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NEWSLETTER

Advertising Is Not a Professional Service under Insurance Agents and Brokers Policy

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An intermediate state appellate court in Illinois has held that the transmission of advertisements for health insurance by an insurance agency did not constitute professional services as an insurance general agent or broker under an insurance agents and brokers professional liability policy. *Westport Ins. Corp. v. Jackson Nat'l Life Ins. Co.*, 2008 WL 5378256 (Ill. App. Ct. Dec. 19, 2008).

The policy provided specified coverage for loss sustained by an insured on account of "any negligent act, error or omission by the insured agent . . . arising out of the conduct of the business of the insured agent in rendering services for others as a licensed life, accident and health insurance general agent . . . or broker." An insured agent was named as a defendant in a class action lawsuit that alleged that the agent had violated federal law by sending unsolicited faxes advertising group health insurance. The advertisement touted the various benefits of the insurance and invited potential customers to request a quotation.

In the coverage litigation that followed, the insurer took the position that there was no coverage for the lawsuit because the insured's liability did not arise from the conduct of its business in rendering any service for others as an insurance agent. The class, as assignees of the insured's rights under the policy pursuant to a settlement agreement, argued that the term "service," in light of its dictionary definition, must be interpreted broadly to mean "any act of assistance." Because providing information to potential customers about the availability of group health insurance was an act of assistance, the class contended that the distribution of the advertisement was a service within the scope of coverage provided by the policy. The court disagreed.

As an initial matter, the court looked to the title of the policy and noted that while it may not be an operative term, it was indicative of the type of coverage purchased, and the type of coverage purchased was "germane to determining the meaning of policy language." Here, according to the court, the title indicated that the policy provided coverage for "professional liability." On this basis, the court determined that the phrase "rendering services for others" must refer to the agent's "professional" services.

The court next looked to a decision from Texas in which the court considered whether a law firm's solicitation of a potential client for a possible medical malpractice claim constituted professional services under its liability policy. In concluding that it did not, the Texas court determined that the services must arise out of acts

particular to the professional's vocation and involve the professional's specialized knowledge or training. The court noted that the law firm's solicitation letter did not include any legal advice or opinions but simply advised the recipient to contact the firm. According to the court, in sending the letter, the law firm was "merely engaged in a practice designed to acquire new business." Its conduct in this regard was only "incidental to professional services."

Following the Texas court's reasoning, the court concluded that the insured agent's transmission of the advertisement faxes did not constitute professional services as contemplated by the policy. According to the court, insurance professionals use specialized training and knowledge about insurance products to help customers select products that are best suited to their needs. The court observed that the advertisement sent out by the agent provided only general information about available health plans and that no expertise was employed by the agent to assist any particular customer in purchasing any particular product. In this regard, the court described the advertisement as only an "overture to potential customers" and held that the "mere offer to perform a professional service is not a professional service in its own right."