

## Other Decisions of Note

---

March 2008

### **District Court Holds that Professional Services Exclusion Does Not Apply to Claim for Negligent Inspection**

The United States District Court for the Western District of Missouri, applying Missouri law, has held that a professional services exclusion in a commercial general liability policy issued to an elevator inspection business did not bar coverage for a wrongful death lawsuit alleging that the policyholder negligently inspected a silo manlift. *Essex Ins. Co. v. Ragland Mills, Inc.*, 2008 WL 351014 (W.D. Mo. Feb. 6, 2008).

The policy's declarations page described the covered business as "Elevator Inspector" and the hazard for which coverage was being provided as "Elevator/Escalator Inspection." The policy also contained a Professional Liability, Errors, Omission exclusion that provided, "Negligent Acts, Malpractice and/or acts of any type including rendering or failure to render any type of professional service is not covered under this policy, unless such coverage is specifically endorsed onto the policy."

In concluding that the exclusion did not bar coverage for the wrongful death suit, the court asserted that neither the term "professional" nor the term "professional service" was defined by the policy, creating an ambiguity. Construing the ambiguity against the insurer, the court determined that "the service of elevator inspectors is not a professional service." The court further reasoned that, "even if elevator inspections are considered a professional service under the exclusion," the exclusion still would not apply because coverage for elevator inspections was specifically endorsed onto the policy, thus implicating the exception within the exclusion.

### **Number of Claims at Issue in Suit Not Ripe for Resolution on Summary Judgment**

A Delaware Superior Court has held that a dispute over the number of claims at issue in a lawsuit would be resolved not on summary judgment but by the jury after trial. *AT&T v. Clarendon Am. Ins. Co.*, 2008 WL 250550 (Del. Super. Ct. Jan. 17, 2008). Reversing a prior ruling of the trial court, the Delaware Supreme Court had held that each cause of action, rather than each lawsuit, could constitute a separate Claim and remanded the action back to the trial court to determine the number of claims. On remand, and after supplemental briefing, the trial court determined that it would not resolve the number of claims at issue as a matter of law on summary judgment.

### **Damages Resulting From Poor Construction Site Inspection Not Barred by Professional Services Exclusion; Barred by Consultation Exclusion**

The United States District Court for the Eastern District of Pennsylvania, applying Pennsylvania law, has held that construction site inspection services are not "professional services" and so damages resulting from an allegedly poor inspection were not excluded by the policy's professional services exclusion. *Scottsdale Indem. Co. v. Hartford Cas. Ins. Co.*, 2008 WL 131105 (E.D. Pa. 2008). The court ruled, however, that the damages were excluded by a "consultation exclusion."

The policyholder was "in the business of providing safety inspection services to construction companies." A construction worker was injured following an inspection at a construction site, allegedly because of the policyholder's failure to identify a danger at the site. The policyholder's general liability policy excluded coverage for damages "due to the rendering of or failure to render any professional service." "Professional service" was defined to include "[s]upervisory, inspection, architectural or engineering activities." The consultation exclusion barred coverage for damages "arising out of" "[a]n error, omission, defect or deficiency in . . . an evaluation, a consultation or advice given, by or on behalf of any insured."

The court ruled that the professional services exclusion did not bar coverage because the construction site inspection services were not "professional services" since they were "something less than a 'vocation' or 'calling' and [were] close to a 'proficiency in the performance of a task.'" The court reasoned that safety inspection services were not "professional services" because they were performed by someone without an advanced degree and by someone who did not have authority to actually correct safety violations but merely reported violations to others. The court ruled, however, that the consultation exclusion applied, given that the damages "[c]learly" resulted from "an 'error, omission, defect or deficiency in' an 'evaluation' or 'consultation.'"