

**IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

TRICE, GEARY & MYERS, LLC;
KEVIN MYERS, CPA

Plaintiffs-Appellants,

v.

CAMICO MUTUAL INSURANCE
COMPANY,

Defendant-Appellee.

No. 10-1473

PETITION FOR REHEARING AND REHEARING EN BANC

Appellee CAMICO Mutual Insurance Company (“CAMICO” or “Appellee”) respectfully moves for reconsideration of the opinion of the Fourth Circuit in this action (“Panel Opinion”), and for reconsideration *en banc* of the Panel Opinion. The Panel Opinion reversed the trial court’s grant of summary judgment in favor of CAMICO on the issue of CAMICO’s duty to defend the underlying complaints in *Ruark v. Myers* (the “*Ruark* Wicomico Action”), *Insurance Alternatives Inc. v. Abesch, Myers* (the “*Insurance Alternatives* Third-Party Action” or the “*Ruark* Baltimore Action”)¹, and *TGM*, and *Caleb L. Fowler*,

¹ The *Ruark* Baltimore Action was originally brought by the *Ruark* plaintiffs against Insurance Alternatives and Hartford Life Insurance Company in a separate action from the *Ruark* Wicomico Action. The *Ruark* Baltimore Action defendants to the initial complaint then filed a third-party complaint against TGM for indemnity.

et al. v. Myers and TGM (the “*Fowler Action*”) (collectively, the “Underlying Complaints”). The Panel Opinion also granted Appellants Trice, Geary, and Myers, LLC, and Kevin E. Myers (“Appellants” or “TGM”) summary judgment on that same issue.

The Underlying Complaints all arose out of the establishment of defined-benefit plans purportedly under Section 412(i) of the Internal Revenue Code. Those “412(ii) Concept” plans were to be funded by life insurance policies issued by the Hartford. (See citations to Underlying Complaints in Response Brief of Appellee CAMICO Mutual Insurance Company (“Response Brief”) at pp. 5-9; 24-26.) As also noted in those complaints, TGM received a commission in connection with the sale of the Hartford policies which funded the defined benefit plan and the premiums for which were represented to be deductible. (See, e.g., the *Ruark Baltimore Action Third Party Complaint* at ¶¶ 1, 2 and 6-12 (J.A. 90-92.)) The Internal Revenue Service disallowed the deductions for the Policy premiums, the plan sponsors faced audit-related expenses, tax liabilities, and penalties, and sued. (*Id.*) The premise of liability against TGM was that it had recommended the flawed plan to its clients without disclosing that it was also receiving a commission on the sale of the insurance policy used to fund that transaction. (*Id.* at ¶ 20. (J.A.

94)).²

CAMICO denied coverage, defense or indemnity, in connection with the

² The *Ruark* Wicomo Complaint is also solely about the “412(i) Concept.” The Complaint alleges that “Myers recommended that [plaintiffs’ defined benefit plan] be wholly funded through a life insurance” and that “Myers further advised Plaintiffs that Baja DBP would qualify as a defined benefit plan under section 412(i) of the Internal Revenue Code (the ‘412(i) Concept’).” (J.A. 44 at ¶ 13.) The Complaint then describes in detail (J.A. 46-32, at ¶¶ 14-34) how the *Ruark* Wicomo plaintiffs relied on this advice, incorrectly declared deductions, and ultimately suffered “audit-related legal and accounting fees and expenses” as well as “significant tax liability” based on “the excessive premiums paid on the Baja Policy.” Meanwhile, the Complaint also alleged that “[u]nbeknownst to Plaintiffs, TGM and Myers received substantial commissions from the sale of the Baja Policy and the Baja Annuities” (J.A. 48 at ¶ 26), an allegation repeated specifically in both counts of the Complaint (J.A. 51 at ¶ 37, J.A. 54 at ¶ 48).

The *Ruark* Baltimore (first-party) Action is also solely about the “412(i) Concept.” The Complaint alleges that “Myers advised Plaintiffs that A&M DBP would qualify as a defined benefit plan under section 412(i) of the Internal Revenue Code (the ‘412(i) Concept’)” (J.A. 59 at ¶ 18), and that based on that ultimately incorrect advice and impermissible deductions, plaintiffs would suffer “audit-related fees and expenses” and “significant tax liability” (J.A. 64 at ¶38). Meanwhile, the *Ruark* Baltimore Complaint alleges that “[a]t all times herein, Myers ... was simultaneously acting as a licensed agent for Hartford [as well as a tax advisor], a fact that was not known by or disclosed to Ruark and Baja Holdings.” (J.A. 59 at ¶ 17; *see also* J.A. 61-80 at ¶¶ 27, 30, 36, 43, 53, 68, 91, 107, and 121.)

Finally, the *Fowler* Action complaint, brought by the same counsel representing Ruark, is also solely about the “412(i) Concept”: “Myers advised Plaintiffs that the A&M DBP would qualify as a defined benefit plan under section 412(i) of the Internal Revenue Code (the ‘412(i) Concept’).” (J.A. 101 at ¶ 14), and plaintiffs would suffer “audit-related legal and accounting fees and expenses” and “significant tax liability.” (J.A. 108 and ¶ 48; *see also* J.A. 104 ¶ 23, describing the “substantial commissions” received by TGM and Myers). None of the Underlying Complaints refer to any erroneous tax or accounting advice other than the advice to utilize or continue to utilize the “412(i) Concept” through plans sold by Hartford.

Underlying Complaints because it concluded that the claims arose out of TGM's alleged acts as an insurance agent or broker and were thus excluded under the Policy. The district court agreed with CAMICO and granted summary judgment. The Panel reversed.

CAMICO moves for reconsideration on two grounds.

First, the Panel Opinion mistakenly construed the term "arising out of" to be susceptible to various meanings. Based on that construction, the Panel then found initially that the Underlying Complaints were potentially covered because some of the claims in each of them were not only alleged to have arisen from TGM's acts as agents and brokers, but were also alleged to have arisen from rendering related "tax advice." However, since Maryland's highest court has stated that, in the insurance context, the phrase "arising out of" unambiguously means originating from, flowing from, or having a connection to, the Panel's analysis was contrary to well-established Maryland law. Whatever else each of the underlying claims may have arisen from, each was also alleged to have arisen out of acts of an insured—Mr. Myers—as a broker or agent. Each claim was thus barred from coverage by the insurance exclusion at issue.

Second, the Panel Opinion's analysis was mistaken in concluding that TGM's receipt of commissions for the sale of the Hartford Policies did not indicate that they were acting as agents or brokers for the placement of those policies.

I. THE TERM “ARISING OUT OF” IS NOT AMBIGUOUS IN THIS CONTEXT

The Panel Opinion failed to follow well-established law of the Maryland Court of Appeals in *N. Ass. Co. of America v. EDP Floors, Inc.*, 311 Md. 217, 533 A.2d 682 (1987), and *Mass Transit Admin. v. CSX Transport., Inc.*, 349 Md. 299, 708 A.2d 298 (1998), holding that the term “arising out of” should be interpreted according to its commonplace meaning, which is “originating from, growing out of, flowing from, or the like.” 311 Md. at 230 (quoting various cases from other jurisdictions and Webster’s Third New International Dictionary (1961)). It was on precisely such an interpretation of the phrase that CAMICO’s position was premised.

The Panel Opinion appears to have concluded that these decisions from Maryland’s highest court are inapposite because *EDP Floors* involved a “general liability policy” and *CSX Transportation* involved “the interpretation of an indemnification clause in a contract” (Op. at 16). Instead, the Panel Opinion relied on the decision of a Maryland intermediate appellate court in *Philadelphia Indem. Ins. Co. v. Md. Yacht Club*, 129 Md. App. 455, 469, 742 A.2d, 79, 86 (Md. App. 1999), to find that the term “arising out of” does not have a settled meaning, and ultimately ruled against CAMICO.

There is, however, nothing in *EDP Floors* that would limit its application to “general liability” insurance. Instead, the Maryland Court of Appeals reached its

decision in *EDP Floors* because “[t]he words ‘arising out of’ must be afforded their common understanding,” 311 Md. at 230 (citations omitted). Consequently, the phrase “arising out of” was unambiguous, and “[w]hen, as here, there is no ambiguity in the policy exclusion, the first principle of construction of insurance policies in Maryland requires that we apply the terms of the contract as written.” *Id.* at 231.

Moreover, the Panel Opinion appears to have misconstrued the holding of *Maryland Yacht Club*. The language quoted in the Panel Opinion first indicates that “arising out of” cannot be “construed in a vacuum” (Op. at 16 (quoting 129 Md. App. at 469)). The intermediate appellate court did not, however, find that the term “arising out of” was ambiguous. Indeed, had it done so, the decision would be in direct conflict with *EDP Floors*, a decision from Maryland’s highest court, the Maryland Court of Appeals. Instead, the *Maryland Yacht Club* court found that an exclusion which barred any claim “arising out of” bodily injury did not encompass a claim for wrongful discharge by an employee who alleged that he was terminated by the insured in retaliation for filing a workers’ compensation claim. *See* 129 Md. App. at 464 (“[t]he loss for which Bock sought recovery in his wrongful discharge action against [the Club] was not the personal injury that he sustained to his leg.... Rather, the loss for which Bock was seeking damages was the loss of his job” (quoting trial court opinion with approval)). The *Maryland*

Yacht Club court simply noted there was not a sufficient relationship between any bodily injury giving rise to the workers' compensation claim and the wrongful discharge claim to find a necessary causal nexus. *Id.* at 479 (“[s]imply put, the nexus between Bock’s wrongful discharge action and his bodily injury claim is too attenuated to permit the insurer to invoke the bodily injury exclusion”). Thus, even were an opinion from the intermediate appellate court decision controlling, *Maryland Yacht Club* does nothing to counsel against a straightforward application of *EDP Floors* here.

Given the holding of *EDP Floors*, the CAMICO Policy excludes coverage for any underlying claim that “originat[es] from, grow[s] out of, flow[s] from, or the like” from TGM’s acts as an insurance or broker or agent, “regardless of whether the injury may also be said to have arisen out of other causes.” *EDP Floors*, 311 Md. at 230. The claims against TGM plainly arose out of its role in the sale of the insurance policies, even if the claims also arose out of TGM’s recommendation that their clients set up the defined-benefit plan in the first instance.

Without the Panel Opinion’s first error, the coverage question before the Fourth Circuit is straightforward, and involves whether the Underlying Complaints allege that the underlying injuries suffered by the claimants “originat[ed] from, gr[ew] out of, flow[ed] from, or the like” from the insurer’s acts as an insurance or

broker or agent.” *See Sheets v. Brethren Mut. Ins. Co.*, 342 Md. 634, 638-639, 679 A.2d 540, 542 (1996) (for purposes of coverage, courts “must assume the facts in the [underlying] complaint are true and examine whether the [trial] court was legally correct in holding that [the insurer] did not have a duty to defend”). As noted above, each of the Underlying Complaints “arose out of” TGM’s acts as agents or brokers for which they received a commission.

The Panel Opinion, however, indicated that none of the Underlying Complaints fell within the insurance exclusion because of its narrow construction of the “arising out of” language in the Policy. (*See Op.* at 21-22 (noting that the allegation in one of the Underlying Complaints that Kevin Myers was “a Hartford Insurance agent” did not affect coverage because “all of the underlying actions asserted that Myers and TGM acted as accountants and tax advisers”).

One consequence of this aspect of the Panel Opinion is that it renders the insurance exclusion to be mere surplusage. Under that analysis, the insurance exclusion would never appear to serve any function. An exclusion applies to an otherwise-covered claim to remove it from coverage. However, in order to be otherwise-covered under the Accountants Professional Liability Insurance Policy, some professional accounting services must be alleged in addition to the acts as an agent or broker. However, under the Panel’s ruling, the combination of any actual accounting service with the acts as agent would defeat the exclusion. The claims

would not be within coverage in the first instance unless there were accounting services at issue; but such accounting services would defeat the application of the insurance exclusion. As a result, that aspect of the Panel Opinion renders the exclusion a nullity. This was error and should be reconsidered.

II. ALL OF THE CLAIMS AT ISSUE AROSE OUT OF THE APPELLANTS' ACTS AS INSURANCE AGENTS OR BROKERS

The other principal error made in the Panel Opinion was the suggestion that the Underlying Complaints' reference to "commissions" received by the Appellants were insufficient to suggest "agent or broker" status, and that the use of the specific term "agent" or "broker" was required to implicate the exclusion. For instance, the Panel Opinion states that:

The Ruark Action alleged that TGM and Myers received professional fees in connection with the accounting and tax advice they provided but failed to disclose they would receive substantial commissions on the life insurance sales. However, the Ruark Action did not identify TGM or Myers as agents or brokers, and there were no allegations that plaintiffs relied on them to perform any duties on their behalf as insurance agents or brokers.

(Op. at 19-20.) The Panel Opinion elaborated that "although CAMICO Insurance and the district court noted that Myers and TGM received a commission on the insurance sales, this fact does not show a principal-agent relationship or employment as a broker." (*Id.* at 22.)

As noted by both the Trial Court (at J.A. 185-86 n.21) and the Appellee's

Brief (at 24-25 n.8)³, there is no other common-sense explanation of the allegations that the Appellants' received commissions other than that Myers and TGM acted as brokers or agents in connection with the sale of the funding insurance policies. The only relevant definition of "commission" found in Black's

³ Appellee's footnote stated:

TGM and Myers seek to suggest that certain allegations in the underlying complaints—namely, that they received substantial commissions from the sale of the Hartford life insurance policies—did not mean that they were Hartford's agents in connection with those sales. (See Appellants Br. at 18 and 29.) That argument was, however, not pressed below, and for good reason: a necessary corollary of receiving a commission for the sale of a life insurance policy is that the commission's recipient was the agent of the seller. *E.g.*, *Dunn v. GE Group Life Assur. Co.*, 289 Fed. Appx. 778, 782 (5th Cir. Tex. 2008):

The term "commission" is defined as "[a] fee paid to an agent or employee for a particular transaction . . . [,]" BLACK'S LAW DICTIONARY 286 (8th ed. 2004) (emphasis added), or "a fee paid to an agent or employee for transacting a piece of business or performing a service . . . [,]" WEBSTER'S THIRD NEW INT'L DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 457 (1993) (emphasis added).

See also, e.g., *Wolfe v. Advance Ins. Co.*, 2009 U.S. Dist. LEXIS 121016 (D.Kan. July 16, 2009) ("A commission is a 'fee or percentage allowed to a sales representative or an agent for services rendered.' THE AMERICAN HERITAGE DICTIONARY (3d ed. 1992)."); *Estes v. Meridian One Corp.*, 77 F. Supp. 2d 722, 726 (E.D.Va. 1999) ("Commission is defined as a 'fee or percentage allowed to a salesman or agent for his services.' [THE AMERICAN HERITAGE DICTIONARY 301 (2d college ed. 1991) at 297.]")."

Law Dictionary is “[a] fee paid to an agent or employee for a particular transaction, usu. as a percentage of the money received from the transaction <a real-estate agent’s commission>.” BLACK’S LAW DICTIONARY 287 (8th ed. 2004).

While the Panel Opinion sought to define the term “agent” with reference to Maryland general common law, the terms “agent” and “broker” in the insurance context have different meanings as reflected in *Sadler v. Loomis Co.*, 139 Md. App. 374, 395, 776 A.2d 25, 37, (2001). In *Sadler*, the Court of Special Appeals explained that the Maryland Code of Insurance then defined the term as “a person that, for compensation, solicits, procures, negotiates, or makes insurance contracts or the renewal or continuance of these insurance contracts for persons issuing the insurance contracts.” See also *Valley Forge Life Ins. Co. v. Liebowitz*, 2005 WL 600330, at *5 (D. Md. Mar. 15, 2005) (“Thus, an ‘insurance agent’ is not necessarily an agent in the legal sense.”).

The refusal to recognize the agency inherent in the use of the term “commission,” and to instead hold that the exclusion does not apply absent explicit use of the term “agent” or “broker,” would also be contrary to longstanding rules of insurance contract construction. See *Travelers Indem. Co. of America v. Coleman Automotive of Columbia, LLC*, 236 F. Supp. 2d 513, 516 (D. Md. 2002) (“[i]t is the substance of the underlying claim, not its label, that controls in duty-to-defend and coverage cases”) (citation omitted); *Titan Holdings Syndicate, Inc. v. City of*

Keene, N.H., 898 F.2d 265, 271 (1st Cir. 1990) (“In deciding the scope of a liability policy’s coverage, a court must compare the policy language with the facts pled in the underlying suit to see if the claim falls within the express terms of the policy; the legal nomenclature the plaintiff uses to frame the suit is relatively unimportant.”).

Beneath the Panel Opinion may be a concern that, despite the allegations regarding commissions received, the Appellants may be held liable in the underlying action even though they were not in fact brokers or agents. However, that was never a real possibility; if Myers had not in fact been acting as an agent or broker he or TGM simply could have supplied information so indicating. Under the Maryland Court of Appeals’ decision in *Chantel Associates v. Mount Vernon Fire Ins. Co.*, 338 Md. 131, 141-42, 656 A.2d 779, 784 (1995), an insured “may establish a potentiality of coverage under an insurance policy through the use of extrinsic evidence so long as the insured demonstrates that there is a reasonable potential that the issue triggering coverage will be generated at trial” (quoting *Aetna v. Cochran*, 337 Md. 98, 651 A.2d 859 (1995)). Here and below, however, the Appellants have not attempted to present extrinsic evidence suggesting that there will be any real dispute as to either their capacity as insurance agents or brokers, or as to the existence of a causal connection between the actions they took as insurance brokers and the alleged injuries of the claimants. This rule illustrates

why Maryland law does not construe policy language against the drafter, *Cheney v. Bell Nat'l Life Ins. Co.*, 315 Md. 761, 766-67, 556 A.2d 1135, 1138 (1989) (citations omitted), because the insured is free to supplement the record to establish potential coverage where, as here, it is otherwise not apparent. Had there been extrinsic evidence to present, Appellants would certainly have presented it; its absence is telling.

The Panel Opinion's conclusion that there were no allegations of Myers acting as an insurance agent or broker were contradicted by a plain and common-sense reading of the Underlying Complaints, and also should be reconsidered.

CONCLUSION

The Panel Opinion erroneously indicated that the term "arising out of" required that the claim be solely because of the excluded act, an interpretation which has specifically been rejected by the highest court of the jurisdiction whose law controls: Maryland. The holding in the Panel Opinion that allegations that the insureds were paid commissions on the sale of insurance did not indicate that they were acting as agents or brokers for the sale similarly constituted error. Accordingly, Appellee CAMICO Mutual Insurance Company respectfully moves that the Panel or the Fourth Circuit sitting *en banc* reconsider the Panel Opinion, and affirm the decision of the trial court.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of January, 2012, the foregoing Petition for Rehearing And Rehearing *En Banc* was served via the CM/EMF system to the registered counsel of Trice Geary & Myers LLC and Kevin Myers, CPA:

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