

Insurance Agents' Referral of Clients to Debt Adjustment Services Company Constitutes Professional Services

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The Kansas Supreme Court has rejected the arguments of two professional liability carriers that they were relieved of their duty to defend claims brought against insurance agents based on the agents' referral of clients to a debt adjustment services company because the claimants' allegations (1) did not allege a "wrongful act"; (2) did not arise out of the "conduct of the business of the 'insuring agent' in rendering service for others"; and (3) were barred by the dishonesty exclusion and an exclusion barring coverage for claims arising out of or in connection with a "fraudulent or nonexistent entity." *Miller v. Westport Ins. Corp.*, 2009 WL 211734 (Kan. Jan. 30, 2009).

Several insurance agents referred clients to a nonprofit company offering debt adjustment services that allowed the clients to finance their insurance premiums and to purchase other insurance products. Thereafter, the owner of the debt adjustment company absconded with the clients' funds. The clients demanded that the agents reimburse them for their losses. The agents then timely submitted the claims to their professional liability insurance carriers. The carriers denied coverage on the basis that the clients' claims did not arise out of services rendered as licensed insurance agents and also cited several policy exclusions. The insureds subsequently initiated coverage litigation.

The relevant policy provision covered loss caused by "wrongful acts" committed by the "insured agent" arising out of the "conduct of the business of the 'insuring agent' in rendering services for others." On appeal, the Kansas Supreme Court first considered the insurers' argument that because "wrongful act" was defined as a negligent act, and because the referrals to the debt adjustment company were intentional, no wrongful act had occurred. The court rejected this argument, noting that certain allegations against the insureds sounded in negligence, including the allegation that the insureds had breached their fiduciary duty to their clients by failing to investigate properly the debt adjustment services company.

The Kansas Supreme Court likewise rejected the insurers' arguments that the clients' allegations against the agents did not arise out of the "conduct of the business of the 'insured agent[s]' in rendering services for others as a licensed life, accident, and health insurance agent." As support for this holding, the court noted

that the insurance agency held itself out as having specialized knowledge and skill in financial planning, which could constitute the "business of the 'insured agent.'" At minimum, according to the court, such evidence raised an ambiguity to be resolved in favor of the insureds.

Finally, the Supreme Court rejected the insurers' arguments that certain policy exclusions barred coverage. The policies' dishonesty exclusion did not relieve the carriers of their obligation to defend the insureds because the alleged acts were never proven or admitted. According to the court, the "defendants' mere suggestion that the agents provided illegal rebates to their clients does not mean that the exclusion . . . is met." The court also rejected the insurers' argument that the exclusion barring coverage for "any 'claim' arising out of or in connection with a fraudulent or nonexistent entity" relieved them of their duty to defend. The court ruled that, notwithstanding the owner's fraudulent acts, the entity itself was incorporated for lawful purposes and, thus, the terms of the exclusion were inapplicable.

Accordingly, the court reversed the grant of summary judgment and ruled that the insurers owed a duty to defend. The court also awarded the insureds defense and settlement costs, which it determined were recoverable in an action alleging breach of the duty to defend.