

ALERT

Claim against Broker Barred by Exclusion for Claims Involving Unauthorized Securities

March 2, 2011

The United States Court of Appeals for the Eighth Circuit has affirmed a lower court's grant of summary judgment in favor of an insurer, holding that coverage was barred under an exclusion for claims involving unauthorized securities. *Behrens v. Arch Ins. Co.*, 2010 WL 350436 (8th Cir. Feb. 7, 2011).

The insured notified his E&O insurer of various lawsuits filed by the SEC and individual investors against him as a result of his alleged engagement in a Ponzi-like scheme while he was an agent for a broker-dealer subsidiary of a life insurance company. The insurer denied coverage, and the insured filed a coverage action. The insurer filed a counterclaim seeking a declaration that it did not have a duty to defend. The lower court granted summary judgment in favor of the insurer because it determined that the insured's alleged activities did not constitute "professional services," and thus were not within the policy's scope of coverage. The insured appealed.

The Eighth Circuit affirmed the lower court's decision on other grounds and did not address whether the insured's conduct constituted "professional services." Instead, the court held that an exclusion for claims "based upon, arising out of or in any way involving any Securities (other than variable annuities, variable life insurance and mutual funds) that were not authorized or approved by the Broker/Dealer subsidiary of the Sponsoring Company or Securities that were not processed through the Broker/Dealer Subsidiary of the Sponsoring Company," applied to bar coverage. According to the Eighth Circuit, the insured admitted the notes were "securities," and it was not plausible to infer that the broker-dealer subsidiary for which the insured was an agent authorized, approved or processed the sale of the securities at issue because the notes were sold from a

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separate entity not affiliated with the broker-dealer subsidiary and the insured was terminated as an agent as soon as the broker-dealer subsidiary learned of the insured's activities.