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NEWSLETTER

Exclusion for Derivatives Sale Applies Regardless Of Legal Theory Asserted

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The United States Court of Appeals for the Ninth Circuit, applying California law, has held that, where all of an underlying claimant's claims against the insured related to the sale of derivatives, a professional liability policy exclusion for losses pertaining to derivative sales barred coverage. *Illinois Union Ins. Co. v. Brookstreet Securities Corp., et al.,* 2011 WL 2883072 (9th Cir. July 20, 2011).

The claimant, an investor, filed suit against the insured investment brokerage over losses pertaining to collateralized mortgage bonds that the insured sold. The mortgage bonds were derivatives. The policy excluded coverage for losses "[b]ased upon, arising out of, attributable to the sale, attempted sale, or servicing of ... [c]ommodities, commodity future contracts, any type of option contract or derivative."

The court rejected the claimant's argument that, because she alleged that the insured breached its fiduciary duty, engaged in fraud, made misrepresentations, and committed other wrongdoing before the derivatives sale, part of her damages arose out of conduct apart from the sale of derivatives, and, under a concurrent causation or efficient proximate cause analysis, coverage was available. The court held that the exclusion applied regardless of the type of legal theory asserted against the insured. Because all of the claimant's claims were based on the purchase and sale of derivatives, the court concluded that no coverage existed.