

ALERT

Failure to Supervise Employee Does Not Constitute "Professional Services"

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Applying Minnesota law, a federal court has found that an insured's failure to supervise an employee and related breach of contract did not constitute a wrongful act in the rendering or failure to render professional services. *Jackson Title Life Insurance Co. v. Catlin Specialty Insurance Co.*, 2013 WL 4519382 (D. Minn. Aug. 26, 2013). The court also held that the policy's use of the article "the" indicated that the named insured must have been alleged to have rendered or failed to render professional services in order to trigger coverage.

The insured entered into a selling agreement with a life insurance company pursuant to which the insured sold the life insurance company's annuities. Pursuant to the agreement, the insured represented that all of its employees selling the annuities would be registered with the insured and that the insured would properly supervise all such registered representatives. The insured also agreed to indemnify the life insurance company for claims resulting from untrue or misleading statements by registered representatives or negligence by the insured in the course of selling the annuities, among other things.

One of the insured's representatives, at the request of his father-in-law, who was not employed by the insured, falsely certified that he had discussed a particular annuity with a client and that he knew of the client's investment goals before the client made a \$1.1 million investment. The client was told by the father-in-law that the annuity would never fall below the value of her initial investment, but later discovered that it was worth well below that amount. The life insurance company agreed to rescind the annuity, refunded the client her money and filed suit against the insured to recoup its loss. The life insurance company prevailed and sought coverage for the

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judgment under the insured's professional liability policy. The insurer denied coverage and coverage litigation ensued.

In concluding that the policy did not respond to the underlying judgment, the court first noted that liability in the underlying action was predicated on the insured's breach of the selling agreement. According to the court, the breach of the agreement was not "the rendering or failing to render Professional Services." The policy defined "Professional Services" as "the supervision of conduct or activities [by employees], in accordance with statutes, regulations or procedures established by governmental or self-regulatory authorities . . . or duties imposed under common law." The court determined that the insured's liability was not based on the violation of governmental regulations or common law duties, but on the insured's obligations under the agreement. Thus, the matter did not arise out of the "rendering or failure to render Professional Services."

The court also rejected the insured's argument that the employee's wrongful act brought the matter within coverage. According to the court, the insured's liability resulted from its failure to supervise its employee, not from the employee's actions. Moreover, the policy specifically provided coverage for damages "*the*" insured became legally obligated to pay because of a claim made against "*the*" insured. Thus, the court explained, the policy's specificity made irrelevant whether an employee of the insured rendered "Professional Services" because liability had to be predicated on "Professional Services" rendered by the insured entity.

The opinion is available [here](#).