“ARISING OUT OF PROFESSIONAL SERVICES” AND “MONEY RECEIVED” EXCLUSION ANALYZED IN INSURANCE AGENT’S E&O POLICY

In *Utica Mutual Ins. Co. v. Miller*[1], the Court of Special Appeals of Maryland considered whether there was a duty to defend under the terms of an errors and omissions policy in a tort action arising from an insurance agent’s alleged failure to remit $326,480.12 in premiums. The insured was a general agent responsible for selling and writing policies on behalf of various insurance companies, collecting premiums from customers and forwarding the premiums to the various insurers. When the broker was sued for allegedly converting premiums collected on behalf of CIGNA, he looked to his errors and omissions carrier for coverage and a defense. The insurer denied coverage, contending that the claims were barred by the “money received” exclusion. The trial court determined that the allegations in the underlying suit gave rise to a duty to defend and granted summary judgment in favor of the insured. The insurer appealed and the Court of Special Appeals affirmed. .

The Court first considered applicability of the “money received” exclusion, which bars coverage for monies received by the insured for “fees, premiums, taxes, commissions, loss payments, or escrow or brokerage monies.” The Court agreed that if the suit alleged only a failure to remit premiums, the exclusion would bar coverage. However, the Complaint also contained alternate claims of negligence, failure to turn over business records and failure to monitor business operations, which were outside the scope of the exclusion. Because there was a potentiality of coverage for these claims, the insurer was required to defend the entire case.

The insurer argued that the claims were not covered because they did not arise from “negligent acts, errors, or omissions … in the rendering or failure to render professional services.” The Court was guided, on this issue of first impression, by a Ninth Circuit opinion summarizing what activities constitute “professional services:”

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[1] 2000WL 122234 (Md. App. 2000).

> The act or service must be such as exacts the use or application of special learning or attainments of some kind. The term 'professional' in the context used in the policy provision means something more than mere proficiency in the performance of a task and implies intellectual skill as contrasted with that used in an occupation for production or sale of commodities …. In determining whether a particular act is of a professional nature or a 'professional service' we must look not to the title or character of the party performing the act, but to the act itself.[2]

In addition to collecting and accounting for premiums, the agreement between CIGNA and the agent required that the agent maintain complete records and accounts of all transactions pertaining to the insurance. The Court noted that the duty to monitor business records was implicit under the agreement. "Indeed, appellee would not be able to maintain adequate records and keep track of premium payments if he did not monitor his business." Thus, the allegations in the underlying suit that the agent "failed to monitor business operations, maintain records, and account for premiums addresses alleged failures in performing professional services" constituted "professional services."

The Court also rejected the argument that the trial court erred in granting summary judgment without allowing the insurer to conduct discovery into certain issues related to coverage, including the existence of other insurance. "Whether appellee has other insurance may be in dispute. Nevertheless, resolution of this dispute has no bearing on the outcome of the summary judgment motion." The insurer was required to assume the defense, absent evidence that a primary carrier existed. Of course, the insurer could proceed against the primary carrier if one is later identified for the costs of the defense.

In sum, the Court concluded that the trial court properly granted summary judgment in favor of the insured and held that the insurer was required to defend all claims in the underlying suit. In so doing, the Court confirmed that an insurer will be required to defend where any of the

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[2] *Bank of America, N.A. v. Opie,* 663 F.2d 977, 981 (9th Cir. 1981)(quoting *Marx v. Hartford Accident and Indem. Co.,* 183 Neb. 12, 157 N.W.2d 870, 871-72 (Neb. 1969).

allegations in the suit give rise to a potentiality of coverage, even where those allegations are groundless, false, fraudulent or intended solely to bring the claim within the coverage of the policy. More importantly, the decision provides guidance for insurers in determining the scope of business activities which are potentially covered under an errors and omissions policy providing coverage for "professional services."

Steven E. Leder
Julie A. Furst