

Lawsuit Based on Negligent Property Management Services Barred by "Professional Services" Exclusion

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An appellate court in California has affirmed a lower court's ruling that a professional services exclusion barred coverage for a lawsuit based on the negligent performance of property management services at an apartment complex. *Golden Eagles Ins. Corp. v. Lemoore Real Estate & Prop. Mgmt Inc.*, 2012 WL 1670475 (Cal. Ct. App. May 14, 2012).

The insured, a licensed real estate broker, provided property management services for an apartment complex. During its tenure as property manager, a fire in one of the apartments killed five people. The survivors of the decedents sued the insured and the owner of the apartment complex for wrongful death, alleging negligence in the maintenance and control of the apartment and failure to keep the property in a safe condition. The insured tendered the lawsuit to the insurer under a business liability insurance policy, but the insurer did not undertake the defense. The insured and the claimants reached a settlement in which the insured assigned its rights under the policy to the claimants and agreed to proceed with a "trial by reference" as opposed to going to trial. The "trial by reference" resulted in judgment in favor of the claimants for \$29 million.

The insurer filed a declaratory judgment action seeking a declaration that the professional services exclusion applied and that, as a result, it had no duty to defend or indemnify the insured. The language of the exclusion provided that the insurance policy "did not apply to 'bodily injury,' 'property damage' or 'personal or advertising injury' caused by the rendering or failure to render any professional services," which was defined to include "services while you are acting in a fiduciary or representative capacity including but not limited to, Real Estate Agents, Insurance Agents and Travel Agents," and "supervisory, inspection, or engineering services," among other things.

In determining that the professional services exclusion barred coverage, the court explained that property management was a "skilled profession or trade," and that such services were the basis for the insured's liability. Further, the court noted that the insured was compensated for the services and that the performance of those services was "not merely incidentally related to [the insured]'s everyday operations." The court also determined that property management services fell within the activities enumerated in the policy as

examples—specifically, “supervisory and inspection services, and services while the insured was acting in a fiduciary or representative capacity.” The court further concluded that the exclusion “expressly convey[ed] the intent that the list is not a limitation” and that the list of examples was “extensive and broad.” Finally, the court determined that coverage was not illusory because the policy “provided coverage for accidental occurrences involving ordinary negligence, . . . not for professional negligence,” and “the policy was not an errors and omissions policy, insuring against professional malpractice”