

Third Circuit Holds Issuance of Promissory Notes Does Not Constitute Provision of "Professional Services"

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In an unpublished opinion, the United States Court of Appeals for the Third Circuit, applying Pennsylvania law, has held that coverage is not available under a professional liability policy issued to an insurance agency for three class action suits stemming from the agency's issuance of promissory notes because the agency's activities did not constitute "professional services" as defined by the policy. *Mallalieu-Golder Ins. Agency, Inc. v. Executive Risk Indem., Inc.*, 2007 WL 4115328 (3d Cir. Nov. 20, 2007).

The policyholder was an insurance agency insured under a professional liability policy. The agency's principal created a purported subsidiary that issued promissory notes for the purpose of financing premiums for policies that were sold by the agency. After the death of the agency's principal and the resulting cessation of the subsidiary's financing activities, the agency determined that the subsidiary was grossly underfunded. The agency notified investors that neither principal nor interest would be paid during an ongoing investigation. Subsequently, three class action suits were brought by investors, and the agency sought a defense and indemnity from the insurer.

The policy provided coverage for claims for "Wrongful Acts," which were defined as "any actual or alleged act, error, omission, or breach of duty by an Insured solely in such Insured's performance of, or failure to perform, Professional Services." The policy defined "Professional Services" as "only insurance services performed for others for a fee or commission . . . including premium financing."

On appeal, the agency argued that the policy was ambiguous because it did not define "premium financing," and that the financing activities involved "premium financing" and were therefore covered under the policy. The court concluded that the agency's activities in issuing promissory notes did not constitute "professional services" because they were not related to "insurance services." The court commented that "[n]ot every activity to raise funds by an insurance agency will constitute the provision of 'insurance services' simply because an insurance company is involved." Recognizing that the class action suits related to the issuance of the promissory notes, the court emphasized that the "investors purchased the notes for the purpose of obtaining a return, not to finance insurance premiums." Therefore, "[b]ecause the activities that formed the basis of the

class action suits are not the performance or failure to perform 'insurance services,' they are not covered by the plain language of the policy."