

CGL Insurance Carriers Had no Duty to Defend Design Professional on Claims Arising out of Professional Services

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An architect under contract to provide professional services related to the renovation and expansion of the Tropicana Casino in Atlantic City, New Jersey was sued by a number of parties claiming damages from wrongful death and physical injuries resulting from the collapse of a parking garage that was under construction. The architect demanded that its commercial general liability (CGL) carrier and excess CGL carrier defend it against the plaintiff's complaints. The carriers refused to do so based on the professional services exclusion of their policies. The architect filed suit seeking declaratory judgment that the carriers had a duty to defend it. The court granted the carriers summary judgment motion – denying coverage and a duty to defend.

The architect's Tropicana contract called for it to provide architecture, structural and mechanical engineering, and construction administration. It entered into a subcontract with a consulting engineering firm that it retained to provide structural engineering services. While the parking garage was being constructed, six levels collapsed, killing four people and injuring others. Numerous plaintiffs filed suit against the architect and others in the local superior court for Atlantic County, New Jersey, and most of these were consolidated into a general Master Complaint, that included several counts against the architect.

The counts in the complaint against the architect alleged that the architect "deviated from the standard of care that should have been utilized as professionals in the fields of architecture relative to the design and supervision of the construction of [the] Garage" and that that the architect was "otherwise careless and negligent."

Two unconsolidated complaints were filed against the architect. One alleged that the architect failed "to perform as a reasonable architect would under the same or similar circumstances." The other asserted negligence, private nuisance and public nuisance against the architect.

A third-party claim was also filed by a construction subcontractor against the architect seeking contribution and indemnification. It alleged that the architect deviated from the standard of care of professionals in the field of architecture, including the supervision of design and "architectural administration of construction" at the Tropicana Construction Project.

In reviewing whether the CGL policies were required to provide a defense to the underlying complaints in the county court action, the Federal District Court in the case of *Wimberly Allison Tong & Goo, Inc. v. Travelers Property Casualty Company and Gulf Underwriters Insurance Group*, 559 F.Supp.2d 504 (D.C. NJ, 2008), compared the allegations of the complaints to the specific wording of the exclusions contained in the policies.

The Travelers policy excluded damages arising out of professional services with the following exclusion:

"This insurance does not apply to "bodily injury," "property damage," "personal injury" or "advertising injury" arising out of the rendering of or failure to render any professional services by you or any engineer, architect or surveyor who is either employed by you or performing work on your behalf in such capacity."

Professional services was defined in the Travelers policy to include:

“1. The preparing, approving, or failing to prepare or approve maps, shop drawings, opinions, reports, surveys, field orders, or drawings and specifications; and 2. Supervisory, inspection, architectural or engineering activities.”

Gulf Insurance company's CGL policy contained similar language stating that damages from professional services were excluded from coverage.

There was also a professional liability policy from a different carrier that provided \$1 million per claim. The court stated there was a \$250,000 deductible. (Editor's note: It is more likely that this was actually a self insured retention (SIR) rather than deductible, but the court refers to it as a "deductible".) The architect also had an excess professional liability policy from the same carrier that covered up to \$2 million per claim and \$5 million in the aggregate – in excess of the \$1 million primary professional liability policy. For reasons not explained by the court, the professional liability carrier did not pay anything toward the eventual \$500,000 settlement of the case or toward the \$2,323,000 that the architect says it incurred in defense costs and legal fees. (See comment at conclusion of this case note).

Architect's theory for why the CGL policies should provide coverage was that the allegations of the complaints were not purely allegations of defective professional services, but rather contained other allegations such as "nuisance" and therefore created the "possibility of coverage" under the CGL policies which required the two carriers to "defend" against the complaints. More specifically, the architect argued that the carriers were required to defend it "until it was unambiguously clear that the professional services exception was applicable to all asserted claims." Although the complaints in the state court action, on their face, appeared to clearly articulate that the basis for the allegations was negligent performance of professional services, the Architect argued that it was not clear that this was the basis of the complaints since the plaintiffs did not mark or state "professional malpractice" when they filled in the blanks on the Civil Case Information Statement form that is attached to the top of the complaint.

The U.S. District Court rejected the architect's argument, saying that the architect conspicuously failed to point to any specific allegation in the underlying action that would support its allegation that the claims were based on anything other than the provision of professional services. Supervisory and inspection-related services, for example, were included within the definition of "professional services" and the court states that is consistent with New Jersey law, "that when a professional party, such as an architectural or engineering practice, supervises the implementation of its work, such supervision is performed in its professional capacity."

In trying to get out from under the professional services exclusion of the policy, the architect also argued that the claims of "nuisance" and "general negligence" were something other than "professional services." The court rejected that argument, concluding that the facts alleged by plaintiffs in the state court action in support of their nuisance and general negligence claims show that those claims were directed at the architect's provision of professional services, "not its general business activities (or other non-professional conduct)." For these reasons, the court found in favor of the CGL carriers that they had no duty to defend the architect in the underlying case, and granted them summary judgment accordingly.

Comment: This final point by the court concerning the difference in general business activities and professional services is one of the keys to its rejection the architect's arguments. Despite what appeared to be some minor extraneous allegations by the underlying plaintiffs in the state court action, all the genuine allegations (based on the facts contained in the complaint) demonstrated that the true essence of each count of the complaint was that the architect provided its professional services in a manner that the plaintiffs asserted was unacceptable and caused their damages. Since all counts were ultimately founded upon professional services, the CGL carriers had no duty to defend.

It is curious that the court did not explain anything about what role, if any, the professional liability carrier had in the underlying action. The court says that this carrier advised the architect it would defend it, yet the architect asserts it never received defense or indemnity from any carrier.

There are several possible reasons a professional liability carrier might not pay any defense costs for an architect in a matter such as this one. First, with a \$250,000 SIR, an architect would be required to pay the first \$250,000 in attorneys fees itself before the insurance carrier has any duty to start paying. Second, with a final settlement of \$500,000, it is not at all clear what constitutes the claimed \$2.3 million in “defense costs” and “legal fees.”

If an architect agrees to defend its client against claims by third parties such as the plaintiffs in the underlying action, those defense costs are not covered by insurance. In this regard, legal fees to defend an architect against multiple plaintiffs would have to be coordinated and typically approved in advance by the insurance company that is expected to cover the defense costs.

The contractual liability exclusion of the professional liability policy will bar coverage for such defense costs that are incurred as a result of the contractual indemnification provision. This is an important matter to be understood by design professionals. Whenever you as a design professional see language include in an indemnification provision that would require you to “defend” your client, this means that you must pay on behalf of your client legal fees and defense costs as they are incurred, instead of awaiting a final decision by a finder of fact whether you were negligent in the performance of your services. Since that is not a liability the architect would have at common law in the absence of the contractual language, the insurance company can assert that costs associated with that liability are excluded pursuant to the contractual liability exclusion.

Please note that I have no personal knowledge of whether any of this commentary applies to the instant case. I am merely using this as learning opportunity to point out the theory of how these principles work.

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