

Insured's Liability for Breach of Agreement Excluded by "Contractual Liability" Exclusion

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The Fifth Circuit, applying Louisiana law, has held that an insurance agent and broker's liability arising out of the issuance of policies prohibited by a Binding Authority Agreement with an insurer is barred by a contractual liability exclusion. *RODCO Worldwide, Inc. v. Arch Specialty Ins. Co.*, 2009 WL 35006 (5th Cir., Jan. 7, 2009 (La.)). The court applied the plain language of the contractual liability exclusion and rejected a competing interpretation offered by the insured that was based on case law interpreting distinguishable policy language.

The insurance agent entered into a Binding Authority Agreement with an insurer. The agreement specifically prohibited it from issuing policies covering (a) property located anywhere other than Louisiana, or (b) greenhouses. Notwithstanding the Binding Authority Agreement, the agent issued three policies that covered property in Mississippi and one that covered greenhouses in Louisiana. The insurer notified the agent of its error and canceled two of the policies but failed to cancel the other two. When Hurricane Katrina damaged the properties insured by the two remaining erroneously issued policies, the insurer paid both claims and then sought to recover the amounts paid from its agent.

The agent submitted the insurer's claims to its own insurer. Under the terms of the agent's policy, its insurer agreed to pay claims resulting from the agent's negligence in "rendering or failing to render professional services." The policy contained exclusions for "any claim based upon, arising out of, or in any way involving: . . . (1.) Any contractual liability [or] . . . "[a]ny actual or alleged breach of any contract, warranty, guarantee, or promise unless liability would have attached to the insured even in the absence of such contract, warranty, guarantee, or promise." Based on these exclusions, the insurer denied the agent's claims on the grounds that they were the direct result of the agent's breach of the Binding Authority Agreement. The agent filed a declaratory judgment action. On motion for summary judgment, the district court, applying the plain language of the policy, held that the agent's claims were excluded by the contractual liability exclusions. The agent appealed, and the Fifth Circuit affirmed.

The Fifth Circuit began by noting that "any doubt or ambiguity as to the meaning of a provision in an insurance policy' must be resolved in favor of the insured." The court then considered the agent's interpretation of the contractual liability exclusion, which was based on two Louisiana decisions, *Broadmoor*

Anderson v. National Union Fire Ins. Co. and Estate of Patout v. City of New Iberia. According to the agent, these cases stand for the proposition that a contractual liability exclusion only applies when the insured assumes the liability of a third party. The court rejected this interpretation as overly broad and distinguished the two cases on the basis of the specific language of the exclusions at issue. The court noted that the exclusion at issue in *Broadmoor* expressly stated that "when the insured is obligated to pay damages by reason of assumption of liability in a contract," coverage is excluded under the policy." Similarly, in *Patout*, the exclusion stated that "[t]his policy does not apply . . . to liability assumed by the Insured under any contract or agreement except an incidental contract." Thus, the court concluded, "the meaning of these and similar 'assumed liability' provisions has no bearing on the proper interpretation of the far broader exclusion provision" in this case.

The court next considered the agent's argument that, because its actions gave rise to allegations sounding in both tort and contract, they were not wholly excluded by the contractual liability exclusions. Citing *Cute'-Togs of New Orleans, Inc. v. Louisiana Health Service & Indemnity Co.*, 386 So.2d 87 (La. 1980), a decision that neither party had raised, however, the court rejected the agent's argument because, under Louisiana contract law, a court must consider "the source . . . of damage." Relying on *Cute'-Togs*, the court held that the relevant question was not whether the agent's actions had given rise to an action sounding in tort *in addition* to the action sounding in contract (which, as the court noted, is typically the case in a breach of contract action), but whether the agent's actions fell within the broad language of the exclusion as it was written, which precluded coverage for any claim "based upon, arising out of, or in any way involving" the agent's breach of the Binding Authority Agreement.

Finally, the court rejected as "without merit" the agent's argument that barring coverage would produce an absurd result "as it would cause the operation of an exclusion to hinge upon the identity of the person asserting the professional liability claims against the insured." The court affirmed the district court's determination that, although the broad contractual liability exclusion creates a "potential gap" in coverage, it "leaves intact substantial coverage for 'negligence . . . in the rendering or failure to render professional services.'" Accordingly, the court held, the denial of coverage is "not so absurd" as to warrant judicial rewriting of a clear and explicit contract.