

Professional Services Exclusion Did Not Preclude Duty to Defend Claim Alleging Negligence

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A California intermediate appellate court has held that a professional services exclusion in a commercial general liability policy issued to an engineering consulting firm does not apply to the obligation to defend a claim arising out of a job-site accident that occurred while the insured was present only for the purpose of rendering professional services, because the disputed facts left open the possibility of liability for ordinary negligence. *Food Pro Int'l, Inc. v. Farmers Ins. Exchange*, 2008 WL 5401336 (Cal. Ct. App. Dec. 30, 2008).

The policy at issue provided specified coverage for amounts that the insured became legally obligated to pay as a result of bodily injury or property damage. The insurer had the right and duty to defend any claim against the insured. Pursuant to its professional services exclusion, the policy did not apply to any claim for injury or damage "arising out of the rendering or failure to render any professional services by or for [the insured], including . . . supervisory, inspection or engineering services."

The underlying claim involved a project for which the insured firm was hired to assist a food processor in the relocation of its operations to a new facility. The food processor served as its own general contractor, retaining subcontractors, vendors and suppliers. The engineering firm served as the client's representative on the site, coordinating contractor activities, making on-site inspections of the work to ensure that it was proceeding in accordance with the contracts and providing progress reports.

The injury at issue occurred when a worker fell through a hole left in an upper floor of the original facility after a piece of equipment had been removed by a subcontractor. An employee of the insured who was on-site at the time of the accident observing the ongoing work previously had advised the general contractor's mechanics of the danger. In response, the mechanics covered the hole with a plastic pallet but did not bolt the pallet in place. The injured worker sued the engineering firm, the general contractor and others, alleging that the defendants "failed to properly cover the hole . . . and/or place warnings around the hole, creating a dangerous condition," and "negligently allowed and/or required . . . [the worker] to work in the area of the dangerous hole." The insured tendered its defense to the insurer, which denied coverage based on the professional services exclusion.

In the coverage litigation that followed, the court rejected the notion that the insured necessarily was engaged in professional services at the time of the accident such that the exclusion applied. The court pointed out that while the firm employee may have been present to supervise and report on the progress of work at the site, the insured's agreement with the general contractor did not require it to take any action to protect workers from injury or to otherwise ensure the safety of the site. On this basis, the court determined that a factual dispute existed as to whether the employee was providing engineering services in relation to the accident and the conditions leading to the worker's injury or whether the employee simply was an observer who noticed the danger and failed to warn of it or take appropriate corrective measures. According to the court, because the latter circumstances would support a claim for ordinary negligence that would not implicate the professional services exclusion, a potential for coverage existed that required the insurer to defend the action.

In reaching this conclusion, the court did recognize that the exclusion applied to injury that "arises from" professional services, but rejected the insurer's argument that it was sufficient for it to show that the only reason the insured employee was on the site was to render professional services. According to the court, if the exclusion were read so broadly to bar coverage for every incident that occurred while the insured was on a project site as an engineering consultant or otherwise performing services requiring its specialized skills, the policy "would be essentially useless."