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NEWSLETTER

Four Suits Concerning Sale of Same Investments Are Separate Claims

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A federal district court in Texas, applying Texas law, has determined that four lawsuits filed against a life insurance agent, insured under two E&O policies, concerning the same type of investment constituted separate claims because the agent's duty to each investor depended on their "unique circumstances." *Am. Auto. Ins. Co. v. Grimes*, 2004 WL 246989 (N.D. Tex. Feb. 10, 2004). The court also held that the underlying allegations involved "professional services," as defined in the policies.

An insurer issued a claims-made E&O policy to one insurance company for the period from February 1, 2001 to February1, 2002, and a claims-made E&O policy to a second insurance company for the period from January 1, 2002 to January 1, 2003. Both policies provided coverage to the life insurance agent who was sued in the underlying litigation. The first policy contained a related claims provision stating that "[t]wo or more claims arising out of a single act, error, omission...or a series of related acts, errors, omissions...shall be treated as a single claim. All such claims, whenever made shall be considered first made during the policy period...in which the earliest claim arising out of such acts, errors, or omissions...was first made and reported." The first policy defined "professional services" to "mean those services necessary to the conduct of the insurance business of the named insured," including the "sale and/or servicing" of various products, including annuities, as well as "[p]roviding advice, consultation, [and] administration...in conjunction" with products the agent sold. The second policy defined "professional services" to include "recommendations regarding saving, investments, insurance, [and] anticipated retirement." The first policy also provided that coverage would be available only if "as of the effective date of this Policy, no named insured had knowledge of any act, error, omission...which could reasonably be expected to result in a claim."

The insured agent began offering non-insurance, non-annuity investments in customer-owned, coin-operated telephones (COCOTs) and allegedly advised his clients to redeem their annuities in order to invest in COCOTs. Four unrelated clients filed separate lawsuits at different times against the agent alleging negligent advice and negligent and fraudulent misrepresentations in connection with the COCOT investments. The insurer filed a declaratory judgment action to determine its obligations under the two policies.

The insurer argued that coverage was available only under the first policy, even though some of the lawsuits were filed during the second policy period, because the four suits were related claims since they all concerned the investments in COCOTs. The court disagreed, explaining that the agent "rendered separate services to each of [the claimants] in separate and distinct meetings, he owed each of them a separate duty, and each meeting required [the agent] to consider unique circumstances in determining how to advise them regarding their investments." It therefore held that the lawsuits filed and reported during the second policy fell within that policy's coverage.

The insurer also argued that coverage was unavailable because the advice concerning the COCOTs investments did not satisfy the policies' definitions of "professional services." The court rejected the argument, explaining that it "will construe those clauses liberally so as to include all services associated with a covered product from its initial sale to a customer through its eventual disposition, provided such services involve the specialized knowledge and training associated with the profession of an insurance agent and/or financial and investment consultant."

Finally, the court addressed the insurer's argument that coverage was unavailable because the agent had knowledge of the claims prior to the inception of the first policy. The court agreed with the insurer's position with respect to one of the claims because, although the plaintiff filed the suit after the inception of the policy, the underlying claimant's attorney had written a letter to the agent alleging fraudulent acts prior to the inception of the policy. The court rejected the agent's argument that the letter did not bar coverage for the allegations of negligence, which had not been raised in the letter, explaining that "the fraud claims involving the COCOTs and the negligence claims involving the annuities clearly arose from a series of related acts involving a single claimant."

The court held that the policies did not preclude coverage for the other claims because there was no evidence demonstrating that the agent had "actual, subjective knowledge [that the underlying plaintiffs] intended to bring claims, or had actually brought claims, against him." In so ruling, the court rejected the argument that the agent had knowledge of the potential claims since he possessed knowledge of his acts, as well as the fraud allegations by one claimant. The court reasoned that "[t]o exclude coverage for claims arising from those acts, simply because claims had been made by other persons regarding different acts, would be to interpret 'knowledge' and 'claim' so broadly as to deny the reasonable expectations of the parties."

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