

ALERT

Undefined Term "Services" Ambiguous in Context of E&O Exclusion

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Applying California law, a federal district court has held that the undefined term "services" was ambiguous in the context of an errors and omissions exclusion endorsed onto a directors, officers and organization liability policy. *Corky McMillin Constr. Services, Inc. v. U.S. Specialty Ins. Co.*, 2012 WL 92346 (S.D. Cal. Jan. 11, 2012).

The policy at issue afforded specified coverage for loss arising out of a claim first made against an insured during the policy period for wrongful acts. The insured homebuilder sought coverage for a class action lawsuit alleging that the insured and its agents made misrepresentations to buyers regarding the nature, value and desirability of certain residential communities. The insurer denied coverage based on the policy's errors and omission exclusion, which precluded coverage for any claim "arising out of, based upon or attributable to the rendering of or failure to render services for others, including without limitation services performed for or on behalf of customers or clients of the Insured Organization."

In the coverage action that followed, the court denied the insurer's motion to dismiss on the grounds that the exclusion on which the insurer relied did not clearly preclude coverage here. Specifically, the court focused on the undefined term "services" and recognized that it must construe the term "in its ordinary and popular sense." In this regard, the court looked to the dictionary, which defines "service" to mean "the work performed by one that serves," and concluded that the term "encompasses a wide array of activities." According to the court, that a term has broad meaning is not determinative of whether there is an ambiguity. Rather, the term is to be considered in the context of the policy as a whole. Here, the court found that its breadth created an uncertainty as to whether the term "services"

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includes "wrongful acts" contemplated by the grant of coverage, such as "misstatements, misleading statements and omissions."