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ARE THOSE "PROFESSIONAL" SERVICES? A CGL V. E&O POLICY BATTLE

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CGL and professional liability policies serve different purposes yet some pleadings allege property damage and loss that trigger a duty to defend under both. How does an insurer properly determine whether each policy must respond or if one is primary while the other is excess? The BC Supreme Court recently addressed this issue in *Northbridge General Insurance Corporation v. XL Specialty Insurance Company*, 2021 BCSC 1682.

BACKGROUND

On January 9, 2017 the plaintiff strata corporation experienced a power outage. Interior temperatures dropped and freezing occurred in the plumbing system leading to the eventual escape of water that damaged property. The plaintiff filed an action alleging the failure of a transformer caused the power outage and resulting damage (the "Action"). PCA Valence Engineering Technologies Ltd. ("PCA"), a defendant, allegedly serviced the failed transformer.

PCA had two relevant insurance policies: a CGL with Northbridge General Insurance Corporation ("Northbridge") and a professional liability or E&O policy with XL Specialty Insurance Company ("XL"). Northbridge accepted it had a duty to defend the Action based on certain allegations in the pleadings while XL denied any such duty arguing Northbridge's policy was primary and its was excess. Northbridge applied for a declaration that XL also had a duty to defend on the basis that the two policies did not respond to the same allegations in the pleadings because the CGL excluded "professional services" while XL's policy insured for "Professional Activities and Duties" and "Professional Loss".

THE RULING

To succeed, Northbridge needed to establish two "possibilities": the E&O policy could respond to at least one of the wrongs alleged in the claim (if proven) and those same individual allegation(s) would be excluded from coverage under the CGL. To resolve these issues, the Court examined every duty the pleading alleged was owed to the plaintiff by PCA and compared each one to the policies' specific language.

In the CGL, the defined term "professional services" meant services that included, but were not limited to:

"[a]ny engineer . . . services including . . . preparation or approval of . . . reports . . . [s]upervisory, inspection . . . services". The E&O policy covered "Professional Activities and Duties" defined, in part, as "activities whether part of, or incidental to, or for which you have responsibility in your business as a construction contractor, construction manager, construction support services provider . . . undertaken by or under the supervision of persons or personnel who have attained an appropriate professional qualification, certification or license, where applicable."

PCA was a firm of "engineering technologists". This designation requires a two-year diploma from a technical college. XL argued PCA employees were not "engineers". Electrical work in British Columbia is, however, governed by regulations and the Court considered the fact only qualified individuals can perform certain electrical work. Specific allegations in the pleadings included: a failure to inspect, service and maintain; a failure to retain competent and *qualified employees*; failure to ensure employees' work was compiled in accordance with *applicable codes, regulations and industry standards*; a failure to *provide opinions* to the strata (including a duty to warn); and, a failure to ensure the transformer was free of defects or to *recommend* replacement [emphasis added].

Citing past case law, the Court confirmed a "professional service" should involve "a mental or intellectual exercise within a recognized discipline and the application of special skill, knowledge and training to the particular function in question". On the facts plead in the Action, the Court found it was "possible" PCA was providing "engineering" services, "opinions" or "reports" that could be covered by the E&O policy and also excluded from the CGL. The fact these policies could respond to distinct allegations was key to the next portion of the analysis. Each policy also had an "other insurance" clause. The CGL was primary if there was "other valid and collectible insurance . . . available to the insured for a loss we cover" while the E&O policy was excess if "other valid and collectible insurance is available to the [i]nsured". Taking a "plain language" approach, the Court concluded the "other insurance" clauses were not engaged unless each policy was covering the same allegation. Having already determined certain allegations could be covered "solely" by one of the two policies, XL was obligated to defend PCA with Northbridge and its policy was not excess.

PRACTICAL CONSIDERATIONS

- When interpreting "professional services" consider all the relevant professional qualifications and whether they were required to perform each alleged wrongful act. For example, an engineer, despite having a professional designation, may have performed a task that did not involve their specialized skills, knowledge or training. This would typically fall under a CGL rather than E&O coverage.
- When interpreting an "other insurance" clause and assessing the duty to defend, again, consider every allegation and ask whether each policy could respond to the specific allegation or if the two

policies are responding to separate and distinct allegations.

- We consider it helpful that insurers maintain a general mindset of broad coverage duties and an open willingness to work with other insurers in the context of overlapping duties to defend.

Should you have any questions about this article, contact Insurance Lawyer, C. Nicole Mangan at nmangan@rbs.ca.