



---

## Duty to Defend Triggered by Allegations of Malicious Prosecution

October 31, 2012

[Philadelphia Indemnity Insurance Co. v. Hamic, 2012 WL 3835088 \(M.D. Fla. Sept. 4, 2012\)](#)

### Brief Summary

The U.S. District Court for the Middle District of Florida held that the duty to defend in an accountant's professional liability policy applied despite an exclusion for wrongful acts where allegations of conspiracy to commit malicious prosecution, malicious prosecution, extortion and abuse of process were by reason of the insureds' accountancy services. Legal malice could be inferred from gross negligence, even where the insureds complained of and provided their client's accounting records to the state's attorney and performed a forensic accounting analysis for the state's attorney, who ultimately *nolle prossed* the charges.

### Complete Summary

Plaintiff insurer issued a professional liability policy to defendant insureds, an accountant (and his firm), which provided coverage "by reason of a negligent act, error or omission in the performance of professional services." The policy defined professional services as "any services performed or advice given by any insured to others for a fee or otherwise in the conduct of the insured's practice as an accountant; . . ." The definition included libel, slander or invasion of privacy "if arising out of" the professional services, as well as "consulting in the course of the practice of accountancy." The policy included a "wrongful acts" exclusion.

In the underlying case, the accountant provided accounting services to a realty brokerage firm that consisted of four individuals, including his brother. The accountant verified that one of the individuals was a member and employee of the brokerage firm and reflected that her wages were paid as an employee. After a dispute arose between the brother and the brokerage firm concerning the value of his interest, the accountant analyzed the books and performed valuations of the firm on behalf of his brother. The accountant then provided a memorandum and confidential documents he had prepared to the state's attorney, contending that two of the members had stolen more than \$60,000 from the firm by paying one of them a salary and benefits. The state's attorney subpoenaed documents from certain third parties, seeking information about the alleged payments. From those documents, the accountant prepared a forensic accounting analysis and other services for the state's attorney. Thereafter, the two members were arrested. But approximately two months later, the criminal charges were *nolle prossed*.

When the valuation issue could not be resolved between the brother and the brokerage, the brokerage firm sued. The brokerage alleged that two days after the initial complaint, the brothers and the



accounting firm “conspired” to commit malicious prosecution, malicious prosecution, extortion and abuse of process. The complaint also alleged that the accountant had agreed to use his professional skills and access to business records to fabricate false criminal charges against the two brokerage members. Both brothers “either knew these assertions were false when made or acted in reckless disregard of their truth or falsity.” They acted with “legal malice” by inciting the criminal investigation without probable cause and either knew the allegations were false or made them with willful ignorance of their falsity.

The insureds sought a defense from the insurer, arguing that the counts for malicious prosecution and civil conspiracy fell under the “negligent act, error or omission” clause in the policy and not under the exclusion for wrongful acts. To trigger coverage under the policy, the alleged facts had to include negligent conduct in the performance of professional services. One of the elements of malicious prosecution is malice, and the parties agreed that the complaint implicated legal malice as opposed to actual malice. Legal malice may be inferred from “gross negligence or great indifference to persons, property, or the rights of others.” *Alamo Rent-A-Car, Inc. v. Mancusi*, 632 So. 2d 1352, 1257 (Fla. 1994).

According to the accountant, gross negligence was alleged through the allegations of legal malice and the allegations that he acted in reckless disregard of the truth of the charges made to the state’s attorney. Despite the holding in *Mancusi*, the insurer argued that legal malice requires proof of an intentional act performed without justification or excuse, and that the allegations did not constitute negligent conduct covered by the policy. It also argued that the accountant’s actions did not constitute the kind of mistakes inherent in the practice of accountancy.

The court determined that the policy’s duty to defend was triggered based upon the allegations of malice and allegations that the accountant performed services customarily provided by an accountant. The court rejected the insurer’s arguments and pointed out that the policy did not have a blanket exclusion for all intentional acts. It noted authority holding that exclusions for dishonest, fraudulent, criminal, malicious or knowingly wrongful or unlawful acts, errors or omissions would be unnecessary if the policy covered only negligent conduct. *S.E.C. v. Credit Bancorp, Ltd.*, 147 F. Supp. 2d 238, 264 (S.D.N.Y. 2001). The court stated the phrases “because of” and “by reason of” mandate causation, while the phrase “arising out of” indicates some causal connection short of proximate cause. The charges against the member individuals were “by reason of” the accounting services rendered by the accountant. Thus, the court denied the insurer’s motion for summary judgment in favor of the duty to defend. With respect to the duty to indemnify, the court held that coverage could not be resolved until the outcome of the case had been determined.

On reconsideration on October 18, 2012, the court also considered the duty to defend with respect to the civil conspiracy claims which predated the allegations of malicious prosecution. The court determined that in civil conspiracy claims, the unlawful act is a tort, and the civil wrong is not the conspiracy itself but the underlying tort. No finding of specific intent to harm was necessary. Because the policy did not contain an “intentional acts” exclusion, and because malicious prosecution fell within the policy’s coverage, coverage also existed for conspiracy to commit malicious prosecution. *Philadelphia Indemnity Insurance Co. v. Hamic*, Court No. 8:12-cv-829-T-26EAJ, (M.D. Fla. Oct. 18, 2012).



## **Significance of Opinion**

This opinion is significant because the duty to defend may be triggered by allegations of legal malice, even where the policy contains a wrongful acts exclusion. Malice may be inferred from gross negligence.

For further information, please contact [Terrence P. McAvoy](#) or [Patricia Lynch Franklin](#).

---

*Hinshaw & Culbertson LLP prepares this publication to provide information on recent legal developments of interest to our readers. This publication is not intended to provide legal advice for a specific situation or to create an attorney-client relationship. We would be pleased to provide such legal assistance as you require on these and other subjects if you contact an editor of this publication or the firm.*

*Copyright © 2012 Hinshaw & Culbertson LLP. All Rights Reserved. No articles may be reprinted without the written permission of Hinshaw & Culbertson LLP, except that permission is hereby granted to subscriber law firms or companies to photocopy solely for internal use by their attorneys and staff.*

*ATTORNEY ADVERTISING pursuant to New York RPC 7.1. The choice of a lawyer is an important decision and should not be based solely upon advertisements.*