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ALERT

Broker Exclusion Does Not Bar Coverage for Accounting Firm's Alleged Negligence

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Applying Maryland law, the United States Court of Appeals for the Fourth Circuit has held that a professional liability policy's insurance-broker exclusion did not relieve an insurer of its duty to defend a series of lawsuits filed against an insured accounting firm. *Trice, Geary & Myers, LLC v. CAMICO Mut. Ins. Co.*, 2011 WL 6425701 (4th Cir. Dec. 22, 2011). The court also held that it was premature to decide whether the insurer owed a duty to indemnify until after resolution of the underlying actions.

In 2009, two clients of the insured accounting firm filed lawsuits against the firm, each alleging negligence in the performance of accounting and tax services. Each client asserted that the firm had recommended that it fund its benefit plan through a life insurance policy and annuities. The firm also directed the clients to an insurance company from which it allegedly received commissions. As a result of the firm's allegedly negligent accounting and tax advice, both clients were audited and exposed to substantial tax debt. The insurance company that issued the policies and annuities also sued, seeking indemnification and contribution for any liability it incurred to the clients.

The accounting firm tendered the claims to its insurer, which denied coverage and declined to defend. The insurer relied on an endorsement providing that the policy's coverage of professional services did not cover liability "arising from acts, errors or omissions in the rendering or failure to render services as an insurance agent or broker." The endorsement amended the policy's definition of "professional services" to reflect that the term did not include services "performed . . . in [the insured's] capacity as an agent or broker for the placement . . . of insurance products or for the sale of annuities."

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The endorsement also added an exclusion for "any Claim in connection with or arising out of any act, error or omission by any Insured in his/her capacity as an agent or broker. . . ." In the coverage litigation that followed, the trial court granted summary judgment in favor of the insurer, concluding that the endorsement relieved the insurer of both its duty to defend and its duty to indemnify the firm. The firm appealed.

The Fourth Circuit reversed. First, with respect to the insurer's duty to defend, the court held that the endorsement ambiguously defined the scope of its coverage limitation. The court characterized the entire endorsement as an "exclusion" and noted that it alternately and inconsistently employed the terms "in connection with" and "arising out of" in defining the scope of coverage. Absent extrinsic evidence, the court construed these "inconsistencies in the scope of the limitation coverage" against the insurer and concluded that the exclusion applied only to claims against the accounting firm arising out of its capacity as a broker or agent. Because the three underlying actions against the insured alleged only that the firm had provided negligent accounting and tax services, the court concluded that the "'potentiality' of coverage" triggered the insurer's duty to defend. Moreover, the court remarked in dicta, even if the underlying lawsuits had included allegations suggesting that the firm had acted as an insurance agent or broker, the "specter of coverage" nonetheless would obligate the insurer to defend.

Second, the court held that the insurer's duty to indemnify could not be established during the pendency of the underlying lawsuits. Although the allegations in the underlying complaints sufficed to trigger the insurer's duty to defend, the ultimate factual findings in the lawsuits might establish that the firm's misconduct had arisen out of an undisclosed relationship as broker or agent for the insurance company to which it had directed its clients. As a result, the court concluded, "a declaration as to [the insurer's] duty of indemnification would be premature at this time."