. He can be reached at Lance@LandTitleLaw.com.

**Citation:** *Entitle Insurance Company vs. Darwin Select Insurance Company*, No. 11-CV-01193 (N. D. Ohio, Feb. 1, 2013)

**Facts:** EnTitle Insurance Co. sells title insurance. However, in this case, EnTitle found itself making a claim under a professional liability insurance policy issued by Darwin.

EnTitle had previously hired Direct Title Insurance Agency as a "non-exclusive policy issuing agent." The agency agreement between the two companies stated that Direct Title was not EnTitle's agent "for the purpose of providing other closing or settlement services." EnTitle offered closing protection letters (CPLs) to its insureds, which obligated EnTitle to reimburse clients for any loss stemming from the agency's fraud, dishonesty or negligence in the handling of the title insurance closings. The agency thereafter misappropriated client funds, and the clients with CPLs sought reimbursement from EnTitle. The underwriter paid for the losses stemming from the agency's misconduct and sought indemnification from Darwin under its Professional Liability Insurance Policy.

**Holding:** The federal district court held that Darwin did not have to indemnify EnTitle under the policy. The relevant policy provision provided coverage for a wrongful act "by an individual or entity for whom [EnTitle] is legally responsible." The court pointed out that EnTitle had reimbursed only those clients that had obtained CPLs and reasoned that EnTitle's obligations to the clients arose solely as a matter of contract, as embodied in the CPLs. It held that "[a] contractual obligation to pay is not the same as a legal obligation to pay." In effect, the court determined that the CPLs were separate insurance contracts between EnTitle and the customers to protect against the misdeeds of a third party, i.e., Direct Title. Since Direct Title was not acting as a settlement or closing agent on EnTitle's behalf, EnTitle was not "legally responsible" for Direct Title's settlement activities under the terms of the Darwin policy.

The court also held that even if Direct Title's act of misappropriation were covered under the policy, the policy definition of "Loss" excluded the reimbursed funds. The relevant provision excluded "amounts due pursuant to an express contract or agreement … ." As stated above, the court found that EnTitle's obligations arose from the CPL "contracts," not from an error or omission by the agent.

**Relevance to the Title Industry:** Title insurers in many jurisdictions throughout the country issue CPLs. They want to persuade potential customers to trust their policy-writing agents, thereby increasing policy sales. Nevertheless, title insurers should ascertain that adequate coverage, such as the agent's E&O policy or fidelity bond, is in place to indemnify against losses stemming from CPL claims. Reliance on the insurer's own E&O policy may be misplaced.

Click here to view the full court ruling.

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