

Contractual Liability Exclusion Not Likely to Apply to Misrepresentations in Issuance of Promissory Notes

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A Pennsylvania federal district court, applying Pennsylvania law, has denied two insureds' motion for a preliminary injunction to require a D&O insurer to advance defense expenses, but, in doing so, it concluded that the insureds had demonstrated a substantial likelihood of success that coverage for their alleged liability arising out of the issuance of two promissory notes would not be barred by a contractual liability exclusion. *McPeck v. Travelers Cas. & Sur. Co. of Am.*, 2006 WL 1308087 (W.D. Pa. May 10, 2006).

Two individuals were named as defendants in an action alleging that they had made fraudulent or negligent misrepresentations or omissions in connection with the issuance of two promissory notes. The individuals sought advancement of their defense expenses under a D&O policy, but the insurer denied coverage on the ground that the policy precluded coverage for claims "arising out of any alleged liability of any Insured under any express contract or agreement." The insureds initiated coverage litigation and filed a motion for a preliminary injunction to enforce their rights to have defense expenses advanced to them. The court ultimately denied their motion without prejudice, concluding that they had not supplied any evidence that they would be irreparably harmed if the injunction were not granted. Prior to reaching the conclusion, however, the court held that they demonstrated a substantial likelihood of success on the merits because their alleged liability arose out of "pre-contract misdeeds, rather than . . . the notes (contracts) themselves." The court stated that it was "unwilling to interpret 'arising out of' so broadly" as to preclude coverage in this instance.