

ALERT

# Discrimination Exclusion Does Not Preclude Coverage for Architects' Failure to Comply With Accessibility Requirements

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The Missouri Court of Appeals has held that a claim against an architectural firm for professional malpractice due to the firm's asserted failure to design a condominium project in compliance with federal and state handicap access laws did not implicate an exclusion in the firm's professional liability policy for claims arising from discrimination and thus was covered under that policy. *Fostill Lake Builders, LLC v. Tudor Insurance Company*, 2011 WL 1118670 (Mo. Ct. App. March 29, 2011).

After being sued for failure to comply with federal and state handicap access laws in the development of a Missouri condominium project, the developer of the project sued the architectural firm that designed the project, which then sought coverage under its professional liability insurance policy. The insurer denied coverage, however, and refused to defend the claim on the grounds that the claim arose out of discrimination by the architectural firm on the basis of handicap and so fell within a policy exclusion that barred coverage for "any claim based upon or arising out of discrimination by the Insured on the basis of race, creed, national origin, handicap, age or sex." The insurer prevailed on this basis in the trial court, and the insured appealed.

The court of appeals rejected the insurer's characterization of the developer's claim against the insured as one of discrimination because the developer's claim alleged professional negligence, not direct discrimination, and because the developer did not have standing to allege discrimination against the architectural firm. In doing so, the appellate court noted that, because the term

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“discrimination” was not defined by the policy, the court would apply the dictionary definition of the word, which was “[m]arked by or showing bias; discriminatory.” The court determined that this definition meant that a purpose to discriminate was required, rather than a mere negligent act. The court then held that such a purpose or intent was absent in the claim against the insured and therefore the exclusion did not apply.

The court also rejected the insurer’s argument that, because the policy was a professional liability policy issued to an architectural firm, claims for discrimination in that field could only be understood to mean violations of handicap accessibility requirements. The court, pointing out that the discrimination exclusion applied to discrimination based on “race, creed, national origin, age and sex” in addition to “handicap,” held that the provision was, at best, ambiguous, and thus should be construed in favor of the insured.

Finally, the court rejected the insurer’s argument that it could not be faulted for failing to defend the insured because it was not made aware of the developer’s second amended cross-claim, which asserted a claim for professional negligence that was not previously pled, until after it denied a defense. The insurer contended that if faced with a facial claim for professional negligence, the insurer may have provided a defense, but it never had the opportunity to consider such a claim. The court ruled that the original complaint provided enough facts to implicate the insurer’s duty to defend, and that, even if a plaintiff originally pleads the wrong cause of action or brings a claim that is likely to be dismissed, the insurer has a duty to defend if “at the time the claim is made, facts are known to the insurer or could reasonably be ascertained by the insurer that would potentially put the claim within the scope of the policy.” The court therefore rejected both of the insurer’s coverage arguments, directing the trial court to award defense costs to the insured, because: (1) the insurer had knowledge of enough facts to implicate its duty to defend; and (2) the arguably applicable exclusion was ambiguous and therefore should have been construed in favor of coverage.