

# Insurer Liable under Lawyers Liability Policy for Damages Awarded to Victim of Investment Ponzi Scheme

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The U.S. Court of Appeals for the Third Circuit, applying Pennsylvania law, recently affirmed a lower court decision holding that an insurer is liable under a Lawyers Professional Liability Policy for damages awarded to several individuals who were the victims of an attorney's fraudulent conduct and misrepresentations in connection with a Ponzi-type investment scheme. *Westport Ins. Corp. v. Ronald Jay Bayer*, 2002 U.S. App. LEXIS 5053 (3d Cir., Mar. 27, 2002)

In 1997, plaintiffs in the underlying action sued attorney Ronald Jay Bayer ("Bayer"), who had been involved in introducing them to Keith Fryer, an individual who claimed to own a successful secondary mortgage business in England and was seeking investors to help finance his business. Fryer told potential investors that high second-mortgage rates in England permitted him to pay interest on such investments in excess of twenty-five percent. Bayer attended meetings where Fryer presented this investment opportunity, promoted the investment to others, and received a commission for successfully soliciting new investors for Fryer. Based on Fryer's presentation and Bayer's representations that he had conducted due diligence on the mortgage company (and had even traveled to England as part of the due diligence process), plaintiffs invested \$678,000 with Fryer. Although plaintiffs were never represented by Bayer, the district court held that Bayer's actions created the false impression that he was "looking out for" their interests. In addition, plaintiffs tendered their \$678,000 investment to Bayer at his law offices; Bayer then forwarded the money to Fryer in England.

Westport Insurance Company ("Westport"), which issued a Lawyers Professional Liability Policy to Bayer, filed a declaratory judgment action seeking relief from any obligation to pay any judgment awarded to plaintiffs in the underlying action. The policy covered claims "arising out of services rendered or which should have been rendered by an insured...and arising out of the conduct of the insured's profession as a lawyer." Westport argued that the underlying claims arose from Bayer's involvement in a business venture, not in connection with the practice of law, thereby precluding coverage.

The Third Circuit found that the policy provided coverage for the underlying claim. As an initial matter, the court determined that professional liability can arise even where an attorney-client relationship does not exist. The court then concluded that the policy language providing coverage for injury "arising out of" Bayer's

provision of professional services was to be interpreted broadly, and that the language providing coverage for claims "arising out of services rendered or which should have been rendered...and arising out of the conduct of the insured's profession as a Lawyer" was ambiguous. The court therefore interpreted the policy provision in favor of the insured to hold that the policy covered the judgment granted to the underlying plaintiffs.

The court also rejected the application of an exclusion for claims arising out of the conduct of any business enterprise other than the named law firm that is "controlled or operated" by an insured. The court reasoned that the lawyer did not control or operate the investment scheme.