

April 1, 2024

Eleventh Circuit Finds Professional Services Exclusion Applies to Construction Management Activities

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In *Colony Ins. Co. v. Coastal Constr. Mgmt., LLC*, 2024 U.S. App. LEXIS 4809 (11th Cir. Feb. 29, 2024), the Eleventh Circuit found the insurer had no duty to defend or indemnify its insured based on a professional services exclusion. In that case, the underlying claims arose out of the construction of a four-story apartment complex. The owner and project developer contracted with the insured to provide construction management services as a construction manager and construction consultant. Several years after the project was completed, the owner filed suit against the architect, general contractor, and the insured alleging numerous defects and deficiencies with respect to the project. The owner asserted claims against the insured for breach of contract and negligence, alleging various failures by the insured in connection with its supervision of construction and failures to properly and timely complete the project, and correct inadequate, defective, and noncomplying work.

Colony issued two commercial general liability policies to the insured, both of which contained a professional services exclusion. Although the policy did not expressly define “professional services,” the professional services exclusion provided a non-exhaustive list of examples, including:

- (2) preparing, approving, or failing to prepare or approve maps, drawings, opinions, reports, surveys, change orders, designs or specifications;
- (3) inspection, supervision, quality control, architectural, or engineering activities done by or for you on a project on which you serve as construction manager; [and,]
- (4) engineering services, including related supervisory or inspection services[.]

In the coverage litigation, Colony argued it had no duty to defend or indemnify the insured and moved for judgment on the pleadings based on the professional services exclusion. The district court granted Colony's motion for judgment on the pleadings and the owner appealed. The Eleventh Circuit affirmed, finding the professional services exclusion was not ambiguous and all of the underlying allegations against the insured paralleled the specific provisions of the professional services exclusion.

In reaching this conclusion, the Eleventh Circuit explained that “[w]hen determining whether a party rendered a professional service, Florida courts often use ‘a fact-intensive analysis’ that ‘focuses on the act itself and not the character of the individual performing the act.’” *Id.* at *5 (quoting *Alecia Enterps., Inc. v. Nationwide Ins. Co. Am.*, 252 So. 3d 799, 802 (Fla. 2d DCA 2018)). Continuing, the Court noted that “‘Florida Courts have consistently interpreted the term professional services to mean those types of services that require specialized training,’ but the analysis also weighs the presence of a causal connection between the act at issue and the professional services provided.” *Id.* (quoting *Westchester Gen. Hospital, Inc. v. Evanston Ins. Co.*, 48 F. 4th 1298, 1304 (11th Cir. 2022)).

With these principles in mind, the Eleventh Circuit examined the underlying allegations and found all of the actions at issue were closely intertwined with the insured's role as the construction manager and consultant. Although the owner admitted that certain allegations, such as supervising the construction of the project, fell within the exclusion, it argued that other tasks fell outside of the exclusion. According to the owner, scheduling, compliance, and liaison tasks did not require any specialized training, experience, or skill and, therefore, these tasks fell outside the scope of the exclusion and Colony had a duty to defend. The Eleventh Circuit rejected the owner's arguments in this regard, reasoning that such tasks could not be separate from the insured's role of supervising the construction. Because all of the alleged wrongs fell within the professional services exclusion, the Eleventh Circuit found the exclusion applied to preclude coverage and Colony had no duty to defend.