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PROFESSIONAL LIABILITY BLOG

Advertisement of Services Is Not "Rendering" of Services, Says the Illinois Appellate Court

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What does it mean to "render" services if (1) you are an insurance agent or brokerage conducting your day-to-day business operations; and (2) you have purchased a professional liability policy to cover errors or omissions you make (or are accused of making) in your business?

According to the Illinois Appellate Court in *Margulis v. BCS Ins. Co.*, 23 N.E.3d 472 (Ill. App. 1 Dist. 2014), advertising or marketing efforts involving allegedly unauthorized telephone solicitations did not involve "rendering services" as an insurance agent or brokerage, and therefore were not covered under a brokerage's professional liability policy.

The Background

Bradford E. Dixon and Associates, an insurance agency and brokerage ("Bradford"), made unsolicited, automated telephone calls that advertised its services. In February 2008, a class action was filed against Bradford alleging that the agency had made pre-recorded telephone calls to private telephone lines advertising its insurance services. Class members alleged Bradford violated the Telephone Consumer Protection Act (TCPA) and invaded residents' privacy by initiating the calls using an artificial or pre-recorded voice delivering a message.

Shortly thereafter, Bradford's insurance company (BCS) declined coverage of the claim. BCS believed that (1) its professional liability policy was designed to cover damages arising out of "rendering services for others" as an insurance agency; and (2) as such, the policy did not cover soliciting business by advertising to the general public. In addition, BCS believed that (3) the policy limited coverage to actions that are negligent in nature, whereas pre-recorded telephone calls are intentional in nature.

After a settlement was reached between the class and Bradford, class members sought an order that BCS had a duty to defend Bradford and pay a judgment that was entered against Bradford in connection with the settlement.

BCS filed a motion for summary judgment, noting the above contentions and emphasizing that Bradford's actions amounted to nothing more than an advertising function of any business, directed at complete strangers. The trial court agreed.

Advertisement of Services = Rendering of Services?

On appeal, the First District heavily focused on the "rendering services for others" language in the professional liability policy. Telephone calls that advertised insurance services did not amount to "rendering" insurance services for others. In addition, there was no established business relationship between Bradford and class members. Recipients of the calls were not insurance clients.

The court likened the case to *Westport Ins. Corp. v. Jackson Nat'l Life Ins. Co.*, 900 N.E.2d 377 (Ill. App. 2008), in which the court held an insurance's agency's faxed advertisement was "merely an overture to potential customers" and was not covered under a professional liability policy. The *Westport* court concluded that the mere offer to perform a professional service does not equate to actual performance of a professional service.

Class members urged the court to instead rely on *Landmark Am. Ins. Co. v. NIP Group, Inc.*, 962 N.E.2d 562 (Ill. App. 2011), in which an insurer had to provide coverage in a suit involving unsolicited fax advertisements.

The First District found *Landmark* distinguishable because the policy at issue there expressly stated that advertising liability was covered. And Illinois law views professional liability policies as limited forms of insurance that typically provide coverage only for those risks "inherent" in the insured's professional services. As such, the specific policy language ultimately controls the determination of what risks are covered. Thus, the fact that the insurer in *Landmark* was required to provide coverage for unsolicited fax advertisements was of no bearing when it came to the policy issued by BCS to Bradford, which did not provide coverage for advertising liability.

The Takeaway

As with any insurance policy, the language used in the document (and in any written contract, really) is of prime consideration.

An insured's expectations regarding what is (or should be) covered do not always match what the policy says is covered.

Insurance brokerages and agents arguably are in a superior position—compared to the general public, anyway—in understanding what policies say and mean. This practical reality is often an additional factor courts take into account in coverage cases brought by those who sell insurance policies for a living.