

ALERT

Claim Based on Accountants' Investment Advice Barred by Securities Practices Exclusion

March 4, 2014

Applying Massachusetts law, the U.S. District Court for the District of Massachusetts has held that an exclusion for claims made in connection with the alleged violation of state blue sky laws bars coverage for securities law and common law counts asserted against accountants in a complaint alleging they gave poor investment advice. *Salomon, et al. v. Philadelphia Ins. Co.*, 2014 WL 294320 (D. Mass. Jan. 23, 2014).

An accounting firm and one of its principal accountants were named as defendants in an action by a former client who alleged that, acting on the advice of his accountants, he invested in what turned out to be a Ponzi scheme. The client's complaint asserted counts for negligent misrepresentation for the accountants' alleged failure to exercise reasonable care in learning about the investment opportunity before recommending it, breach of fiduciary duty for similar conduct, and numerous counts for violation of the Massachusetts Uniform Securities Act.

The accountants sought coverage under their professional liability policy, but the insurer denied coverage based on three separate policy exclusions for claims arising out of (1) professional services performed for a client for whom any insured promoted, sold, or solicited securities or other investments; (2) the sale or solicitation of securities or other investments by any insured; and (3) the actual or alleged violation of state blue sky laws and claims "based upon common law principles of liability if made in connection with an actual or alleged violation of" the state blue sky laws. According to the insurer, the counts for Massachusetts Uniform Securities Act

Practice Areas

- D&O and Financial Institution Liability
- E&O for Lawyers, Accountants and Other Professionals
- Insurance
- Professional Liability Defense

violations were barred by the blue sky law exclusion, a proposition which the insured did not dispute, and the other counts were common law claims "made in connection with" the same alleged wrongful conduct and thus were barred by the exclusion. In addition, the insurer asserted that the other two exclusions for the solicitation and sale of investments independently operated to bar coverage for the negligent misrepresentation and breach of fiduciary duty counts. In response, the accountants contended that the insurer's interpretation of the exclusions would render meaningless an endorsement in the policy that provided coverage for "personal financial planning," which, the accountants contend, was precisely what was alleged in the client's complaint.

The court ruled for the insurer, finding first that, although there was some overlap between the policy's two exclusions for the solicitation and sale of investments on the one hand and the coverage extension for personal financial planning on the other, the extension did not read the exclusions out of the policy. Moreover, the court concluded, even in the absence of those two exclusions the claim would still be barred by the blue sky law exclusion, because the counts for negligent misrepresentation and breach of fiduciary duty were based on the same allegations as the excluded securities law violations, and thus all of the counts were "made in connection with an . . . alleged violation of" state blue sky laws. Accordingly, the court held that the insurer had no duty to defend or indemnify the accountants.

The opinion is available [here](#).