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Court limits scope of professional services exclusion

By Samuel H. Ruby

In one of the first eAlerts of 2009, we examine one of the California Court of Appeals' final opinions of 2008, in which the court held that a professional services exclusion in a CGL policy only applies to bodily injury or damage that actually arises out of the performance of a professional service. The exclusion does not apply when bodily injury or damage is caused by ordinary acts of negligence that happen to occur while an insured is rendering professional services.

In *Food Pro International v. Farmers Insurance Exchange* (No. H031178, Dec. 30, 2008), the Court of Appeals reversed a trial court judgment finding that Farmers had no duty to defend Food Pro, an engineering consulting firm, in a lawsuit arising out of an injury to an electrician who fell through a hole in the floor while working on a project that was being supervised by Food Pro. Food Pro's employee, who was present at the time of the accident, had previously noted the danger posed by the hole and had advised that it be covered. However, Food Pro was not directly involved in the creation of or the covering of the opening. Following the accident, the injured electrician and the insurer responsible for his workers' compensation benefits filed two lawsuits against Food Pro, who tendered the defense of these actions to Farmers. Farmers concluded that it had no duty to defend or indemnify Food Pro, citing the professional services exclusion in the CGL policy issued to Food Pro. Farmer's position was based on the fact that Food Pro was at the site to perform consulting services.

At the trial of the subsequent coverage action, the court found that the undisputed evidence established that the injury arose out of Food Pro's rendering of supervisory services and was therefore excluded under the professional services exclusion.

On review, the Court of Appeals first noted that the trial court had ignored the existence of evidence that Food Pro was not directly responsible for the injury to the electrician and that Food Pro was only acting as an observer at the time of the accident. Therefore, any failure to warn of the danger posed by the hole in the floor would only implicate ordinary negligence. The Court of Appeals also found that the complaints filed against Food Pro did not allege that the injury was related to Food Pro's professional services. The court concluded that the facts available to Farmers at the time it denied a duty to defend showed potential liability arising from the breach of a common law duty, and not from the performance of professional services.

The Court of Appeals rejected Farmers' argument that because Food Pro was only present at the site to perform professional services, any act by Food Pro that resulted in injury "arises from" professional services and is covered by the exclusion. The court held that in order to fall within the professional services exclusion, the injury must arise out of the performance of a professional service, not merely at the same time an insured is performing such services. Under Farmers' interpretation, the court noted that the policy would be essentially useless to Food Pro.

In addition to providing guidance on the professional services exclusion, the *Food Pro* opinion serves as a reminder that coverage exclusions tend to be construed narrowly.