

ALERT

Testimony About a Wrongful Act Does Not Constitute Professional Services

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Applying Mississippi law, a federal district court has held that an insurance agent's testimony about a prior wrongful act did not constitute "professional services" as defined in the agency's errors and omissions liability policy. *Henson v. United States Liability Insurance Co.*, 2012 WL 3011754 (N.D. Miss. July 23, 2012).

In June 2009, on behalf of an owner of a shopping mall, the agent completed an application for property and casualty insurance. Based on the application, a policy was issued to the mall, but when the mall subsequently burned down, the insurer refused to provide coverage, contending that the application for coverage included material misrepresentations. In the coverage action that followed, the mall took the position that the agent incorrectly filled out the application. The agent provided testimony to this effect on January 10, 2010 and later was named as a third-party defendant in the action.

The agent sought coverage for the third-party complaint from its errors and omissions insurer, which issued a claims-made and reported policy. The policy included a retroactive date of October 8, 2009, limiting coverage to claims arising from a wrongful act in the performance of professional services that occurred on or after that date. Pointing to the fact that the agent's alleged error in completing the mall owner's application took place in June 2009, the insurer denied coverage.

In the coverage litigation that followed, the court rejected the argument that coverage was triggered because the third-party complaint arose from the agent's testimony in the mall owner's case on January 10, 2010. The court focused on the policy's definition of "professional services," which included "the marketing, sale or

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servicing of insurance products, provided they are performed as part of and in conjunction with services the Insured performs for others in their capacity as a licensed agent or broker, general agent, managing general agent or underwriter, program administrator, including a wholesale broker or excess and surplus lines broker for property/casualty, life/health and surety products.” Finding that the agent’s testimony was not provided during the marketing, selling or servicing of insurance products, the court held that “testifying about an insured’s allegedly wrongful acts is in itself [not] a wrongful act or professional service covered by the E&O policy.” Therefore, according to the court, to the extent that the third-party complaint arose from the agent’s testimony, the claim did not arise from a wrongful act involving professional services that post-dated the policy’s retroactive date.

The opinion is available [here](#).