

No. 1-13-3518

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

ILLINOIS STATE BAR ASSOCIATION MUTUAL)	
INSURANCE COMPANY,)	
)	Appeal from the
Plaintiff and Counter-Defendant-Appellee,)	Circuit Court of
)	Cook County.
v.)	
)	
THE COLEMAN LAW FIRM,)	
)	No. 12 CH 37475
Defendant and Counter-Plaintiff Appellant,)	
)	
and)	
)	Honorable
FEDERAL DEPOSIT INSURANCE CORPORATION,)	Sophia H. Hall,
as Receiver for George Washington Savings Bank,)	Judge Presiding.
)	
Defendant.)	

JUSTICE CUNNINGHAM delivered the judgment of the court.
Presiding Justice Delort and Justice Harris concurred in the judgment.

ORDER

¶ 1 *Held:* The circuit court properly granted summary judgment in favor of the insurer and against the insured, where the insurer's duty to defend the insured in an underlying action was not triggered under the professional liability insurance policy that is the subject of the instant declaratory judgment action.

¶ 2 This appeal arises from the October 18, 2013 order entered by the circuit court of Cook County, which granted summary judgment in favor of plaintiff Illinois State Bar Association Mutual Insurance Company (ISBA Mutual), and denied a cross-motion for summary judgment filed by the defendant, The Coleman Law Firm (Coleman Law), in a declaratory judgment action arising out of a dispute over the coverage terms of an insurance policy issued by ISBA Mutual. On appeal, Coleman Law argues that the circuit court erred in granting summary judgment in favor of ISBA Mutual by finding that ISBA Mutual owed no duty to defend Coleman Law in an underlying action initiated against Coleman Law by a third party. For the following reasons, we affirm the judgment of the circuit court of Cook County.

¶ 3 **BACKGROUND**

¶ 4 The facts of this case are undisputed by the parties. On November 19, 2009, Mark Wiegel and Ted Wiegel (collectively, the Wiegels), as inside directors of the George Washington Savings Bank (the Bank), entered into an "advanced payment retainer agreement" (the retainer agreement) with Coleman Law. Pursuant to the retainer agreement, Coleman Law agreed to provide "professional legal services" to the Wiegels as clients, in connection with legal matters arising out of their capacity as insider directors of the Bank. Under the retainer agreement, the Wiegels agreed to be legally responsible for paying any legal fees owed to Coleman Law, but advised Coleman Law that the Bank agreed to advance \$150,000 on behalf of the Wiegels to Coleman Law for reasonable costs and expenses incurred in connection with the matters for which the Wiegels had retained Coleman Law, "subject to an undertaking by [the Wiegels] to repay [the Bank] the amount of such advance if it shall ultimately be determined that they are not entitled to be indemnified against such costs and expenses." The retainer agreement also stated that Coleman Law would not undertake the representation of the Wiegels unless the Bank agreed

to provide Coleman Law with an advance retainer payment of \$150,000. The retainer agreement further set forth language explaining the difference between an "advance payment retainer," which immediately becomes the property of the law firm, and a "security retainer," which remains the property of the clients until it is applied to charges incurred for actual services rendered. The retainer agreement specified that, "under the unique and special circumstances present at this time, [Coleman Law], [the Wiegels] and the Bank believe the use of an [a]dvance [p]ayment [r]etainer is advantageous to [the Wiegels] because of the present and likely risk that [the Bank] will be seized or otherwise taken over by the Federal Deposit Insurance Company *** before the services provided for herein are fully provided." The Bank and the Wiegels acknowledged under the retainer agreement that the Bank intended to make an advance payment retainer of \$150,000 to Coleman Law for future legal services to the Wiegel, and that the \$150,000 retainer "will pass immediately upon payment to [Coleman Law] and will be deposited in [Coleman Law's] own account." The retainer agreement was signed by the Wiegels, the Bank's corporate secretary,¹ and attorney Robert Coleman (Attorney Coleman) of Coleman Law.

¶ 5 On November 20, 2009, pursuant to the retainer agreement, the Bank tendered \$150,000 to Coleman Law.

¶ 6 On December 4, 2009, the Illinois Department of Financial and Professional Regulation (IDFPR) issued a cease and desist order, finding that the Bank failed to maintain the minimum level of capital required and that the Bank was operating in an "unsafe and unsound" condition. Consequently, the IDFPR took custody of the Bank and appointed the Federal Deposit Insurance Corporation (the FDIC) as "receiver" of the Bank.

¹ The name of the corporate secretary cannot be deciphered from the signature.

¶ 7 In a letter dated April 27, 2010, the FDIC requested the return of the \$150,000 "service retainer" from Coleman Law. Coleman Law refused to return the \$150,000.

¶ 8 On November 20, 2010, ISBA Mutual, as the insurer, issued a "lawyer's professional liability insurance" policy (the insurance policy) to Coleman Law as the insured. The insurance policy had an effective policy term from November 20, 2010 to November 20, 2011, and was a renewal of a previous policy issued by ISBA Mutual for the coverage period dated November 20, 2009 to November 20, 2010. The insurance policy was a "claims made and reported policy" which applied to claims made against Coleman Law and reported to ISBA Mutual during the effective policy term. Under section I of the insurance policy, coverage is provided to Coleman Law for claims made against Coleman Law which arise out of a "wrongful act." Under section II of the insurance policy terms, ISBA Mutual has a right and duty to defend any lawsuit against Coleman Law "that seeks damages arising out of a wrongful act even if any of the allegations of the suit *** are groundless, false or fraudulent." Under the policy terms, "damages" mean all sums which an insured is legally obligated to pay for any claim to which the insurance policy applies, but do not include "legal fees, costs or expenses paid or incurred by the claimant, or retained or possessed by the insured whether claimed by way of restitution of specific funds, forfeiture, financial loss or otherwise, and injuries which are, in whole or part, a consequence of those fees." Section VI specifically excludes coverage for any claim "arising out of any criminal, dishonest, fraudulent or intentional act or omission committed by any insured."

¶ 9 On November 4, 2011, Coleman Law notified ISBA Mutual by electronic mail (e-mail) that the FDIC had threatened to sue Coleman Law. On November 9, 2011, ISBA Mutual retained the law firm of Stamos & Trucco, LLP (Stamos & Trucco) to provide legal advice to Coleman Law with respect to the FDIC's threat to sue. In a letter dated November 18, 2011 to

Coleman Law, ISBA Mutual acknowledged that it had received Coleman Law's November 4, 2011 email, and noted that it would not complete a "coverage review" because "at the present time you are not tendering for coverage or a defense."

¶ 10 On December 13, 2011, the FDIC, as "receiver" for the Bank, filed a lawsuit against Coleman Law² in the United States District Court for the Northern District of Illinois (case No. 11 C 8823), seeking recovery of the \$150,000 advance payment retainer made by the Bank to Coleman Law which the FDIC alleged was prohibited under section 1828(k)(3) of the United States Code (12 U.S.C. § 1828(k)(3) (2010)) (the underlying action). The FDIC's complaint in the underlying action alleged that section 1828(k)(3) prohibits "prepayment of legal expenses on behalf of institution-affiliated parties, such as a financial institution's officers or directors, if such payments are made in contemplation of the institution's insolvency or after an act of insolvency and the payments have the purpose or effect of preventing the proper application of the assets of an institution to its creditors or prefer one creditor over another." The FDIC's complaint specifically alleged that the \$150,000 paid by the Bank to Coleman Law on behalf of the Wiegels, who were "institution-affiliated parties," was improper because those funds then became unavailable for distribution to the Bank's creditors or had the effect of preferring some of the Bank's creditors (the Bank's inside directors and officers) over the Bank's other creditors. The FDIC complaint further alleged that the prepayment of \$150,000 to Coleman Law for providing future legal services to the Wiegels violated section 1828(k)(3) because Coleman Law knew or should have known that the Bank "was experiencing significant financial difficulties and was likely to be seized and the FDIC appointed Receiver." The FDIC complaint requested that

² The FDIC's federal lawsuit also named Kevin Flynn & Associates as a defendant. However, Kevin Flynn & Associates is not a party before us in the instant case and has no bearing on the issues in this appeal.

the District Court enter an order declaring that the Bank's "prepayment of future legal expenses on behalf of its officers and directors violated 12 U.S.C. § 1828(k)(3)"; that the provisions of the retainer agreement requiring payment of the retainer to be void *ab initio*; and that Coleman Law return the \$150,000 with interest to the FDIC.

¶ 11 On January 12, 2012, Coleman Law provided ISBA Mutual with a copy of the FDIC complaint in the underlying action. In a letter dated January 23, 2012, ISBA Mutual acknowledged receipt of the FDIC complaint, and confirmed, based on a January 19, 2012 telephone conversation between the two parties, that Coleman Law was "not currently tendering for a defense or coverage." The January 23, 2012 letter also noted that Coleman Law was not precluded from "tendering in the future."

¶ 12 On July 11, 2012, Coleman Law formally tendered the FDIC's complaint to ISBA Mutual for defense. On July 31, 2012, in a letter to Coleman Law, ISBA Mutual refused to defend Coleman Law in the underlying action on the basis that coverage under the insurance policy was not triggered. Specifically, ISBA Mutual noted that the FDIC complaint did not allege a claim for "damages" within the meaning of the policy terms, and did not allege a "wrongful act" as defined by the policy. The July 31, 2012 letter further noted that the policy coverage did not apply because Coleman Law failed to provide written notice to ISBA Mutual of the FDIC's claim at the time the FDIC first requested the return of the \$150,000 from Coleman Law in April 2010.

¶ 13 On October 5, 2012, ISBA Mutual filed the instant declaratory judgment action against Coleman Law and the FDIC as "receiver" for the Bank, seeking a declaration that, under the terms of the insurance policy, it had no duty to defend Coleman Law in the underlying action.

On June 19, 2013, Coleman Law filed a combined second amended answer and a counterclaim,³ alleging a claim of breach of insurance contract against ISBA Mutual. Coleman Law's counterclaim alleged that the allegations in the FDIC complaint fell within or potentially within the coverage provisions of the insurance policy, that ISBA Mutual had a duty to defend Coleman Law against the FDIC's claims in the underlying action, that ISBA Mutual breached the insurance policy by refusing to accept Coleman Law's tender of defense, and that ISBA Mutual's breach of the insurance contract proximately caused Coleman Law to incur legal fees, costs, and expenses in defending against the FDIC's claims in the underlying action. On July 11, 2013, ISBA Mutual filed an answer to Coleman Law's counterclaim.

¶ 14 On July 31, 2013, ISBA Mutual filed an amended motion for summary judgment,⁴ arguing that the insurance policy did not provide coverage to Coleman Law with regard to the underlying action because the FDIC claim was not reported to ISBA Mutual during the proper policy period; that Coleman Law had failed to establish that the coverage terms under the insurance policy were triggered; and that ISBA Mutual had no duty to defend Coleman Law under the insurance policy.

¶ 15 On August 29, 2013, Coleman Law filed a cross-motion for summary judgment, arguing that it was entitled to summary judgment on its counterclaim against ISBA Mutual because ISBA Mutual breached its duty to defend Coleman Law under the policy terms.

¶ 16 On September 17, 2013, ISBA Mutual filed a combined reply in support of its motion for summary judgment and response to Coleman Law's cross-motion for summary judgment. On

³ It does not appear that Coleman Law's first amended answer or the original answer is included in the record on appeal.

⁴ It does not appear that ISBA Mutual's original motion for summary judgment is included in the record on appeal.

October 2, 2013, Coleman Law filed a reply in support of its cross-motion for summary judgment.

¶ 17 On October 2, 2013, ISBA Mutual and the FDIC⁵ entered into a "joint stipulation to dismiss" (joint stipulation), pursuant to which ISBA Mutual agreed to withdraw its motion for summary judgment as it pertained to the FDIC, and to dismiss the declaratory judgment action against the FDIC with prejudice. In exchange, the FDIC agreed to be bound by the judgment of the circuit court with regard to its ruling on the insurance coverage issues pending between ISBA Mutual and Coleman Law.

¶ 18 On October 18, 2013, following a hearing on the parties' cross-motions for summary judgment, the circuit court granted ISBA Mutual's amended motion for summary judgment and denied Coleman Law's cross-motion for summary judgment. Specifically, the circuit court found that the April 27, 2010 letter in which the FDIC requested the return of the \$150,000 "service retainer" from Coleman Law, did not constitute a "claim" within the meaning of the policy terms because the letter did not accuse Coleman Law of a "wrongful act." However, the circuit court found that the allegations in the FDIC complaint did not "raise a potential for finding of negligence on the part of [Coleman Law] in providing professional services to the Wiegels" and, thus, coverage under the insurance policy was not triggered and ISBA Mutual had no duty to defend Coleman Law in the underlying action. In the October 18, 2013 written order, the circuit court also dismissed the FDIC as a party pursuant to the October 2, 2013 joint stipulation.

¶ 19 On November 12, 2013, Coleman Law filed a timely notice of appeal. Accordingly, this court has jurisdiction.

⁵ As noted, the FDIC was named as a defendant in the instant declaratory judgment action filed by ISBA Mutual.

¶ 20

ANALYSIS

¶ 21 The relevant inquiry before us on appeal is whether the circuit court erred in granting summary judgment in favor of ISBA Mutual and against Coleman Law, on the basis that ISBA Mutual had no duty to defend Coleman Law in the underlying action. We review this issue *de novo*. See *Illinois Farmers Insurance Co. v. Marchwiany*, 222 Ill. 2d 472, 476 (2006) (construction of an insurance policy presents a question of law that is reviewed *de novo*); *Home Insurance Co. v. Cincinnati Insurance Co.*, 213 Ill. 2d 307, 315 (2004) (a court's entry of summary judgment is reviewed *de novo*).

¶ 22 "The construction of an insurance policy and the determination of the rights and obligations thereunder are questions of law for the court which are appropriate subjects of disposition by way of summary judgment." *Crum & Forster Managers Corp. v. Resolution Trust Corp.*, 156 Ill. 2d 384, 391 (1993). Summary judgment is proper where "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." 735 ILCS 5/2-1005(c) (West 2012). Where cross-motions for summary judgment are filed in an insurance coverage case, as was the case here, the parties acknowledge that no material questions of fact exist and only the issue of law regarding the construction of an insurance policy is present. *Hunt v. State Farm Mutual Automobile Insurance Co.*, 2013 IL App (1st) 120561, ¶ 15. A reviewing court may affirm a grant of summary judgment on any basis appearing in the record, regardless of whether the circuit court relied on that basis. *Home Insurance Co.*, 213 Ill. 2d at 315.

¶ 23 The primary function of the court when construing an insurance policy is "to ascertain and enforce the intentions of the parties as expressed in the agreement." *Crum & Forster*

Managers Corp., 156 Ill. 2d at 391. "To ascertain the intent of the parties and the meaning of the words used in the insurance policy, the court must construe the policy as a whole, taking into account the type of insurance for which the parties have contracted, the risks undertaken and purchased, the subject matter that is insured and the purposes of the entire contract." *Id.* "If the words in the policy are plain and unambiguous, the court will afford them their plain, ordinary meaning and will apply them as written." *Id.* The court will not search for ambiguity where there is none. *Id.* Where an ambiguity exists in the insurance policy, it will be resolved in favor of the insured and against the insurer. *American Economy Insurance Co. v. Holabird & Root*, 382 Ill. App. 3d 1017, 1023 (2008).

¶ 24 In determining whether an insurer is obligated to defend its insured, we generally compare the allegations of the underlying complaint to the relevant provisions of the insurance policy. *Insurance Corporation of Hanover v. Shelborne Associates*, 389 Ill. App. 3d 795, 799 (2009). "If the underlying complaints allege facts within or potentially within policy coverage, the insurer is obligated to defend its insured even if the allegations are groundless, false, or fraudulent." (Internal quotation marks omitted.) *Holabird & Root*, 382 Ill. App. 3d at 1022 (quoting *Northbrook Property & Casualty Co. v. Transportation Joint Agreement*, 194 Ill. 2d 96, 98 (2000)). "The insurer's duty to defend does not depend upon a sufficient suggestion of liability raised in the complaint; instead, the insurer has the duty to defend unless the allegations of the underlying complaint demonstrate that the plaintiff in the underlying suit will not be able to prove the insured liable, under any theory supported by the complaint, without also proving facts that show the loss falls outside the coverage of the insurance policy." (Internal quotation marks omitted.) *Holabird & Root*, 382 Ill. App. 3d at 1022 (quoting *Illinois Emcasco Insurance Co. v. Northwestern National Casualty Co.*, 337 Ill. App. 3d 356, 361 (2003)). "The duty to

defend does not require that the complaint allege or use language affirmatively bringing the claims within the scope of the policy. The question of coverage should not hinge on the draftsmanship skills or whims of the plaintiff in the underlying action." *International Insurance Co. v. Rollpoint Packaging Products, Inc.*, 312 Ill. App. 3d 998, 1007 (2000). "Little weight is given to the legal label that characterizes the allegations of the underlying complaint; rather, the determination focuses on whether the alleged conduct arguably falls within at least one of the categories of wrongdoing listed in the policy." *Illinois State Bar Association Mutual Insurance Co. v. Mondo*, 392 Ill. App. 3d 1032, 1037 (2009). Any doubt with regard to the duty to defend is to be resolved in favor of the insured. *Shelborne Associates*, 389 Ill. App. 3d at 799. Further, provisions in a policy that limit or exclude coverage must be construed liberally in favor of the insured and against the insurer. *Id.* It is the insurer's burden to affirmatively demonstrate the applicability of an exclusion. *Id.* The insurer can " 'safely and justifiably refuse to defend only when the allegations clearly show on their face that the claim is beyond policy coverage, for the duty to defend is broader than the duty to indemnify.' " *Mondo*, 392 Ill. App. 3d 1032, 1037 (2009) (quoting *Management Support Associates v. Union Indemnity Insurance Company of New York*, 129 Ill. App. 3d 1089, 1096 (1984)).

¶ 25 Coleman Law argues on appeal that the circuit court erred in finding that ISBA Mutual's duty to defend under the insurance policy was not triggered and in granting summary judgment in favor of ISBA Mutual. Coleman Law specifically contends that ISBA Mutual had a duty to defend Coleman Law in the underlying action on the basis that the policy exclusions did not apply to bar coverage. Coleman Law contends that the insurance policy did not exclude *all* intentional acts but only those committed with the *specific intent* to harm; that the FDIC's complaint in the underlying action did not allege that Coleman Law specifically intended to harm

the Bank or the Bank's creditors; and that the retainer agreement did not establish any specific intent by Coleman Law to harm the Bank or the Bank's creditors. Coleman Law also argues that the damages sought by the FDIC in the underlying action did not constitute "legal fees" so as to fall under the policy exclusions. Coleman Law argues instead that that it was entitled to summary judgment on the duty to defend because the FDIC's claim against it in the underlying action was a claim that arose out of professional services it had rendered to its clients, the Wiegels, and that it was the type of claim the insurance policy was intended to cover. However, Coleman Law argues that the circuit court correctly found that the April 27, 2010 letter in which the FDIC requested the return of the \$150,000 from Coleman Law, did not constitute a "claim" within the meaning of the policy terms so as to require Coleman Law to notify ISBA Mutual during the coverage period of a prior policy between the parties.

¶ 26 ISBA Mutual counters that it had no duty to defend Coleman Law in the underlying action because the FDIC complaint failed to allege any "wrongful act" against Coleman Law so as to trigger policy coverage. ISBA Mutual argues that, even assuming that the FDIC complaint had alleged a "wrongful act" within the meaning of the policy terms, such act did not arise out of the performance of "professional services" so as to trigger coverage under the insurance policy. ISBA Mutual further argues that no duty to defend was triggered under the policy terms because the underlying action sought recovery for "legal fees, costs or expenses," which did not constitute "damages" within the meaning of the insurance policy. ISBA Mutual, however, argues that the circuit court erred in finding that the FDIC's April 27, 2010 letter to Coleman Law did not constitute a "claim" requiring notice to ISBA Mutual under the effective dates of a prior policy between the parties and, thus, ISBA Mutual had no duty to defend Coleman Law in

the underlying action on this basis under the terms of the insurance policy that is the subject of the instant action.

¶ 27 We first address Coleman Law's argument that the circuit court erred in finding that ISBA Mutual's duty to defend under the insurance policy was not triggered and in granting summary judgment in favor of ISBA Mutual. Coleman Law argues that ISBA Mutual owed a duty to defend it in the underlying action because the policy exclusions did not apply to bar coverage. ISBA Mutual counters that it had no duty to defend Coleman Law in the underlying action because the FDIC complaint failed to allege any "wrongful act" against Coleman Law so as to trigger policy coverage.

¶ 28 Section I of the insurance policy sets forth the following relevant coverage terms:

"A. [ISBA Mutual] agrees to pay on [Coleman Law's] behalf all DAMAGES and CLAIM EXPENSES *** which [Coleman Law] becomes legally obligated to pay as a result of a CLAIM first made against [Coleman Law] and reported to [ISBA Mutual] in writing during the POLICY TERM ***, provided that:

1. The CLAIM arises out of a WRONGFUL ACT which occurred on or after the PRIOR ACTS DATE;

* * *

B. With respect to the insurance afforded by this Policy, [ISBA Mutual] has a right and duty to defend any suit or arbitration proceeding against [Coleman Law] that seeks DAMAGES arising out of a WRONGFUL ACT even if any of the allegations of the suit or arbitration proceeding are groundless, false or fraudulent."

¶ 29 The insurance policy defines a "claim" as "a demand received by the INSURED for money or services, or the service of a suit or the initiation of an arbitration proceeding against the INSURED that seeks DAMAGES arising out of a WRONGFUL ACT."

¶ 30 The policy further defines a "wrongful act" as "any actual or alleged negligent act, error, or omission in the rendering of or failure to render PROFESSIONAL SERVICES, including PERSONAL INJURY committed by an INSURED in the course of rendering PROFESSIONAL SERVICES."

¶ 31 "Professional services" is defined under the policy terms as "services rendered by the INSURED as a lawyer, including services, whether or not for a fee, as an administrator, arbitrator, conservator, executor, guardian, mediator, notary public, personal representative, real estate title insurance agent, receiver, trustee or in any other similar fiduciary activity."

¶ 32 Section VI of the insurance policy sets forth the following relevant policy exclusion:

"This Policy does not apply to any CLAIM:

A. arising out of any criminal, dishonest, fraudulent or intentional act or omission committed by any INSURED."

¶ 33 The FDIC complaint in the underlying action sought recovery of the \$150,000 advance payment retainer made by the Bank on behalf of its inside directors, the Wiegels, to Coleman Law as a prepayment of future legal services to the Wiegels. The FDIC complaint alleged that the \$150,000 advance payment retainer made by the Bank to Coleman Law was prohibited under section 1828(k)(3) of the United States Code (12 U.S.C. § 1828(k)(3) (2010)), which bars "prepayment of legal expenses on behalf of institution-affiliated parties, such as a financial institution's officers or directors, if such payments are made in contemplation of the institution's

insolvency or after an act of insolvency and the payments have the purpose or effect of preventing the proper application of the assets of an institution to its creditors or prefer one creditor over another." The FDIC complaint specifically alleged that the \$150,000 paid by the Bank to Coleman Law on behalf of the Wiegels, who were "institution-affiliated parties," was improper because those funds then became unavailable for distribution to the Bank's creditors or had the effect of preferring some of the Bank's creditors (the Bank's inside directors and officers) over the Bank's other creditors. It further alleged that the prepayment of \$150,000 to Coleman Law for providing future legal services to the Wiegels violated section 1828(k)(3) because Coleman Law knew or should have known that the Bank "was experiencing significant financial difficulties and was likely to be seized and the FDIC appointed Receiver." The FDIC complaint requested that a court order be entered declaring that the Bank's "prepayment of future legal expenses on behalf of its officers and directors violated 12 U.S.C. § 1828(k)(3)"; that the provisions of the retainer agreement requiring payment of the retainer to be void *ab initio*; and that Coleman Law return the \$150,000 with interest to the FDIC.

¶ 34 We find that the circuit court correctly found that ISBA Mutual had no duty to defend Coleman Law in the underlying action. We find *Illinois State Bar Ass'n Mutual Insurance Co. v. Cavenagh*, 2012 IL App (1st) 111810; *Illinois State Bar Ass'n Mutual Insurance Co. v. Mondo*, 392 Ill. App. 3d 1032 (2009); and *United Fire & Casualty Co. v. Jim Maloof Realty, Inc.*, 105 Ill. App. 3d 1048 (1982), to be instructive. In *Cavenagh*, the insurer, ISBA Mutual, brought a declaratory judgment action against its insured, an attorney, under a professional liability insurance policy, seeking a declaration that it had no duty to defend the insured attorney in an action brought against the insured attorney by another attorney. *Cavenagh*, 2012 IL App (1st) 111810, ¶ 5. The underlying action alleged claims for fraud and conspiracy to commit fraud,

alleging specifically that the insured attorney misrepresented the status of a personal injury lawsuit of which the suing attorney and insured attorney were on opposing sides and that the insured attorney misled the trial court in the personal injury lawsuit to obtain an inflated default judgment award. *Id.* ¶ 3. Under the professional liability policy, ISBA Mutual was required to defend any claim that "arises out of a wrongful act," which was defined as "any actual or alleged negligent act, error or omission in the rendering of or failure to render PROFESSIONAL SERVICES, including PERSONAL INJURY committed by the INSURED in the course of rendering PROFESSIONAL SERVICES." *Id.* ¶ 15. The policy excluded coverage for any claim "arising out of any criminal, dishonest, fraudulent, or intentional act or omission committed by any of the INSURED." *Id.* The circuit court granted summary judgment in favor of ISBA Mutual. *Id.* ¶ 1. On appeal, this court upheld the circuit court's decision, by finding that ISBA Mutual's duty to defend was not triggered under the policy terms. *Id.* ¶ 18. In reading the definition of "wrongful act" along with the policy exclusion for fraudulent and intentional acts, the *Cavenagh* court found that the allegations of fraud and conspiracy in the underlying complaint did not constitute a "wrongful act" and, instead, fell under the exclusion for intentional and fraudulent acts. *Id.*

¶ 35 In *Mondo*, this court addressed a nearly identical policy provision as in *Cavenagh* and in the case at bar. There, the policy issued by ISBA Mutual to an attorney covered claims arising out of a "wrongful act," which was defined to mean "any actual or alleged negligent act, error, or omission in the rendering of or failure to render PROFESSIONAL SERVICES, including PERSONAL INJURY committed by YOU [the insured] in the course of rendering PROFESSIONAL SERVICES." *Mondo*, 392 Ill. App. 3d at 1038. The *Mondo* court determined that the insurer had no duty to defend where "the factual allegations in the *** underlying action

[made] clear that [the insured's] failure to disclose information was allegedly part of his overall scheme to mislead and defraud the [underlying plaintiff] and not based upon any negligent or potentially negligent conduct." *Id.* at 1039. The *Mondo* court further noted that even assuming the underlying complaint could somehow be construed to allege negligent acts, the fraud count within the complaint would be excluded from coverage based on the policy's exclusion provision. *Id.* at 1039-40. The *Mondo* court further found that, because the policy covered the insured for professional liability as a sole practitioner, and every cause of action raised against the insured in the underlying action arose out of his relationship with the underlying plaintiff as an insurance expert and not as an attorney, ISBA Mutual had no duty to defend him because the allegations could not be said to fall, or potentially fall, within coverage of the policy. *Id.* at 1040; see also *United Fire & Casualty Co.*, 105 Ill. App. 3d at 1048-50 (finding insurer had no duty to defend insured in the underlying action, where the factual allegations were premised upon the theory of intentional fraud and the policy covered "negligent act or omission" of the insured but did not apply to "dishonesty, intentional fraud, criminal or malicious act, libel or slander").

¶ 36 We find that the coverage and exclusion provisions in the insurance policy in the instant case are identical to those at issue in *Cavenagh* and nearly identical to those in *Mondo*. Comparing the allegations of the FDIC complaint in the underlying action to the provisions of the insurance policy at hand, the factual allegations in the underlying complaint did not allege acts of negligence, but rather acts which could only be classified as intentional and, thus, excluded from policy coverage. The FDIC complaint in the underlying action specifically alleged that Coleman Law elicited an improper "prepayment" from the Bank that served to create a "war chest" to be used to pay future legal expenses of the Bank's inside directors, the Wiegels; that Coleman Law would not undertake the proposed representation of the Wiegels unless the

Bank paid in advance; that at the time Coleman Law demanded and accepted the prepayment, it was "well-known or should have been well known *** that [the Bank] was experiencing significant financial difficulties and was likely to be seized and the FDIC appointed Receiver"; and that the \$150,000 prepayment to Coleman Law was made "in contemplation of [the Bank's] insolvency or after an act of [the Bank's] insolvency." We find nothing in the FDIC's allegations to be considered claims of negligence against Coleman Law. Like *Cavenagh*, *Mondo*, and *United Fire & Casualty Co.*, coverage under the policy at issue only extended to claims against Coleman Law for negligent acts or omissions, but excluded acts which were intentional. Because the factual allegations in the FDIC complaint did not set forth a "negligent act" committed by Coleman Law so as to constitute a "wrongful act" within the meaning of the policy terms, we find that the allegations did not fall, or potentially fall, within coverage of the policy. Accordingly, ISBA Mutual's duty to defend under the insurance policy was not triggered.

¶ 37 Nonetheless, Coleman Law attempts to distinguish *Cavenagh*, *Mondo*, and *United Fire & Casualty Co.*, and argues, citing *Lincoln Logan Mutual Insurance Co. v. Fornshell*, 309 Ill. App. 3d 479 (1999), that the policy only excluded intentional acts committed with an *intent to harm*, but covered intentional acts where the resulting harm was unintended. We find *Fornshell* to be inapposite. *Fornshell* involved insurers who sued a convicted murderer and the murder victim's parents, seeking a declaration that they had no duty under the personal liability provision of the murderer's homeowner's insurance policy to defend him in a wrongful death lawsuit brought by the victim's parents. *Fornshell*, 309 Ill. App. 3d at 480-81. Because the *Fornshell* homeowner's insurance policy insured a different type of risk and pertained to a different purpose than the professional liability policy in the case at bar, we find *Fornshell* to have little relevance to the facts in the instant case.

¶ 38 In further support of its argument that intentional acts without the intent of harm were covered under the policy, Coleman Law gives a hypothetical example of an attorney who miscalculates the days for filing a lawsuit before the expiration of the statute of limitations and consequently files the lawsuit late. Coleman Law argues that this hypothetical example shows that an attorney's actions are intentional because he intentionally calculates the time remaining to file and he intentionally files the lawsuit and, thus, his professional liability insurance policy "would be expected to defend him when he is sued for *negligently* failing to file the suit on time." (Emphasis added.) We do not see how this example advances Coleman Law's argument, where in the hypothetical, as Coleman Law states, the hypothetical attorney's *negligent* act of inadvertently filing the lawsuit late would arguably constitute a "wrongful act" within the meaning of the policy terms. Contrary to Coleman Law's argument, we find that the plain language of the insurance policy expressly bars coverage of any claim "arising out of criminal, dishonest, fraudulent or intentional act or omission" committed by the insured, and does not differentiate between intentional acts committed with an intent to harm and those committed without an intent to harm. See *Crum & Forster Managers Corp.*, 156 Ill. 2d at 391 (in construing an insurance policy, where the words in the policy are plain and unambiguous, the court will afford them their plain, ordinary meaning and will apply them as written and will not search for ambiguity where there is none). To construe the policy as Coleman Law suggests, would render superfluous the express term of "intentional act" in the exclusionary clause, because criminal, dishonest, fraudulent acts are already intentional by nature. See *Pekin Insurance Co. v. Wilson*, 237 Ill. 2d 446, 466 (2010) (a reviewing court will not interpret an insurance policy in such a way that any of its terms are rendered meaningless or superfluous).

Thus, we find that the parties intended all intentional acts, regardless of the intent to harm, to be excluded from coverage under the policy.

¶ 39 Even if the policy could be construed to mean that only intentional acts committed with an intent to harm would be excluded from coverage, we find that the FDIC complaint, when read as a whole, alleged facts to show that the retainer agreement was part of a fee arrangement designed by Coleman Law and the Wiegels to ensure that \$150,000 of the Bank's funds could be sheltered from the FDIC and used as a "war chest" to pay for future legal expenses of the Bank's inside directors and officers. Coleman Law makes certain arguments that the "operative allegations" of the FDIC complaint were "exclusively based on section 1828(k)(3),⁶ track the wording of section 1828(k)(3), and are thus directed at allegedly prohibited actions by the Bank, not at any proscribed act of [Coleman Law]." In support of this argument, Coleman Law directs our attention to paragraphs 29 to 36 of the FDIC complaint, arguing that these allegations were the "substantive and specific allegations necessary to trigger [s]ection 1828(k)(3)'s prohibition of the Bank's prepayment of its indemnification obligation on behalf of the Wiegels," and that they were directed only at the Bank and not Coleman Law. We reject this contention. We decline to only look at certain paragraphs of the FDIC complaint in isolation and ignore other parts of the pleading specifically alleging that Coleman Law elicited an improper "prepayment" from the Bank that served to create a "war chest" to be used to pay future legal expenses of the Bank's inside directors while it had knowledge that the Bank was having significant financial troubles

⁶ Section 1828(k)(3) of the United States Code states that "[n]o insured depository institution or covered company may prepay the salary of any liability or legal expense of any institution-affiliated party if such payment is made (A) in contemplation of the insolvency of such institution or covered company or after the commission of an act of insolvency; and (B) with a view to, or has the result of (i) preventing the proper application of the assets of the institution to creditors; or (ii) preferring one creditor over another." 12 U.S.C. § 1828(k)(3) (2010).

and was likely to be seized by the FDIC. See *United Fire & Casualty Co.*, 105 Ill. App. 3d at 1050 (the underlying complaint "must be read as a whole in order to assess its true nature"). Further, the retainer agreement terms, which were quoted by the FDIC complaint, stated that Coleman Law wanted the money from the Bank because it believed that the Bank might be seized by the FDIC and would be unable to pay. Thus, the allegations of the FDIC complaint were directed to Coleman Law's intentional conduct in drafting a retainer agreement that would allow it to receive and own the \$150,000, despite knowing that the Bank was in financial difficulties and might be seized by the FDIC. Therefore, to the extent that the policy excluded only criminal, dishonest, fraudulent or intentional act and omissions committed *with the specific intent to harm*, we find that ISBA Mutual has satisfied the burden of showing that the policy exclusions applied to bar coverage. See *Shelborne Associates*, 389 Ill. App. 3d at 799 (in determining whether an insurer is obligated to defend its insured, it is the insurer's burden to affirmatively demonstrate the applicability of the exclusion).

¶ 40 Coleman Law further makes various arguments that the underlying FDIC complaint and the retainer agreement failed to allege or establish that Coleman Law specifically intended to violate section 1828(k)(3) or to harm the Bank or its creditors. In light of our finding that the policy excluded coverage for *all* intentional acts, not just those committed with an intent to harm, we necessarily reject Coleman Law's arguments that ISBA Mutual's duty to defend was triggered on the basis that neither the underlying FDIC complaint nor the retainer agreement, which was attached to the FDIC complaint as an exhibit, alleged or established that Coleman Law had the *specific intent* to violate section 1828(k)(3) or to harm the Bank and its creditors.

¶ 41 We further find that, even assuming, *arguendo*, that the allegations of the FDIC complaint alleged a "negligent act, error, or omission" and the policy exclusion for intentional

acts was not triggered, ISBA Mutual would still owe no duty to defend Coleman Law in the underlying action. As discussed, the policy only covers claims against Coleman Law as the insured that seeks "DAMAGES arising out of a WRONGFUL ACT." The policy defines a "wrongful act" as "any actual or alleged negligent act, error, or omission in the rendering of or failure to render PROFESSIONAL SERVICES, including PERSONAL INJURY committed by an INSURED in the course of rendering PROFESSIONAL SERVICES." "Professional services" is further defined under the policy terms as "services rendered by the INSURED as a lawyer, including services, whether or not for a fee, as an administrator, arbitrator, conservator, executor, guardian, mediator, notary public, personal representative, real estate title insurance agent, receiver, trustee or in any other similar fiduciary activity."

¶ 42 The term "professional services" in the context of a professional liability policy refers to the practice of law. *Continental Casualty Co. v. Cuda*, 306 Ill. App. 3d 340, 348 (1999); *Regas v. Continental Casualty Co.*, 139 Ill. App. 3d 45, 51 (1985). Our supreme court has described the practice of law as:

"[T]he giving of advice or rendition of any sort of service by any person, firm or corporation when the giving of such advice or rendition of such service requires the use of any degree of legal knowledge or skill." *People ex rel. Illinois State Bar Ass'n v. Schafer*, 404 Ill. 45, 51 (1949).

¶ 43 We find that *even if* somehow a negligent act, error, or omission had been properly alleged against Coleman Law in the FDIC complaint, any such act did not stem from "the rendering of or failure to render professional services." Coleman Law's retention of the \$150,000, which was made as an advance retainer payment in contemplation of *future* legal

services to the Wiegels in their capacity as inside directors of the Bank, could not be considered as anything but a business practice of fee-setting and billing, which did not require the inherent skills typified by the law profession or the use of skills necessary as a lawyer in the practice of law. See *Continental Casualty Co. v. Donald T. Bertucci, Ltd.*, 399 Ill. App. 3d 775, 784-85 (2010) (in a fee dispute arising out of insured attorney's retention of an excessive amount of attorney's fees from the settlement proceeds of an underlying medical malpractice action, lawsuit did not allege an act or omission in the performance of "legal services" within the meaning of the policy where insured attorney's retention of the money "could not be construed as the provision of any type of service for another person and is a business practice independent of the lawyer-client relationship").

¶ 44 Notwithstanding these facts, Coleman Law argues that its "drafting of the [retainer agreement] and advising the Wiegels" regarding the advance payment fee arrangement, required the exercise of the skills and knowledge of a lawyer and, thus, constituted "professional services" within the meaning of the policy. Coleman Law specifically argues that drafting and executing the retainer agreement, which followed the language our supreme court set forth as mandatory for advance payment retainers in *Dowling v. Chicago Options Associates, Inc.*, 226 Ill. 2d 277 (2007), required the exercise of the skills and special knowledge of an attorney. We reject this contention. Although Coleman Law now argues that it was "advising the Wiegels" in the course of executing the retainer agreement, we note that earlier on page 25 of its opening brief, Coleman Law represented to this court that it "did not advise its clients the Wiegels, let alone the Bank, who was not its client" and that Coleman Law was "merely complying with the mandate of *Dowling*." We further find that the fact that the retainer agreement mimicked the required language in *Dowling*, did not convert Coleman Law's business practice of fee-setting for future

legal services through the retainer agreement into an act of rendering a service in the practice of law. Thus, Coleman Law's arguments on this basis must fail. Therefore, we find that, even had the FDIC complaint alleged a "negligent act, error, or omission" against Coleman Law, such act did not stem from the rendering of, or failure to render, "professional services" within the definition of a "wrongful act" under the policy. Consequently, ISBA Mutual's duty to defend was not triggered because the allegations in the FDIC complaint did not allege facts within or potentially within policy coverage, where the claim against Coleman Law in the underlying action was not one that sought damages arising out of a "wrongful act." Accordingly, we hold that the circuit court did not err in granting summary judgment in favor of ISBA Mutual and against Coleman Law.

¶ 45 In light of our holding, we need not address ISBA Mutual's additional arguments that it had no duty to defend under the policy terms because the underlying action sought recovery for "legal fees, costs or expenses," which did not constitute "damages" within the meaning of the insurance policy, or that the April 27, 2010 letter in which the FDIC requested the return of the \$150,000 from Coleman Law constituted a "claim" requiring notice to ISBA Mutual under the effective dates of a prior policy between the parties.

¶ 46 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 47 Affirmed.