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NEWSLETTER

Professional Services Exclusion in D&O Policy Bars Coverage for Claims Against Financial Advisor

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A New York federal district court has held that a professional services exclusion in a D&O policy unambiguously barred coverage for claims asserted against a financial advisor arising out of its alleged misrepresentations and failure to conduct due diligence in connection with the sale of shares of real estate investment trusts (REITs). *David Lerner Assocs., Inc. v. Phila. Indem. Ins. Co.*, 2013 WL 1277882 (E.D.N.Y. Mar. 29, 2013).

The insured, a securities broker-dealer, was named in numerous claims asserted by the Financial Industry Regulatory Authority (FINRA) and private plaintiffs. Those claims alleged that the insured, in its role as the underwriter and sole distributor for certain REITs, made misrepresentations and failed to conduct adequate due diligence regarding the REITs. The insured tendered the claims to its insurer under its D&O policy, but the insurer denied coverage on the grounds that an exclusion in its policy for claims "in any way involving [the insured's] performance of or failure to perform professional services for others" barred coverage. The insured then brought an action seeking a declaration that the policy afforded coverage for the claims.

The court dismissed the insured's lawsuit, holding that the policy's professional services exclusion unambiguously barred coverage. The court held that the only reasonable interpretation of the term "professional services," left undefined by the policy, was "that individuals engaged in the due diligence and sale of financial products are engaged in professional services." The court rejected the insured's argument that financial advisors do not perform "professional services" since they are not classified as professionals under malpractice law, instead finding that the term "professional services" as used in the insurance context applies to a "far broader range of activities." The court also ruled that the professional services exclusion would apply even if certain acts alleged in the claims were ministerial in nature, noting that the existence of such acts "would not negate the large degree of specialized training or knowledge required in all of the other actions performed by [the insured]."