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NEWSLETTER

First Circuit Holds No Coverage Under E&O Policy for Agency's Breach of Exclusivity Clause

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The United States Court of Appeals for the First Circuit, applying Massachusetts law, has held that coverage was not available under an Insurance Agent and Broker E&O Policy for an arbitration award assessed against a policyholder for its breach of an agency agreement because the claims at issue arose out of the policyholder's ordinary business decisions rather than from its exercise of professional skills. *Massamont Ins. Agency, Inc. v. Utica Mut. Ins. Co.*, 2007 WL 1633817 (1st Cir. June 7, 2007).

The policyholder, an insurance agency, entered into an agency agreement with an insurance company for two of the agency's insurance programs. The agreement contained an exclusivity clause prohibiting the agency from soliciting the program business for any other insurer. Following a series of disputes with the insurance company, the agency placed part of its business under the two programs with a different insurer. The first insurance company sought damages in an arbitration proceeding, alleging that the agency breached the exclusivity clause of the agreement. The agency's policy promised to defend against claims of, and indemnification for, loss that "arise[s] out of" a "wrongful act" allegedly "committed in the conduct of the insured's business . . . in rendering or failing to render professional services." The insurer refused to defend or indemnify the agency, and an award of $2.6 million subsequently was entered against the agency in the arbitration. In a suit brought by the agency against the carrier, the court observed that the focus of the underlying arbitration demand was the agency's breach of the exclusivity provision, while any charges that the agency negligently managed the program served merely as background information. The court then held that the agency's decision to divert business to another insurance company was not covered under the E&O policy. The court noted that "[a] promise by an agent to represent one insurer exclusively for certain lines of insurance is not itself a professional service, nor does a diversion of business in breach of such a contract comprise the performance of professional service." The court recognized that the agency's decision to divert business may have been caused by disputes over insurance matters, but the diversion still qualified as a distinct business decision that was not "the target of an E&O or malpractice policy."