
Dangers When a Contractor Agrees to Indemnify or Name an Architect/Engineer as an Additional Insured on an Insurance Policy

By Scott D. Garbo / Feb 06, 2017

Contractors are often required to contractually indemnify and defend owner's engineers and architects, and include them as additional insureds on liability insurance policies. However, a recent federal case demonstrated the limited circumstances under which there would actually be insurance coverage under these policies. In an unpublished opinion applying Michigan law, the Court held that the Professional Services Exclusion - a variation of which is found in most commercial general liability policies -precluded coverage to the owner's engineer because the claims against the engineer arose out of professional services.

In *Orchard, Hiltz & McCliment, Inc. v. Phoenix Insurance Co.*, the Owner engaged the Contractor to provide construction for a wastewater treatment plant. Through the contract, the Owner required the Contractor to maintain liability insurance under which the Owner's project engineer was protected from claims arising out of the Contractor's work. After injured workers on the project brought claims against the Engineer for unsafe conditions, the Engineer sought coverage under the Contractor's insurance policy. However, the Insurer denied coverage based on the Professional Services Exclusion. This Exclusion generally provided that there was no coverage for personal injuries or property damages arising out of the rendering of, or failure to render, any professional services (including engineering). In a lawsuit to determine coverage, the U. S. Court of Appeals for the Sixth Circuit found that the Professional Services Exclusion precluded coverage for the Engineer. The Engineer argued that the Exclusion should not apply because the injured workers' claims included allegations which implicated "non-professional" acts and omissions (such as unskilled construction and holding safety meetings). Applying the Exclusion broadly, the Court held that even if some of the injured workers' allegations implicated tasks that do not, in and of themselves, involve a specialized skill (i.e., engineering), the Exclusion still precluded coverage because those non-professional acts and omissions were reasonably related to the Engineer's overall provision of professional services (i.e., engineering).

The Court's broad application of the Professional Services Exclusion increases risks to both design professionals (engineers and architects) and contractors (general contractors and subcontractors). Engineers and architects must be aware that even if they are included as additional insureds on a contractor's insurance policy, or the contractor is contractually required to indemnify them, it is likely that the Professional Services Exclusion will preclude coverage under most circumstances. Contractors, on the other hand, should be mindful that they may not have insurance coverage for indemnification claims brought by engineers and architects, or may be exposed to claims for failing to procure contractually-required insurance. These increased risks should be considered when negotiating contract terms at the beginning of projects.

Insurance and indemnification clauses can be complex, and have significant consequences. Clark Hill's Construction Practice Group is here to assist when negotiating and interpreting these provisions. If you have any questions, or would like assistance, please contact Scott Garbo at 313.965.8654 | sgarbo@clarkhill.com or another member of Clark Hill's Construction Law Team.