

ALERT

The Management of Client Funds Held in Trust Constitutes a "Professional Service"

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The United States Court of Appeals for the Eleventh Circuit, applying Florida law, has held that an insured's management of funds held in trust for clients constitutes a "professional service" as defined by the policy. *Nardella Chong, P.A. v. Medmarc Cas. Ins. Co.*, 2011 WL 2083941 (11th Cir. May 27, 2011). The court further held that the insured's erroneous transfer of its clients' trust funds to a third party was an act or omission in the conduct of its professional fiduciary duties to its clients that would give rise to a claim of negligence against it by those clients and for which it would be liable in damages.

The insurer issued a professional liability policy to the insured, a law firm, that covered all claims of negligence arising from an act or omission in the performance of "professional services" rendered by the insured. The policy defined professional services to include "[s]ervices as a . . . trustee . . . but only for those services typically and customarily performed by an attorney." The act that gave rise to a claim for coverage was the insured's distribution of its trust account funds in response to a fraud perpetrated upon it by a putative client. This client gave the insured a cashier's check in payment, which the insured deposited into its firm's trust account. The client then directed the insured to wire-transfer most of the proceeds of the cashier's check to alleged overseas business partners, which the insured did. It was later determined that the cashier's check was a forgery, and that the funds being transferred from the trust account belonged to other clients. Upon learning of the fraud, the insured notified the insurer, but the insurer denied coverage for the missing funds. In the subsequent coverage litigation, the district court granted the insurer's motion for summary judgment, finding that there were no negligent acts or

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omissions resulting from the performance, or failure to perform, professional services. The district court also found that the insured's other clients' potential claims against the insured would be in the nature of restitution rather than damages that would be covered under the policy.

The appellate court reversed the grant of summary judgment in favor of the insurer. The court found that the deposit of clients' funds into a trust account creates a fiduciary relationship between those clients and the law firm. Therefore, the court held that the management of funds held in trust constitutes a "professional service" as defined in the policy. To support its holding, the court points to the fact that the Florida Bar devotes an entire chapter of its rules of conduct to the topic of attorney management of the client trust account. Additionally, the court stated that the insurer's own corporate representative, in her deposition, testified that the insured's management of its trust account constituted the performance of legal services to those clients with funds in the account. The court found that under the terms of the policy, claims alleging negligent acts or omissions in the performance of the insured's professional services are covered. The court also found no merit in the argument that the claims by the clients would be in the nature of restitution and not damages, and therefore not covered. The court found that Florida law makes clear that when an attorney distributes client funds to a third party without the client's authorization he may be sued for malpractice damages, for which he would have a claim for under his errors and omissions policy.