

Court Narrowly Construes Contract and Services Exclusions

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The United States District Court for the Western District of Pennsylvania has held that a contract exclusion applied only to the underlying plaintiffs' cause of action for breach of contract and that an errors and omissions exclusion was not implicated where the allegations in the underlying complaint concerning the insured's rendering of, or failure to render, services were tangential to the claims asserted. *Fleming Fitzgerald & Associates, Ltd. v. U.S. Specialty Ins. Co.*, 2008 WL 4425845 (W.D. Pa. Sept. 30, 2008).

The insured, the manager of a fishing recreation area, had purchased a professional liability policy that provided coverage for loss, including defense costs, arising from claims made against the insured during the policy period for a wrongful act. The policy did not impose upon the insurer a duty to defend but did obligate the insurer to "pay covered Defense Costs on an as-incurred basis." The policy further provided that "[i]f it is finally determined that any Defense Costs paid by the Insurer are not covered under this policy, the Insureds agree to repay such non-covered Defense Costs to the Insurer." Not covered under the policy was loss in connection with any claim "for any actual or alleged breach of contract or agreement." The policy also excluded coverage for loss resulting from any claim for "any actual or alleged act, error [or] omission . . . in connection with the rendering of, or actual or alleged failure to render, any services for others for a fee or commission . . . by an [insured]."

The fishing recreation area's primary attraction was the fall salmon run. A group of individuals—known as a "syndicate"—contracted with the manager of the recreation area to purchase the exclusive right to fish for two weeks in the fall for a certain period of years at a fixed price each year. As demand to fish grew over the years, the manager, who received a commission based on booking fees, began losing money for the weeks in which the syndicate exercised its exclusive booking rights. In an effort to extinguish those rights, the manager sold its operations to a third party. Thereafter, the manager refused to allow the syndicate to purchase its annual fishing rights under the contract, and the syndicate brought suit. The complaint asserted thirteen causes of action, including one count for breach of contract and various counts for related torts.

The insured denied coverage, and litigation followed. Addressing the parties' cross-motions for summary judgment, the court first noted that the policy required "immediate reimbursement of covered defense costs as they become due." According to the court, the insurer could not await an adjudication as to which defense

costs were covered and which were not. Rather, under the policy, it was incumbent upon the insurer "to make an initial determination, based on the allegations of the complaint, as to what defense costs are covered and to immediately begin paying those defense costs to the insureds." To the extent that the insurer is entitled to reimbursement from the insured, such reimbursement is required only after it is "finally determined" that the insurer advanced defense costs that were not, in fact, covered.

Turning to the insurer's grounds for denying coverage, the court held that the contract exclusion did not bar coverage for loss in connection with any cause of action other than the single cause of action for breach of contract. In so holding, the court rejected the insurer's invocation of "the gist of the action doctrine," which requires a determination of whether a particular cause of action "sounds in contract or tort." According to the court, the doctrine did not apply because the exclusion at issue did not include prefatory language such as "arising out of" or "based upon." In this regard, the court noted that the use of such language in other exclusions in the policy suggested that the contract exclusion deliberately was worded to be more narrow.

The court also rejected the insurer's reliance on the errors and omissions exclusion. According to the court, application of the exclusion was contingent on whether any of the counts in the underlying action "are for any acts 'in connection with' the rendering of or failure to render 'services.'" The court noted that the underlying complaint included allegations concerning "logistical" services rendered by the insured, such as making travel arrangements and collecting payments. These services, however, were "tangential to the [underlying action]" and did not form the basis for relief sought. The court observed that plaintiffs' claims were not about the manager's "failure to provide services," but, rather, were "about the sale of fishing rights" and how the sale of the manager's operations to a third party interfered with those rights. For this reason, the court concluded that the exclusion was not implicated.