

Court Broadly Construes E&O Extension Endorsement in CGL Policy

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In an unreported decision, the United States Court of Appeals for the Fourth Circuit, applying Pennsylvania law, has construed a stand-alone E&O extension endorsement in a CGL policy, holding that the endorsement afforded coverage for underlying litigation alleging breach of contract and negligent performance in constructing a swimming pool. *Tankovits v. Del Suppo, Inc.*, 2005 WL 995464 (4th Cir. Apr. 29, 2005).

The policyholder, a swimming pool contractor, sought a defense and indemnification after it was sued by two of its former customers, who alleged breach of contract and negligent performance in the installation of a swimming pool. The insurer intervened in the underlying litigation, seeking a declaratory judgment that it bore no duty to defend or indemnify the policyholder.

The contractor had purchased a one-year policy that, according to the declarations page, contained two coverage parts: one for CGL and one for professional liability. The CGL part contained a lengthy policy form with various provisions, including an exclusion for damages "by reason of the assumption of liability in a contract or agreement" and an exclusion for property damage.

The policy did not contain a professional liability coverage form. Instead, the only reference to professional liability was in an "Errors and Omissions Extension" to the CGL coverage part. That endorsement stated:

In consideration of an additional premium, and subject to the conditions and exclusions in the coverage form, the coverage afforded by this endorsement shall apply to sums which you shall become legally obligated to pay as a result of "bodily injury" or "property damage" due to any negligent act, error or omission committed during the policy period in the conduct of the operations shown above, whether committed by you or by any person for whom you are legally responsible.

The insurer argued that because the E&O extension endorsement expressly provided that it was "subject to the exclusions" of the commercial liability coverage form, applicable exclusions in the CGL coverage part applied to preclude coverage.

The Fourth Circuit disagreed. It explained that it had "no trouble concluding that the [homeowners'] allegations fall squarely within the concept of professional liability coverage ... embodied ... in the policy." The court concluded that a "reasonable interpretation" of the effect of the policy's E&O endorsement was that the endorsement did not constitute the entirety of professional liability coverage available under the policy. The court therefore found the policy ambiguous regarding the scope of available professional liability coverage since there was no separate professional liability coverage part. The court justified its conclusion by noting that the policy's E&O endorsement specified that the endorsement modified the policy's commercial liability coverage part, but did not expressly modify or limit the policy's professional liability coverage part. Second, the Fourth Circuit explained that the E&O endorsement "describe[d] itself" as an "extension" of coverage rather than a limitation on coverage. Third, the court noted that the endorsement "subject[ed] itself to the same conditions and exclusions [as contained] in the Commercial General Liability Coverage Form," thereby undercutting an interpretation of the E&O endorsement as applying to the policy's professional liability coverage part. In light of the ambiguity and the requirement under Pennsylvania law to construe ambiguities against the insurer, the court held that the insurer was not entitled to a declaration of no coverage.

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