

“Non-Insurance Contracts” and “Securities Broker/Dealer” Exclusions Held Ambiguous as Applied to Viatical Agreements

January 2004

A federal district court in Georgia, applying Georgia law, has held that "non-insurance contracts" and "securities" exclusions in an E&O policy issued to a life insurance salesman did not unambiguously bar coverage for the sale of a viatical settlement agreement and that, as a result, a jury could consider parol evidence about the exclusions. *Utica Mutual Ins. Co. v. Costa*, 2003 WL 22945649 (M.D. Ga. Dec. 10, 2003).

The insurer issued an E&O policy to a life insurance salesman who sold viatical settlements. The policy issued to the life insurance salesman excluded coverage for "non-insurance contracts," which included "[a]ny investment advice given or alleged to have been given relating to the performance or lack of performance of any investment or resulting from valuations in the value of any investments including, but not limited to...any non-insurance contract." The policy also excluded "[s]ervices" as a "security broker" or "security dealer." Various investors filed suit against the insured for negligence, breach of fiduciary duty and fraud. Coverage litigation followed.

The federal district court found that the exclusions as applied to viatical agreements were ambiguous. The court explained that a reasonable insured could understand that a viatical agreement did not constitute a non-insurance contract because of the "close connection" between viatical investments and life insurance. The court also found that the "securities broker/dealer" exclusion was ambiguous because, at the time, "it was unclear whether viatical settlements were securities under Georgia law." Accordingly, the court allowed parol evidence to show that viatical agreements were covered under the policy. The court emphasized the fact that in the past the insurer had notified the life insurance salesman that certain activities were not covered under the policy, but it had failed to notify him that activities relating to viatical settlement agreements would not be covered.

For more information, please contact us at 202.719.7130.