E&O Insurance Coverage Practice Regarding Lawyers, Accountants and Other Professionals: Additional Cases

- Obtained Fifth Circuit reversal of adverse district court decision finding coverage under a lawyers professional liability policy. The appellate court concluded that claim against insured lawyer for restitution of funds paid as part of a settlement fraudulently induced by his client did not trigger coverage because it did not “arise out of an act or omission . . . in [the lawyer’s] rendering of or failure to render legal services.” *Edwards v. Cont’l Cas. Co.*, 841 F.3d. 360 (5th Cir. Nov. 2, 2016).

- Obtained judgment on the pleadings for professional liability insurer that policy did not afford coverage for construction defect claim because subcontractor, which had agreed to make repairs demanded by general contractor, was not “legally obligated to pay” the amounts for which it sought coverage. The court also found that the insured’s costs of remediation, which it agreed to incur without the insurer’s written consent, did not satisfy the policy’s definition of “damages.” *Wyndham Const., LLC v. Columbia Cas. Ins. Co.*, 208 F.Supp. 3d 599 (D.N.J. Sept. 21, 2016).

- Obtained summary judgment for insurer that “premium finance” and “premium payment guaranty” exclusions in life insurance agent’s E&O policy barred coverage for a multi-million dollar claim against a life insurance agent; defeated insured’s motions to stay or dismiss the coverage action while the underlying claim was pending and to allow discovery on the coverage issues; and obtained judgment requiring the insured to repay all defense costs paid by the insurer. *Columbia Cas. Co. v. Abdou*, No. 15-cv-00080-LAB-KSC, 2015 WL 9244305 (S.D. Ca. Dec. 16, 2015), as amended 2016 WL 4417711 (S.D. Ca. Aug. 18, 2016).

- Obtained summary judgment for insurer that it had no duty to defend or indemnify an insured attorney for fees and costs incurred in seeking reversal of a sanctions award for deposition misconduct because the sanctions order did not constitute a “claim” and the sanctions sought were not covered “damages.” *Reich, Album & Plunkett, LLC v. Cont’l Cas. Co.*, No. 755-822, Division “M” (July 19, 2016).

- Obtained declaratory judgment determining that a D&O policy did not provide coverage for a 2010 lawsuit against the insured and certain of its subsidiaries/officers because the 2010 lawsuit and an earlier filed 2006 lawsuit involved “Interrelated Wrongful Acts” and therefore were properly treated as a single claim that was first made in 2006, years before the inception of the On appeal, the Fourth Circuit affirmed, holding that the policy’s definition of “Interrelated Wrongful Acts” was both expansive and unambiguous and that the two lawsuits were both logically and causally linked by “a multitude of common facts”; “a common transaction”; and “common circumstances.” *W.C. & A.N. Miller Dev. Co. v. Cont’l Cas. Co.*, No. GJH-14-00425, 2014 WL 5812316 (D. Md. Nov. 7, 2014), aff’d, 814 F.3d 171 (4th Cir. 2016).

- Obtained summary judgment for insurer, holding that business enterprise, trust and investment advice exclusions in a lawyer’s professional liability policy barred coverage for claim against insured attorney


- Prevailed in the trial court on motion to dismiss complaint seeking coverage under accountants professional liability policy on grounds that unambiguous tax shelter exclusion precludes coverage for claims that the insured implemented investment strategies constituting illegal tax avoidance schemes. On appeal, obtained affirmance on grounds that the exclusion with its broad prefatory language for claims “based on, arising out of or in connection with the design, recommendation, referral, sale or promotion” of illegal tax shelters barred any potential coverage for the claims and that the concurrent causation doctrine had no application because all of the insured’s actions entailed the recommendation of illegal tax shelters. *Financial Strategy Grp., PLC v. Cont’l Cas. Co.*, No. 14-2154, 2014 WL 11515524 (W.D. Tenn. Sept. 23, 2014), *aff’d*, 620 Fed.App’x. 422 (6th Cir. 2015).

- Prevailed on a summary judgment motion in the trial court, obtaining a published decision holding, among other things, that a bond exclusion and insured vs. insured exclusion barred coverage for a claim brought by a homeowner’s association against its property management company, where the association alleged that the property manager had negligently failed to secure extensions of surety bonds covering construction work on the association’s property; the trial court also held that the insurer was entitled to recoupment of sums paid to settle the underlying action subject to a reservation of rights. On appeal, the Ninth Circuit affirmed in an unpublished memorandum opinion, holding that the bond exclusion unambiguously barred coverage, without reaching the other coverage issues and leaving undisturbed the trial court’s judgment determining that the insurer was entitled to repayment of amounts it paid to settle the underlying case. *VierraMoore, Inc. v. Cont’l Cas. Co.*, 940 F. Supp. 2d 1270 (E.D. Cal. 2013), *aff’d*, 607 F. App’x 749 (9th Cir. 2015).

- Obtained summary judgment determining that insurer had no duty to defend or indemnify the insured under an accountants professional liability policy for a lawsuit alleging that insured breached agreement to repay loans from client because that activity did not constitute a “professional service” and because the policy’s personal profit exclusion barred coverage for suit seeking return of funds from insured to which he was not legally entitled. *Navigators Ins. Co. v. Hamlin*, 6:14-cv-00196-MC, 2015 WL 1084825 (D. Or. Mar. 10, 2015).

- Prevailed on motion to dismiss claim under lawyers professional liability policy on grounds that the allegations against the insured, including allegations of an ongoing conspiracy, pertaining solely to acts before the policy’s retroactive date, and therefore were barred from coverage. *Wesco Ins. Co. v. Regas*, 1:14-cv-00716, 2015 WL 500702 (N.D. Ill. Feb. 3, 2015).
Retained as appellate counsel following an adverse decision in the district court and obtained Eighth Circuit reversal of that decision; the court of appeals held that a lawsuit by four siblings against an investment advisor alleged “Interrelated Wrongful Acts” and therefore constituted a single claim because each sibling alleged that the adviser provided unsuitable investment advice and breached her fiduciary duties to each sibling in the same manner. *Kilcher v. Cont’l Cas. Co.*, 747 F.3d 983 (8th Cir. 2014).


Obtained summary judgment holding that no coverage existed under any of a series of consecutive claims-made and reported policies issued to a law firm for a claim that was first made during one policy period but first reported during a later period, and rejecting the claimants’ argument that existing 11th Circuit precedent permitted an insured to report a claim at any time during a period of continuous coverage provided by the same insurer under the same policy number. *527 Orton LLC v. Cont’l Cas. Co.*, No. 13-61571, 2014 WL 11696697 (S.D. Fla. Sept. 22, 2014).


Obtained summary judgment dismissing lawsuit under directors and officers liability policy on grounds that the claim against the insured was first made before the policy period, the policy’s prior notice exclusion barred coverage, the amounts sought were not “loss” under Virginia law but instead a contractual obligation and pre-existing judicial obligation, notice was not given “as soon as practicable” as a matter of law, and the insured’s settlement offers without the insurer’s written consent contravened the unambiguous cooperation clause in the policy. *Lessard v. Cont’l Cas. Co.*, No. 1:14-cv-63, 2014 WL 4162006 (E.D. Va. Aug. 19, 2014).

Obtained favorable summary judgment ruling that an exclusion in an employment practices liability policy for any alleged violation of laws “governing wage, hour and payroll policies” encompassed all of the California Labor Code claims asserted against the insured in the underlying class action litigation, including a claim for failure to reimburse business expenses, and that none of the relief sought in the underlying action qualified as “Loss.” The court also held that the insurer gave adequate notice of change in policy terms and, regardless of its ruling on the merits of the coverage dispute, the “genuine dispute doctrine” applied to bar the insured’s bad faith claim. *M Bar C Constr. Inc. v. Cont’l Cas. Co., et al.*, No. 2012-37-00088258-CU-IC-CTL (Cal. Super. Ct., San Diego Cty. Jan. 3, 2014).

Prevailed on appeal of trial court’s order dismissing a declaratory judgment action brought by an injured party against a lawyer’s professional liability insurer and obtained favorable ruling that, under New Mexico law, claimants cannot bring direct actions against insurers or join insurers as defendants in

- Obtained a decision that the insured from an architects and engineers professional liability policy had failed to meet the unambiguous requirement that it obtain prior written consent to receive reimbursement of claims expenses. The court noted that the interpretive principles calling for insurance policies to be interpreted against the insurer are less applicable where the policyholder is a large sophisticated business. *Paulus Sokolowski & Sartor, LLC v. Cont’l Cas. Co.*, No. 12-7172, 2013 WL 11084770 (D.N.J. Aug. 30, 2013).

- Prevailed on motion for judgment on the pleadings, obtaining a favorable ruling with respect to a matter of first impression under Louisiana law that a legal malpractice policy did not respond to what the court characterized as a fee dispute between the insured lawyer and his former client, both because no "legal services" were alleged and because the relief sought did not constitute “damages.” *Pias v. Cont’l Cas. Ins. Co.*, No. 2:13-CV-00182-PM-KK, 2013 WL 4012709 (W.D. La. Aug. 6, 2013).

- Obtained summary judgment that no coverage was available for a claim made against the insured law firm under either of two consecutive claims made and reported policies because the claim was not both first made and reported during either policy. *Clauson & Atwood v. Prof’ls Direct Ins. Co.*, No. 12-cv-199-JL, 2013 WL 1966058 (D.N.H. May 13, 2013).

- Obtained summary judgment dismissing a lawsuit against insurer under a lawyers professional liability policy, and an affirmation of the judgment by the U.S. Court of Appeals for the Eleventh Circuit, on the grounds that a pre-lawsuit dispute between the claimant and the insureds about the repayment of money was a claim first made prior to the inception of the applicable claims made and reported policy, and that subsequent claims of legal malpractice in a lawsuit filed during the policy period were related claims as to the pre-lawsuit dispute and thus deemed to arise at the same time as the pre-lawsuit dispute. *Simpson & Creasy, P.C. v. Cont’l Cas. Co.*, 770 F. Supp. 2d 1351 (S.D. Ga. 2011), aff’d, 453 F. App’x 868 (11th Cir. 2011) and No. CV409–202, 2012 WL 5389818 (S.D. Ga. Oct. 31, 2012).

- Obtained summary judgment in favor of the insurer, and an affirmation by the U.S. Court of Appeals for the Fifth Circuit, determining that under a lawyers professional liability policy giving the insurer the right and duty to defend, the insured was not entitled to select independent defense counsel where the grounds on which the insurer reserved rights did not create a conflict between the insurer and the insured as to how the underlying case would be defended, and thus the insurer had no obligation to pay for counsel hired by the insured. *Coats, Rose, Yale, Ryman & Lee, P.C. v. Navigators Specialty Ins. Co.*, 830 F. Supp. 2d 216 (N.D. Tex. 2011), aff’d, 489 F. App’x 769 (5th Cir. 2012).

- Obtained summary judgment for an insurer on the grounds that policy exclusion for claims based on or arising out of the loss or misappropriation of assets within an insured’s control barred coverage for six lawsuits that arose out of the insured law firm’s participation in an alleged fraudulent investment scheme. *Navigators Ins. Co. v. Baylor & Jackson, PLLC*, 888 F. Supp. 2d. 55 (D.D.C. 2012).

- Retained as appellate counsel and obtained a Fourth Circuit holding that an accountants professional liability policy's innocent insured provision did not save coverage where the policy's prior knowledge
condition to coverage had not been satisfied. *Cont’l Cas. Co. v. Battery Wealth*, 474 F. App’x 898 (4th Cir. 2012).

- Represented an insurance carrier in coverage litigation regarding a lawyers professional liability policy in the trial court and on appeal to the Sixth Circuit, obtaining a published decision from the Sixth Circuit holding that an insured attorney's failure to disclose on the insurance application circumstances surrounding his knowledge of circumstances that could result in a claim and his knowledge of pending disciplinary proceedings constituted material misrepresentations justifying rescission of the policy, and that, alternatively, the policy's dishonesty exclusion barred coverage for the ensuing malpractice action. The Sixth Circuit also held that materiality could be determined as a matter of law on summary judgment. *Cont’l Cas. Co. v. Law Offices of Melbourne Mills, Jr., PLLC*, 5:06-272-JMH, 2010 WL 996472 (E.D. Ky. Mar. 16, 2010), aff’d, 676 F.3d 534 (6th Cir. 2012).


- Obtained summary judgment in favor of an insurer on grounds that the financial products exclusion in a professional liability policy barred coverage because the claim against the insured accounting firm concerned preparation of allegedly fraudulent workers compensation insurance applications and any services that might be considered “professional services” under the policy, such as payroll records, were rendered in connection with insurance applications and not in connection with “financial products” as defined by the policy. *Accounting Servs., Inc. v. Cont’l Cas. Co.*, No. CCB-11-CV-00145, 2011 WL 5853906 (D. Md. Nov. 21, 2011).

- Obtained summary judgment in favor of the insurer dismissing breach of contract and bad faith claims, and an affirmance by the U.S. Court of Appeals for the Eleventh Circuit, in a case involving whether an accountants professional liability policy’s innocent insured provision saved coverage where the policy’s prior knowledge condition to coverage had not been satisfied. *Prof’l Asset Strategies, et al. v. Cont’l Cas. Co.*, No. 2:09-cv-1238-AKK, 2010 WL 4284991 (N.D. Ala. Aug. 27, 2010), aff’d, 447 F. App’x 97 (11th Cir. 2011).

- Obtained summary judgment in favor of the insurer, and defeated bad faith claim asserted by insured's judgment creditor, on grounds that insured failed to satisfy the policy's unambiguous requirements that a claim be first made and reported to the insurer in writing during the policy period or extended reporting period. *Boys v. Cont’l Cas. Co.*, 808 F. Supp. 2d 410 (D. Conn. 2011).

- Obtained summary judgment in favor of the insurer, and defeated insured's bad faith claim, on grounds that insured failed to satisfy the prior knowledge condition because insured law firm had knowledge of circumstances that might reasonably be expected to be the basis of a claim before the policy incepted. *McKeen, et al., v. Cont’l Cas. Co.*, 2:10-cv-10624, 2011 WL 3839803 (E.D. Mich. Aug. 30, 2011).
• Obtained summary judgment in the trial court, and an affirmance on appeal, for an insurer on the grounds that 12 claims arising out of a common embezzlement scheme allegedly perpetrated by an employee of the insured law firm arose out of related acts or omissions and therefore were related claims, subject to the policy's single per-claim limit of liability. *Cont'l Cas. Co. v. Howard Hoffman & Assocs.*, 08CH25568 (Ill. Cir. Ct., Cook County, Mar. 10, 2010), **affirmed**, 955 N.E.2d 151 (Ill. App. Ct. 2011).

• Obtained summary judgment for an insurer on the grounds that the prior knowledge provision in a lawyer’s professional liability policy was not satisfied because prior to the policy’s inception the insured law firm had knowledge of circumstances that might reasonably be expected to be the basis of a claim. *Capitol Specialty Ins. Corp. v. Sanford Wittels & Heisler, LLP*, 793 F. Supp. 2d 399 (D.D.C. 2011).

• Obtained judgment on the pleadings for an insurer on the grounds that the prior knowledge provision in a lawyer’s professional liability policy was not satisfied because before the policy’s inception the insured lawyer had knowledge of circumstances that might reasonably be expected to be the basis of a claim and because the allegations in the underlying claim either indirectly resulted from or were a consequence of the insured’s business interest in a separate entity. *Darwin Nat’l Ass. Co. v. Hellyer, et al.*, 10 C 50224, 2011 WL 2259801 (N.D. Ill. June 7, 2011).

• Obtained summary judgment for an insurer on the grounds that the prior knowledge provision in an accountants professional liability policy was not satisfied because prior to the policy’s inception the insured accountants had knowledge of circumstances that might reasonably be expected to be the basis of a claim. *Cuthill & Eddy LLC v. Cont’l Cas. Co.*, 784 F. Supp. 2d 1331 (M.D. Fla. 2011).

• Obtained summary judgment in favor of an insurer on the grounds that the business enterprise exclusion in a lawyers professional liability policy barred coverage for a legal malpractice claim arising out the insured attorney’s ownership interest where the alleged malpractice began prior to, but continued after, the acceptance of that interest. *Corbello v. Moore, et. al.*, No. C-10-5357BHS, 2011 WL 1516327 (W.D. Wash. Apr. 20, 2011).

• Obtained summary judgment in favor of an insurer, which ruling was affirmed by the U.S. Court of Appeals for the Fourth Circuit, on the grounds that the accountants professional liability policy’s prior knowledge condition to coverage had not been satisfied and the policy’s innocent insured provision was inapplicable. *Bryan Bros., Inc. v. Cont’l Cas. Co.*, 704 F. Supp. 2d 537 (E.D. Va. 2010), **affirmed**, 660 F.3d 827 (4th Cir. 2011).

• Obtained partial summary judgment in favor of the insurer determining that, under both California law and as a question of first impression under Arizona law, an insurer may reserve the right to seek reimbursement of non-covered defense and indemnity amounts, absent bad faith and provided that insurer gives notice of its reservation of rights to the insured. *Phillips & Assocs., P.C. v. Navigators Ins. Co.*, 764 F. Supp. 2d 1174 (D. Ariz. 2011).

• Obtained summary judgment in favor of the insurer, and an affirmance by the U.S. Court of Appeals for the District of Columbia Circuit, on the grounds that the prior knowledge condition to coverage in a lawyers professional liability policy was not satisfied. *Ross v. Cont’l Cas. Co.*, 420 B.R. 43 (D.D.C. 2009), **affirmed**, 393 F. App’x 726 (D.C. Cir. 2010).

• Obtained a determination that there was no defense or indemnity coverage for a claim against an insured law firm because none of the relief sought constituted "damages," and that there was no supplementary coverage for a related disciplinary proceeding because no "legal services" were alleged. *Cont'l Cas. Co. v. Donald T. Bertucci, Ltd.*, 926 N.E.2d 833 (Ill. App. 2010).

• Prevailed at a bench trial in the Eastern District of Virginia obtaining a decision that an insurer was entitled to rescind three crime insurance policies, and obtained an affirmance by the U.S. Court of Appeals for the Fourth Circuit. *Koger Mgmt. Grp., Inc. v. Cont'l Cas. Co., et al.*, No. 1:08cv301 (LMB/JFA), 2009 WL 577597 (E.D. Va. Mar. 3, 2009), *affirmed*, 363 F. App’x 982 (4th Cir. 2010).