

# The CGL and the Professional Liability Exclusion

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**The Insurance Services Office, Inc. (ISO), commercial general liability (CGL) policy does *not* automatically exclude coverage for any and all professional services—the CGL must be endorsed to eliminate coverage for professional services.**

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This does not suggest that all professional services are *covered* by the unendorsed CGL policy. Coverage is not triggered unless the claim against an insured is for damages because of bodily injury or property damage (which must be caused by an occurrence) or the claim is for damages because of personal and advertising injury.

For example, assume that, due to an architect's arithmetic error, the control tower of an airport was built too close to the terminal—resulting in inadequate site lines for the ground control staff. The cost to rectify this error and move the control tower was not damages because of property damage (the claim was not for physical injury to tangible property), and thus, the architect's CGL did not provide coverage for this claim—regardless of whether or not the CGL excluded professional services.

## Contractor's Professional Liability Exclusions

While certainly there are numerous professional services exclusions that can be added to the CGL by endorsement, ranging from blood banks to pharmacists to law enforcement activities, the exclusionary endorsement that has been the subject of the most substantial litigation has been the exclusion of professional services on the CGL policy of a contractor.

## Contractors Engaged in Construction Operations—Exclusion of Professional Services

It is customary to find an exclusionary endorsement attached to a contractor's CGL policy with one of the following titles and form numbers:

- "Exclusion—Engineers, Architects or Surveyors Professional Liability" (CG 22 43)
- "Exclusion—Contractors—Professional Liability" (CG 22 79)
- "Limited Exclusion—Contractors—Professional Liability" (CG 22 80)

All three exclusionary endorsements eliminate coverage for bodily injury, property damage, and personal and advertising injury "arising out of the rendering of or failure to render any professional services...." While each endorsement is *materially different* in the scope of the coverage eliminated, it is fair to say these endorsements are generally intended to remove coverage from the contractor's CGL policy for engineering, architectural, or surveying services.

## Exclusion—Engineers, Architects or Surveyors Professional Liability (CG 22 43)

Traditionally, insurers used only endorsement CG 22 43—"Exclusion—Engineers, Architects or Surveyors Professional Liability." This endorsement defined professional services of engineers, architects, or surveyors to include "the preparing, approving, or failure to prepare or approve maps, shop drawings, opinions, reports, surveys, field orders, change orders or drawings and specifications." Further, the endorsement also defined excluded as professional services "supervisory, inspection, architectural or engineering activities."

This exclusion applied whether the named insured or an engineer, architect, or surveyor *engaged by the named insured* performed the professional services. In other words, if a contractor that performed *none of the services* described in the endorsement engaged an engineer, architect, or surveyor to perform any of the excluded services, the contractor was not covered for any allegations that implicated those services.

### Illustration of the Application of CG 22 43

Assume a general contractor was engaged by the owner to build a house for the property owner. The general contractor engaged an engineering firm to survey and stake out the location of the home on the parcel. After completion of the house, the building inspector would not grant an occupancy permit—alleging the setback was less than the required 25 feet from the property line. The home owner sued the general contractor. While there was dispute over who actually staked out the home site—the general contractor or the engineering firm—the trial court found that it did not matter—the professional services exclusion applied irrespective of that fact.

The court noted that the general contractor "failed to supervise or otherwise ensure the professional service of preparing an accurate survey" and that the insurer had no duty to defend as the circumstances fell within the professional liability exclusion. *Western World Ins. Co. v. Azoff*, 24 Mass. L. Rep. 450 (Mass. Super. Ct. 2008).

## Professional versus Nonprofessional Services

A substantial amount of the litigation regarding the meaning of the professional services exclusion centers on which activities are professional services and which are *not* professional services—the result of which greatly affects the scope of the professional services exclusion.

### Illustration of a Typical Dispute—Professional versus Nonprofessional Services

An engineering firm was engaged by a restaurant owner to monitor a pier on which the restaurant was located. The engineer found that the pier was not stable—the pier was actually moving. While the engineer did not believe the pier was in imminent danger of collapse, the engineer did testify he informed the owner of the restaurant on May 17 that the pier was going to collapse. On May 18, the pier suffered a catastrophic collapse, resulting in three deaths, numerous other injuries, and significant property damage.

**The Complaint.** The engineering firm was one of many defendants named in a complaint that soon followed, which included allegations that the engineering firm had a duty to warn the owner, public authorities, and the restaurant patrons and had failed to provide the requisite warnings. The engineering firm sent the claim to its CGL and umbrella insurer.<sup>1</sup>

**Denial of Coverage.** The insurer denied coverage under the engineering firm's CGL and umbrella policy, citing the terms of the professional liability exclusion CG 22 43, contending the injuries and property damage came "under the mantle of professional services because the negligent conduct arose out of professional services rendered ... and was thus excluded under both policies."

**The Ruling.** Because exclusions are to be strictly construed, the trial and appellate court found that the professional liability exclusion did not apply. The court stated, "The excluded acts in the CGL policy are the actual professional services, whereas the acts that fall within the products-completed operations relate to giving information i.e. warnings or instructions. Thus, we conclude liability ... resulting from the failure to warn or give instructions was not excluded by the professional liability exclusion."

**Completed Operations Coverage.** In other words, the claims against the engineer were found by the court to fall within the products-completed operations hazard—bodily injury or property damage occurring away from the engineering firm's premises and arising out of "your work." "Your work" as defined in the CGL policy expressly states the term includes the providing of or failing to provide warnings or instructions.

**Failure To Warn Is Not a Professional Service.** But the court went even further, finding that the professional liability services exclusion would *not* have applied even in the absence of the products-completed operations coverage. According to the court, the failure to provide warnings did not emanate from the performance of or failure to perform actual professional services. The court observed:

To be sure, allegations respecting a professional's failure to provide adequate engineering, supervisory, inspection, or architectural services or to discover or remedy a condition for which the professional services were engaged would necessarily fall within the exclusion as dependent on the professional services provided. However, allegations encompassing the violation of a duty to provide information about a known danger resulting from either a negligent omission or commission, whether based upon the relationship of the parties or legal principle, are not dependent on the rendering of professional services. Instead, such allegations arise from the information actually possessed and not provided by a party obligated to disclose such information.

Put another way, the engineering firm's failure to warn was not considered the rendering of or failing to render professional service, and the CGL and umbrella policies applied to the collapse loss. *S.T. Hudson Eng'rs, Inc. v. Pennsylvania Nat'l Mut. Cas. Co.*, 189 N.J. 647 (App. Div. 2007).

## ***Another Ruling on the Professional Services Exclusion***

In a case filed on March 13, 2014, the California Court of Appeal provided important commentary on the application of the professional services exclusion that is substantially the same (but not identical) to CG 22 43. In the California case, an engineering firm (NCE) designed and built a dam for a winery. Shortly after the dam was built, neighbors complained of excess sediment downstream and that the construction was causing erosion in the surrounding waterways. The state brought a complaint against the owner of the winery, who in turn cross-complained against NCE, alleging NCE's failure to construct the dam in a good and professional manner. Specifically, NCE placed fill for construction of the dam, roadways, and the spillway, and the complaint alleged that the fill resulted in damage to downstream tributaries.

**The Trial Court.** After a rather astonishing handling of the claim, the insurer denied any duty to defend NCE under the business liability portion of a businessowners policy based in part on the professional liability exclusion. The trial judge granted a directed verdict for the insurer on the coverage matter, finding the project "to be complicated" and therefore to require "professional expertise." On this basis, the judge concluded that all the work that was done, including the construction of the dam, was "professional work" to which the professional liability exclusion applied, ruling there was *noconceivable basis* for coverage and thus no duty to defend.

**Insurer's View.** The position taken by the insurer at the trial and adopted by the trial judge was that a professional service is any task requiring skill performed for payment. The insurer's view was the professional liability exclusion applied to any task requiring skill, including any manual work if such work was performed by a professional. According to the insurer, the professional liability exclusion applied to almost *any purposeful activity done in furtherance of the insured's business*. In other words, the insurer asserted the most expansive view of the professional services exclusion

imaginable: Because the named insured was a professional services company, no general liability coverage would apply to virtually any business activity conducted by the named insured.

**Appeals Court.** It may be an understatement to observe that the appeals court justices sharply disagreed with the trial court judge. The appeals court first remarked that many of the allegations were clearly *outside* of the professional services exclusion—including damages sought for negligence in construction of the dam.

The appeals court determined that NCE performed ordinary labor and construction work in connection with building the dam and was being sued for construction work. This construction work was not, according to the appeals court, within the policy definition of professional services. The policy defined professional service, and that definition did not include the terms "construction" or "labor."

**Appeals Court Ruling.** The appeals court was influenced by the *S.T. Hudson Engineers* decision in New Jersey and took a similar position. The professional services exclusion also did not apply because the business liability policy provided products-completed operations for "your work."

In the NCE case, one of the allegations was the failure to notify the dam owner of the need for permits and, thus, the "failure to provide warnings or instructions." The appeals court found that this allegation fell within the products-completed operations hazard and was covered by the CGL policy. The California Court of Appeal reversed the trial court's rulings and determined the insurer did have a duty to defend. *North Cnty. Eng'g, Inc. v. State Farm Gen. Ins. Co.*, 2014 Cal. App. LEXIS 235 (Cal. App. 1st Dist. Mar. 13, 2014).

## Conclusion

Because of the potential for an overly expansive application of the professional services exclusion, the endorsement CG 22 43 is no longer intended by ISO to be used with contractors engaged in construction operations. In 1996, ISO introduced two additional professional services exclusions—CG 22 79 and CG 22 80.

The first exclusion—CG 22 79—"Exclusion—Contractors—Professional Liability" is almost verbatim to CG 22 43 but with one significant difference. Professional services does not include (and therefore the exclusion does not apply) to "services within construction means, methods, techniques, sequences and procedures employed by you in connection with your operations in your capacity as a construction contractor." Thus, allegations of faulty construction should not be excluded, to the extent the operations involve construction "means and methods."

The second exclusion—CG 22 80—"Limited Exclusion—Contractors—Professional Liability" is also almost verbatim to CG 22 43, but the exception to this exclusion is very significant—the professional services exclusion does not apply to the named insured's construction work, including construction work done on behalf of the named insured.

CG 22 80 is intended for design-build contractors; the CGL policy excludes coverage *only* if the named insured is providing professional services in connection with construction *not performed* by or on behalf of the named insured. Design work done as part of the named insured's construction work, including construction work done on behalf of the named insured, is not excluded by this endorsement.

The ruling in NCE has caused at least one legal commentator to observe that any of the professional liability exclusions apply *only if* the bodily injury, property damage, or personal or advertising injury takes place *during* the performance of the services—if the allegations are that the bodily injury, property damage, or personal or advertising injury took place *after* the service was completed, the professional services exclusions should never apply. In other words, the professional services exclusions and products-completed operations coverage are mutually exclusive.

<sup>1</sup>The engineering firm had purchased professional liability insurance, but the policy excluded claims arising out of completed operations.

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