

Professional Services Exclusion Ambiguous as to Service Not Specified Within Exclusion

January 2013

A New York trial court has held that a professional services exclusion is ambiguous as applied to art authentication services where the exclusion listed other unrelated services as examples of excluded activity. *Andy Warhol Found. for the Visual Arts, Inc. v. Philadelphia Indem. Ins. Co.*, 37 Misc. 3d 1229 (N.Y. Sup. Ct. Dec. 7, 2012).

Claimants sued the policyholder art foundation on a variety of theories for the foundation's refusal to certify certain art as genuine. The foundation's carrier, which had issued a \$2 million E&O policy and a \$10 million D&O policy, advanced as defense costs the E&O policy limits and denied coverage under the D&O policy. The underlying litigation eventually settled. The claimants dismissed their suits with prejudice, and the policyholder agreed not to seek contractual indemnification from the claimants, who were in any event judgment proof. The policyholder then sought another \$4.6 million of defense costs under the D&O policy.

The D&O policy's professional services exclusion barred coverage for claims involving the furnishing of "professional services by an attorney, architect, engineer, accountant, real estate agent, financial consultant, securities dealer, veterinarian or insurance agent or broker," the furnishing of "professional services by a physician, dentist, psychologist, anesthesiologist, nurse practitioner, nurse midwife, x-ray therapist, radiologist, chiropodist, chiropractor, optometrist or other medical or mental health professional," and any actual or alleged act or omission "in the actual rendering of professional series to others, including counseling services, in your capacity as a social service organization. Professional services include the furnishing of food, beverages, medications or appliances in connection therewith."

The court denied the carrier's motion for summary judgment. The court noted that the exclusion "lists specific occupations that involve specialized knowledge, training or skill," and that "authentication services is not listed." The insurer argued that the policyholder was a "social service organization" within the third part of the exclusion, noting that a telephone directory listed the policyholder as a "social service organization." The court rejected this argument, stating that "the examples of 'professional services' listed do not relate in any way to art authentication services." The court accordingly held that the exclusion was "at best ambiguous" and construed it against the insurer.

The carrier also sought partial summary judgment as to an underlying Lanham Act claim on the basis of an exclusion barring coverage for knowingly false publication, contending that such a claim could only succeed where the claimant established a knowingly false statement. The court rejected this argument as well, noting that the underlying court had held that the claimants could potentially prevail if they could prove that a literally true statement was likely to mislead customers. In such circumstances, the policyholder would not have made a knowingly false statement, and the exclusion would not apply.