Wiley Rein LLP

EXECUTIVE SUMMARY

Developments Affecting Professional Liability Insurers | May 2013

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Bond Exclusion and Insured vs. Insured Exclusion Bar Coverage for Claims Against Property Management Company

A California federal district court has held that a bond exclusion in a professional liability policy issued to a property management company and the insured vs. insured exclusion in a professional liability policy issued to the homeowner's association that employed the property manager unambiguously barred coverage for claims asserted against the property manager arising out of its alleged failure to secure extensions of two surety bonds relating to construction work performed on property owned by the association. *VierraMoore, Inc. v. Cont'l Cas.Co.*, No. 2:12-cv-01926-MCE-EFB (E.D. Cal. Apr. 15, 2013). Wiley Rein represented the insurer.

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"Based Upon, Arising From, or In Consequence Of" Language in Exclusion Requires Causal Connection, Not Proximate Causation

The United States District Court for the District of New Mexico has held that a "Lending Services" exclusion in a D&O policy barred coverage for a claim alleging that a policyholder wrongfully recorded and refused to release certain security interests. *W. Heritage Bank v. Fed. Ins. Co.*, 2013 WL 1491895 (D.N.M. Mar. 21, 2013). In so ruling, the court held that an injury is "based upon, arises from, or is in consequence of" certain conduct if there is a causal connection between the two, rejecting an insured's argument that proximate causation is required.

The policyholder, a bank, made several loans to its customer so that the customer could purchase a franchise and open a restaurant. The customer entered into a lease with a property owner and made renovations to the property, and the bank secured its loans with liens on the restaurant equipment, the franchise and the lease. The customer subsequently defaulted on its bank loans, franchise agreement and lease, and the property

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Allegations of Misleading Statements Regarding Scope of Coverage Not Sufficient to Support Insureds' Fraud Claim

Applying California law, the United States District Court for the Eastern District of California has dismissed a claim by insured directors and officers alleging insurer fraud, ruling that the complaint failed to allege with sufficient particularity that the insurer had misled the insureds regarding the scope of the policy's coverage. *Hawker v. Bancinsurance, Inc.,* 2013 WL 1281573 (E.D. Cal. Mar. 26, 2013). The court also held that the insureds' bad faith claims failed to allege malice, oppression or fraud on the part of the insurer necessary to support a claim for punitive damages.

A bank purchased a directors and officers insurance policy with a coverage term from January 2006 to January 2009. The policy's insured vs. insured exclusion precluded coverage for "a Claim by, or on behalf of, the Company, or any successor, trustee, assignee or receiver of the Company." The policy also contained a regulatory exclusion precluding coverage for actions or proceedings brought by or on behalf of any regulatory agency, but that exclusion was deleted by endorsement. In 2007, while the policy was in effect, the bank requested additional directors and officers coverage, and the insurer advised that the bank substitute its current policy with a new policy. The new policy had a similar insured vs. insured exclusion, but it did not include a regulatory exclusion like that included in (and deleted from) the original policy. According to the bank, the insurer indicated that the new policy provided broader coverage than the original policy, and thus the bank agreed to purchase the new policy.

Subsequently, the bank failed and the Federal Deposit Insurance Corporation (FDIC) was appointed as receiver. The FDIC then filed suit against the bank's directors and officers for negligence and breach of fiduciary duty. The insurer denied coverage for the claim pursuant to the new policy's insured vs. insured exclusion. The directors and officers filed suit against the insurer alleging fraud and seeking reformation of the new policy. The complaint alleged that, based on the insurer's suggestion that the new policy afforded broader coverage than the original policy, and in light of the new policy's omission of a regulatory exclusion like that in the original policy, the insureds believed that the new policy would provide coverage for regulatory actions

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Malpractice Actions by Multiple Clients for Separate Services Do Not Constitute Related Claims

The Appellate Division of the New York Supreme Court, First Department, has held that four lawsuits alleging legal malpractice arising out of a mass marketing campaign for the provision of estate planning legal services did not constitute related claims because the lawsuits were filed by multiple clients to which the lawyer had provided separate services. *Am. Guar. & Liability Ins. Co. v. Chicago Ins. Co.*, 2013 WL 1760338 (N.Y. App. Div. Apr. 25, 2013).

The insured lawyer was sued by four clients. The lawyer solicited senior citizens in a mass marketing campaign to provide estate planning services. When the solicitation was accepted, the lawyer would refer clients to various financial services representatives. Four of the clients were victims of theft and fraud by their respective financial service representative. Two clients filed suit against the lawyer during one claims-made policy period, and two clients filed suit against the lawyer during the subsequent claims-made policy period. The insurer that issued the second policy denied coverage for the two later suits on the ground that those suits were the "same and/or related" to the suits filed during the previous policy period. The insurer that issued the first policy settled the lawsuits and filed suit against the insurer that issued the second policy to recover the settlement amounts paid for the two later suits.

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Controlling Shareholder's Bankruptcy Does Not Render Entity Insolvent; Fraud Claim Uninsurable as a Matter of Law

Applying Minnesota law, a federal district court has held that, where an entity's principal shareholder was insolvent, but the entity was not, the individual's insolvency could not be attributed to the entity for purposes of establishing Side A coverage for "Non-Indemnifiable Loss." *Zayed v. Arch Ins. Co.*, 2013 WL 1183952 (D. Minn. Mar. 20, 2013). The court further held that allegations of fraudulent inducement did not trigger an exclusion for claims "arising from" contractual liability, but that the claim was uninsurable as matter of law.

The D&O policy at issue insured a holding company up to $1 million for "Loss" and its directors and officers up to $500,000 for "Non-Indemnifiable Loss" incurred by those individuals. The policy defined "Non-Indemnifiable Loss" as "Loss" that an insured organization could not indemnify because of a legal prohibition or insolvency.

An investor in the company brought suit for breach of contract and various torts against the company and its CEO, who held 34% of the company's stock, alleging that the CEO misrepresented the company's financial health in order to obtain a $2.5 million investment. The investor settled those claims in return for a $1 million judgment against the company and a $500,000 judgment against the CEO with the judgments apportioned entirely to the investor's claims that it was fraudulently induced into making the investment. A trustee who was assigned the insured's rights under the policy sought indemnification for the settlements. Having initially paid the policyholder's defense costs, the insurer disclaimed coverage.

In the coverage litigation that followed, the court first held that the insurer had no duty to indemnify the claimant for the $500,000 settlement given that it was not "Non-Indemnifiable Loss." According to the court, the policyholder was not "insolvent" within the meaning of the policy, which defined the term to mean "the appointment of any conservator, liquidator, receiver, trustee, or similar official" or becoming a debtor in possession. The policyholder did not satisfy either condition.

The court rejected the claimant's argument that the entity should be treated as insolvent under a "reverse-piercing" theory because the CEO was

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Claimant May Use Connecticut Direct Action Statute To Sue Carrier After Compromising Claim With Policyholder

The United States District Court for the District of Connecticut has held that a settlement agreement between the claimant and policyholder satisfies Connecticut's direct action statute's requirement regarding the need for an unsatisfied judgment. *Tucker v. Am. Int'l Group, Inc.*, 2013 WL 1294476 (D. Conn. Mar. 28, 2013). Accordingly, the court permitted the claimant's suit against the carrier to proceed.

The claimant received a $4 million judgment in her underlying suit for wrongful discharge. After the policyholder media company filed for bankruptcy, the claimant and the policyholder entered into an agreement in which the policyholder made a small payment toward the judgment, waived appellate rights and assigned its interest in insurance coverage for the judgment to the claimant. The claimant then filed suit against the carrier, bringing a cause of action for, among other things, subrogation under Connecticut's direct action statute, Connecticut General Statutes Section 38a-321.

In order for the claimant to proceed with a subrogation claim against a carrier, the direct action statute requires the claimant to recover "a final judgment" that is unsatisfied for at least thirty days. The carrier moved to dismiss the claimant's subrogation cause of action on the grounds that

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Court of Appeals Affirms That "In Fact" Requirement Was Triggered By Jury's Guilty Verdict

Applying Illinois and Florida law, the United States Court of Appeals for the Fourth Circuit has affirmed that a jury's guilty verdict in a criminal proceeding triggers the "in fact" element of a D&O policy's dishonesty and personal profit exclusions, allowing the insurer unilaterally to cease advancing defense costs. *Farkas v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 2013 WL 1459248 (4th Cir. Apr. 11, 2013). In a short *per curiam* opinion without additional legal analysis, the court adopted the district court's "thorough" opinion in *Farkas v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 861 F. Supp. 2d 716 (E.D. Va. 2012), originally discussed in the May 2012 issue of *The Executive Summary* and summarized briefly below.

The insured, the chairman of a bankrupt mortgage corporation, was indicted on various criminal counts for bank, wire and securities fraud. The mortgage corporation's D&O insurer agreed that the criminal proceeding constituted a claim under the policy, but reserved its right to limit or deny coverage based on policy exclusions for claims "in fact" arising out of fraud or wrongful personal profit. Pursuant to an order of the bankruptcy court, the insurer advanced approximately $1 million for the chairman's defense costs and then awaited court approval to advance additional amounts. The jury found the chairman guilty on all counts, and the insurer informed the chairman that the verdict triggered the "in fact" element of the policy's dishonesty and personal profits exclusions, such that it would no longer advance defense costs.

In the ensuing coverage dispute, the court first held that the jury's verdict clearly triggered the "in fact" requirement of the personal profit and dishonesty exclusions, rejecting the chairman's argument that the phrase was ambiguous and holding that the insurer properly could refuse to advance further defense costs.

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Fraud Exclusion Bars Coverage for Suit Against Bank Regarding Life Insurance Premium Loans

The United States District Court for the Central District of California has held that no coverage is available for a suit against an insured bank because of the clear language of the policy's fraud exclusion. *Nat'l Bank of Cal. v. Progressive Cas. Ins. Co.*, 2013 WL 1387196 (C.D. Cal. Apr. 3, 2013). The court additionally held that the insurer is not liable for defense costs incurred prior to the bank tendering the claim.

The bank had issued a premium loan for the purchase of a $6 million life insurance policy as part of a strategy to profit from the secondary market for life insurance policies. When the bank sought repayment of the loan from the life insurance trust, the trustees brought suit, asserting that they did not understand the documents they had signed and therefore did not know that they had signed loan documents or guaranteed repayment. The arbitrator in the underlying suit found that the loan agreement was not enforceable because of fraud in the execution or fraud in the inception regardless of whether the bank intended to defraud the trustees.

The bank's insurer denied coverage for the claim on the basis of the policy's fraud exclusion, which was modified by an endorsement to preclude coverage for "any Claim arising out of or in any way involving, in fact, any fraudulent, dishonest or criminal act or any willful violation of any civil or criminal statute, regulation or law by the Insured." The standard policy form required a final adjudication of fraud rather than the "in fact" standard found in the endorsement. The bank filed suit against the insurer, contending that the exclusion could only apply where the alleged fraud was committed with wrongful intent and that the exclusion was unclear and deceptive.

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Prior Knowledge Exclusion Bars Coverage Where Law Firm's Mistake Allowed a Seller to Void Client's Deal

Applying Indiana law, the United States Court of Appeals for the Seventh Circuit has held that no coverage was available for a law firm that failed to notify its malpractice insurer of its mistake in purchasing a drug store on behalf of its client, where the seller rescinded its offer and filed a related lawsuit against the firm before the policy period. *Koransky, Bouwer & Poracky, P.C. v. The Bar Plan Mutual Ins. Co*., 2013 WL 1296724 (7th Cir. Apr. 2, 2013). The court held that the firm reasonably knew or should have known that the mistake would lead to a claim, implicating the policy's "prior knowledge exclusion."

The firm's client entered negotiations to buy four drug stores from a seller. On the fourth transaction, the seller executed a sales contract and sent it to the firm, whose client executed it. The insured firm misfiled the contract, however, and did not send it to the seller. The seller decided to rescind the offer and so notified the insured firm. An attorney at the insured firm immediately emailed the seller's counsel to request that the seller complete the transaction, apologizing and stating the "whole situation is my fault." A few weeks later, the seller filed a lawsuit in Alabama, where the property was located, seeking a declaration that no contract had been formed.

During the same time period, the firm was renewing its claims-made malpractice policy. In the application, the firm stated that neither it nor any firm attorney or employee had "knowledge of any incident, circumstance, act or omission, which may give rise to a claim not previously reported." Based on the application, the policy was issued. An exclusion precluded coverage for unreported actions or omissions predating the policy period where, before the effective date, the firm "knew, or should reasonably have known, of any circumstance, act or omission that might reasonably be expected to be the basis of that Claim." After the policy incepted, the firm's client sent a formal notice of a malpractice claim to the firm, which the firm forwarded to the insurer, which denied coverage.

The Seventh Circuit held that the policy's "prior knowledge" exclusion barred coverage because the firm had knowledge of an act or omission that reasonably could lead to a claim when it learned that the seller was refusing to complete a negotiated sale to its client due to the mistake of the firm's attorney. Moreover, the court held, the filing of a lawsuit by the seller informed the firm "beyond doubt" that the seller had no intention of honoring its agreement and that the firm's failure to deliver the contract could result in a malpractice claim. The court rejected the firm's argument that it did not know the deal was truly doomed because it had assurances that the Alabama court would not exercise jurisdiction over the suit or because other counsel informed the firm that the sales contract was enforceable notwithstanding the lack of delivery. According to the court, whether the deal was ultimately enforced was irrelevant to the question whether the firm had reason to believe their acts or omissions *may* result in a claim.

Under Indiana law, the court determined, prejudice is irrelevant to notice under a claims-made professional liability policy.

In addition, the court rejected the firm's argument that the insurer was not prejudiced by its failure to provide timely notice. Under Indiana law, the court determined, prejudice is irrelevant to notice under a claims-made professional liability policy. ■

Allegations of Misleading Statements Regarding Scope of Coverage Not Sufficient to Support Insureds' Fraud Claim *continued from page 2*

by the FDIC. The insurer moved to dismiss the directors' and officers' complaint.

The court held that the complaint adequately alleged that the insurer had advised the bank that the new policy would afford broader coverage than the original policy, and that the bank had reasonably relied on this assurance in agreeing to purchase the replacement policy. Nevertheless, the court stated, a fraud claim requires pleading with particularity as to the names of persons who allegedly made fraudulent misrepresentations and the details of those statements. Finding that the directors and officers had failed to plead such details, the court dismissed the fraud claim with leave to amend.

The directors and officers also asserted a claim against the insurer for punitive damages based on the insurer's denial of coverage without reasonable basis and without conducting a reasonable investigation. The insurer sought dismissal of this claim based on the failure of the insureds to plead malice, oppression or fraud. The court agreed with the insurer, finding that the directors and officers had not alleged misconduct on the part of the insurer to support a claim for punitive damages, and thus the court dismissed the claim. ■

Controlling Shareholder's Bankruptcy Does Not Render Entity Insolvent; Fraud Claim Uninsurable as a Matter of Law *continued from page 3*

insolvent. In so holding, the court noted that the reverse-piercing theory had been applied only where the insolvent shareholder owned 100% of the entity's stock and there was extensive comingling of personal and corporate property. The court held that the "more fundamental" reason the policyholder's argument failed was that, if the CEO were treated as legally indistinguishable from the entity, Side A coverage would not exist because such coverage is available only for officers and shareholders who could not be indemnified by the entity.

The court then held that coverage for the fraudulent inducement claim was not barred by the policy's contractual-liability exclusion, which excluded coverage for "Loss . . . arising from . . . any liability under any contract or agreement . . .." The court noted that the exclusion applied only to loss that would not exist but for contractual *liability*, distinguishing situations in which the loss arises out of a contractual relationship. Here, although the investment at issue was the subject of a contract and there would have been no investment to recover absent the existence of the contract, the court held that the exclusion did not apply because the claim for fraudulent inducement would have existed even if the policyholder had fulfilled all of its obligations under the contract.

Finally, the court held that the underlying claim was uninsurable as a matter of Minnesota law, rejecting the claimant's argument that the underlying causes of action (conversion, breach of fiduciary duties, and violations of the Minnesota Securities Act) could have arisen from either intentional or unintentional wrongdoing. The court looked beyond the complaint's labels and determined that the substance of the underlying claim was that the CEO intentionally lied to induce the investment. The court noted that the concept of uninsurability under Minnesota law is "largely . . . driven" by concerns regarding moral hazard, and held the loss here uninsurable because "if someone in [the CEO's] position could foist the consequences of his behavior onto his insurer, he would have little incentive to be truthful." ■

Bond Exclusion and Insured vs. Insured Exclusion Bar Coverage for Claims Against Property Management Company *continued from page 1*

The insured, a property management firm, was named as a defendant in a California superior court action brought by a community association alleging that the property manager negligently failed to secure extensions of two surety bonds that were issued in connection with construction work performed on property owned by the association. The insured tendered the claim to its insurer under both a professional liability policy issued to the property manager and a professional liability policy issued to the association. The insurer denied coverage under the property manager policy on the ground that, among other things, the policy contained a bond exclusion that barred coverage for any claim "based upon, directly or indirectly arising out of, or in any way involving the failure to effect or maintain any insurance or bond, or to any failure to cover certain perils or to purchase an adequate amount or type of insurance." The insurer denied coverage under the association policy on the ground that the association policy contained two insured vs. insured exclusions that barred coverage for claims brought by or derivatively on behalf of the association. Notwithstanding the insurer's position that neither policy afforded coverage for the association's claim, the insurer contributed to the settlement of the underlying action on the property manager's behalf subject to a full reservation of rights, including an express reservation of the right of recoupment.

After the insured instituted a coverage action, the court granted summary judgment to the insurer under both policies. With regard to the bond exclusion, the court held that the exclusion unambiguously barred coverage for loss in connection with "any claim" that "in any way involv[ed] the failure to effect or maintain any insurance or bond" regardless of the theory of liability alleged by the underlying claimant. The court rejected the property manager's attempts to limit the broad language of the exclusion based on the property manager's alleged, subjective intent or a narrower construction of the exclusion that was inconsistent with its plain language. With regard to the insured vs. insured exclusions, the property manager did not dispute that they applied, but argued that the insurer had waived or forfeited the right to rely upon them when it defended the association's former directors against a cross-complaint brought by the property manager. The court rejected this argument, however, reasoning that the insured vs. insured exclusions did not bar coverage for the property manager's cross-complaint against the directors because the cross-complaint was not brought by or derivatively on behalf of the association. Noting that the insurer had contributed to the settlement of the underlying action subject to a full reservation of rights and that the property manager did not dispute the insurer's right to recoupment, the court ordered the property manager to reimburse the insurer for the amount that it had contributed to the settlement of the underlying action. ■

Court of Appeals Affirms That "In Fact" Requirement Was Triggered By Jury's Guilty Verdict *continued from page 4*

The court further held that the insurer could recoup the defense costs previously advanced, rejecting the insured's argument that the carrier was obligated to advance *all* defense costs incurred prior to the jury's verdict and *then* seek reimbursement on the basis that the dishonesty and personal profit exclusions barred coverage. Noting that this was not a case where the carrier had "dragged its feet before advancing costs," the court held that forcing the carrier to pay out amounts for which it could immediately seek recoupment was not appropriate either under the terms of the policy or as a practical matter. ■

"Based Upon, Arising From, or In Consequence Of" Language in Exclusion Requires Causal Connection, Not Proximate Causation *continued from page 1*

owner terminated the lease and identified another company to take over the franchise and operate the restaurant. That company eventually shut down its operation of the restaurant, however, when the bank refused to release its liens.

The property owner filed suit against the bank and its officers, seeking a declaratory judgment that the liens were fraudulent, and asserting various state law claims. Those claims were premised on allegations that the bank and its officers improperly placed fraudulent liens on the owner's property and that they refused to release those liens unless they were paid a certain sum of money. The bank tendered the suit to its D&O insurer, which determined that its policy did not afford coverage.

In a coverage action that followed, the insurer argued that there was no coverage for the property owner's claims because the policy excluded claims "based upon, arising from, or in consequence of the [insured's] performing or failure to perform . . . Lending Services." The bank took the position that the exclusion did not apply because the underlying suit involved damages caused by the bank's intentional failure to remove the liens, which would not constitute "Lending Services," and not from its recording of them, which would.

The court rejected the bank's argument that "the alleged intentional tort . . . of refusing to release the [l]iens [was] an independent intervening cause," concluding instead that words such as "arising out of" were "ordinarily understood to mean 'originating from,' 'having its origin in,' 'growing out of' or 'flowing from.'" The court reasoned that the policy language required that there be "some causal connection" between the Lending Services and the injuries suffered, but "not . . . proximate cause in the legal sense." The court found that there was "clearly" a causal connection between the bank's Lending Services and the property owner's alleged damages from the bank's failure to release the liens. Accordingly, the court concluded that the Lending Services exclusion barred coverage for the property owner's claims. ■

Claimant May Use Connecticut Direct Action Statute to Sue Carrier After Compromising Claim With Policyholder *continued from page 3*

the settlement with the policyholder and the claimant's release of the policyholder meant that no final judgment remained unsatisfied.

The court denied the carrier's motion. It reasoned that the Connecticut Supreme Court had by implication approved of a claimant's use of the direct action statute after compromising a claim with a policyholder. The court also cited a Connecticut lower court's allowance of such a claim. The district court held that a stipulated judgment may form the basis of an action under Connecticut's direct action statute. The court observed, however, that the carrier could assert any appropriate coverage defenses. ■

Fraud Exclusion Bars Coverage for Suit Against Bank Regarding Life Insurance Premium Loans

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The court granted summary judgment to the insurer, finding that the fraud exclusion barred coverage for the claim. The court held that the "determinative question . . . was whether it was the mutual intention of the parties, and whether the Bank reasonably expected, to execute a fraud exclusion that would be triggered by findings such as those in the Arbitrator's Award." The court found that a layperson would interpret the words of the exclusion as encompassing as wide a range of acts as possible, noting in particular the phrase "in any way involving." The court also considered that the endorsement had removed any requirement for a final judgment or adjudication, which further increased the ways in which fraudulent acts could trigger the exclusion. Although the court applied the "layperson" standard, it observed that the bank was a sophisticated party that would reasonably expect the exclusion language to cover the different varieties of fraud under California law.

The court additionally found that the exclusion was sufficiently plain and clear, that it would attract a reader's attention and that it was not misleading. The court noted that the policy explained "endorsements," placed the fraud exclusion endorsement on its own page with a bold header, and clearly indicated that the policy language was "deleted and replaced" with the endorsement language.

The bank also sought coverage for the defense costs it had incurred as a result of several other claims. Because the bank had expended some costs in pursuing its own claims against the loan borrowers, the insurer had informed the bank that it was allocating only 20% of the costs to covered loss based on the relative legal exposure of the bank. The insurer also requested a determination from the court that it was not liable for costs incurred before the bank tendered the claims.

The court held that the bank was not entitled to recover the defense costs incurred before it gave notice of the claims to the insurer. The court looked to the policy language stating that the "Insured shall not incur Defense Costs . . . without the Insurer's prior written consent." However, the court declined to grant summary judgment on the issue of how the defense costs should be allocated—or the bank's related claim that the insurer had breached the covenant of good faith and fair dealing by allocating only 20% of the costs to covered loss—because there was insufficient evidence on the record to establish whether the insurer had correctly determined what portion of the legal expenses were not covered or that the coverage decision was reasonable. ■

> The court held that the bank was not entitled to recover the defense costs incurred before it gave notice of the claims to the insurer.

Malpractice Actions by Multiple Clients for Separate Services Do Not Constitute Related Claims

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The court held that the four lawsuits were not the "same and/or related." Rejecting the trial court's reasoning that the suits were related because the clients' relationship with the lawyer and the financial services representatives originated with the mass marketing solicitation, the court held that the lawyer provided separate services for separate clients because different financial representatives allegedly committed fraud and the amount sought from the lawyer by each client was different. ■

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