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ALERT

Tenth Circuit Holds Exclusion for Claims Arising Out of Bankruptcy or Insolvency May Bar Coverage for Claim Under Broker's Errors and Omissions Policy

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The United States Court of Appeals for the Tenth Circuit, applying Oklahoma law, has held that a bankruptcy or insolvency exclusion may bar coverage for the insured broker's claim, where the broker's actions were connected to the bankruptcy of its client's former insurer. *C.L. Frates & Co. v. Westchester Fire Ins. Co.*, 2013 WL 4734093 (10th Cir. Sept. 4, 2013).

The insured broker had obtained stop-loss insurance for one of its clients from a company that subsequently filed for bankruptcy. The broker then investigated and learned that the company was not an insurance company and had filed for bankruptcy to stall litigation against it in another state. The broker recommended that its client move its policy to another insurer, but the broker was forced to reimburse the client for the difference in higher deductibles. The broker then sought coverage under its own E&O policy. The E&O insurer argued that the broker's claim arose out of the bankruptcy of the stop-loss insurance company, therefore falling within the policy exclusion barring coverage for claims "arising out of" bankruptcy or insolvency. The broker contended that the claim instead arose out of the stop-loss insurance company's deception. The trial court granted summary judgment to the broker.

On appeal, the Tenth Circuit reversed and remanded the case, holding that a fact-finder could reasonably infer that the broker's injury arose out of the stop-loss insurer's bankruptcy or insolvency and therefore could fall within the bankruptcy or insolvency exclusion. The

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court held that, under Oklahoma law, the phrase "arising out of" is broadly interpreted as requiring only some connection to the injury. The court observed that the broker's investigation into the stop-loss insurer was prompted by news of the bankruptcy and that the broker had recommended that its client switch insurers because of the insurer's financial problems. Accordingly, the court held that the trial court's grant of summary judgment was inappropriate.