

Professional Services Exclusion Bars Coverage for Claims Arising Out of Advertising and Public Relations Activities

March 2006

In an unpublished opinion, a Washington intermediate appellate court has ruled that an exclusion for claims arising out of "any actual or alleged act, error or omission . . . with respect to the rendering of, or failure to render professional services" applies to claims arising in connection with a company's rendering of advertising and public relations services. *Planet Earth Foundation v. Gulf Underwriters Insurance Co.*, 2005 WL 3275619 (Wash. Ct. App. Dec. 5, 2005). Accordingly, the court concluded that an D&O insurer was not obligated to defend the company against allegations that it committed fraud, trademark infringement and unfair competition in providing advertising and public relations services for a third-party claimant.

The insurer issued a "nonprofit management and organization liability" insurance policy to the company, a nonprofit foundation that provided advertising and public relations services. The company contracted with the underlying claimant to produce paid advertisements and public service announcements in support of the claimant's programs. The claimant subsequently sued the company, alleging that it made fraudulent misrepresentations, engaged in unfair competition and infringed on the claimant's trademark. When the company tendered defense of these claims to the insurer, the insurer denied coverage and refused to defend. Coverage litigation ensued.

The intermediate appellate court held that the professional services exclusion "unambiguously encompassed public relations and advertising services." The court relied in part on *Marx v. Hartford Accident Indemnity Co.*, 157 N.W.2d 870 (Neb. 1968), which held that in the insurance context, a "professional service" is "one arising out of a vocation, calling, occupation, or employment involving specialized knowledge, labor, or skill, and the labor or skill involved in predominantly mental or intellectual, rather than physical or manual." The court reasoned that the company's public relations and advertising services constituted "professional services" under this definition because they arose out of media-related occupations and required specialized knowledge and skills that were predominantly mental and intellectual. The court therefore concluded that coverage for the claims against the company was barred by the professional services exclusion. The court rejected the company's argument that this interpretation rendered coverage illusory, noting that the policy still provided the protection traditionally offered by directors and officers policies. The court further rejected the

company's argument that the fraud, trademark infringement and unfair competition claims against it were "independent" of its professional services.

The court also rejected the company's argument that the exclusion was inapplicable because Washington Revised Code § 18.100.030(1) defined "professional service" as a service that requires its practitioners to obtain specialized training or licensure by the state. The court noted that the statute at issue was enacted to authorize the creations of professional corporations that provide services requiring legal authorization, not to define "professional service" for insurance purposes.