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No. 55068-3-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

PLANET EARTH FOUNDATION, JOHN KEITH BLUME, JR. and
LISA BLUME,

Plaintiffs/Appellants.

v.

GULF UNDERWRITERS INSURANCE COMPANY and AMERICAN
BUSINESS & PERSONAL INSURANCE, INC.

Defendants/Respondents

□

BRIEF OF RESPONDENT GULF UNDERWRITERS INSURANCE
COMPANY

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I.
STATEMENT OF ISSUE

Did the trial court correctly rule that, as alleged in its complaint, all of NYU's claims arose out of the professional services that Planet Earth provided to NYU and that the Gulf Insurance policy excluded coverage for claims arising out of Planet Earth providing professional services?

II.
STATEMENT OF CASE

Planet Earth¹ acknowledges in its brief that the NYU allegations arise out of professional services that it was providing to NYU when the definition of "professional services" is used that has been applied by numerous courts construing insurance policies. However, Planet Earth is trying to convince this Court that the trial court erred in one of two ways: (1) the trial court erred by applying a definition of "professional services" that has been widely used by numerous courts or (2) that some of the services as alleged by the NYU complaint were somehow unrelated to the professional services that it was providing.² Neither argument Planet Earth is advancing is valid. Accordingly, the trial court's decision should be upheld.

¹ Gulf will use the term "Planet Earth" to refer to all the plaintiffs.

² As in initial matter, this second argument should not be considered as Planet Earth did not raise the argument at the trial level. *Babcock v. State*, 116 Wn.2d 596, 606, 809 P.2d 143 (1991).

A. The Trial court correctly ruled that the policy at issue here did not provide coverage for claims arising from the professional services that Planet Earth was providing.

The trial court provided a thorough analysis of the issues involved in this dispute. It carefully set forth its analysis in a letter opinion dated August 19, 2004 where it held that the claims, as alleged by NYU in its complaint against Planet Earth, all arose from the professional services that Planet Earth was providing to NYU. In addition, the trial court correctly ruled that the term “professional services” was not ambiguous and applied the definition that has been applied by numerous courts across the country. The trial court then held that if the term “professional services” was ambiguous, then the extrinsic evidence demonstrated that the parties both knew and understood that this policy was never intended to provide coverage for claims arising from the professional services that Planet Earth was providing to its clients.

The trial court wrote in its August 19, 2004 letter opinion:

As the Ninth Circuit observed in Bank of California N.A. vs. Opie, 663 F.2d 977, 981 (9th Cir. 1981), ‘[t]he basic rules for construing insurance policies under Washington law are typical of the rules found in most states’ Under these well settled rules, the interpretation of insurance policies is a question of law, and the policy is construed as a whole, with the policy being given a fair, reasonable and sensible construction as would be given to the

contract by the average person purchasing the insurance in questions. If the language is clear and unambiguous, the court must enforce it as written. If the clause is ambiguous, however, extrinsic evidence of the intent of the parties may be relied upon to resolve the ambiguity. Any ambiguities remaining after considering the extrinsic evidence are then resolved in favor of the insured. Weyerhaeuser Co. v. Commercial Union Insurance Co., 142 Wn.2d 654, 665-66 (2000); American Star Insurance Co. v. Grice, 121 Wn.2d 869, 874 (1993).

With regard to the “Professional services” exclusion at issue on this motion, several courts, without exception and without any reference to extrinsic evidence, have interpreted ‘professional services’ to have the following plain and unambiguous meaning:

Something more than an act flowing from mere employment or vocation . . . [t]he act or service must be such as exacts the use or application of special learning or attainments of some kind. The term ‘professional’ . . . means something more than mere proficiency in the performance of a task and implies intellectual skill as contrasted with that used in an occupation for production or sale of commodities. A ‘professional’ act or service is one arising out of a vocation, calling, occupation, or employment involving specialized knowledge, labor, or skill, and the labor or skill involved is predominantly mental or intellectual, rather than physical or manual. In determining whether a particular act

is of a professional nature or a 'professional service' we must look not to the title or character of the party performing the act, but to the act itself.

Harad v. Aetna Casualty and Surety Co, 839 F.2d 979, 984 (3rd Cir. 1988). When this definition is applied to the claims made by NYU against the plaintiff/insureds, it is clear, even when NYU's complaint is liberally construed, that the claims arise out of plaintiffs' provision of professional services and therefore would never be covered. Accordingly, no duty to defend arises.

Even if the court were to conclude that the language is ambiguous on its face, the extrinsic evidence clearly establishes that the insurer and insured understood, knew, and intended that 'professional services' would have the above meaning and that the exclusion would apply to the types of claims being made by NYU against plaintiffs. Plaintiffs are incorrect in arguing that the court is precluded by Truck Insurance Exchange v. VanPort Homes, Inc. 147 Wn.2d 751 (2002), from considering extrinsic evidence to resolve an ambiguity contained in an insurance policy. VanPort holds only that neither the insurer nor the court can consider extrinsic evidence regarding the nature or validity of the claims being asserted against the insured for the purpose of determining whether there is a duty to defend. To extend this holding to preclude the consideration of extrinsic evidence to resolve an ambiguity in the policy itself would be contrary to the longstanding well established rules of construction discussed above.

Because the meaning of the professional services exclusions is clear and unambiguous on its face, and because extrinsic evidence would resolve any policy ambiguity against the plaintiffs in any case, and because under the plain meaning of the exclusion there could be no coverage for any of the claims being asserted by NYU against the plaintiffs, there arises no duty to defend. Accordingly, plaintiffs' Motion for Partial Summary Judgment Re: Duty to Defend will be denied. ...

C.P. 948 to 950.

The record before this Court fully supports the trial court's analysis and conclusion.

B. Planet Earth provided professional media services.

Planet Earth has not argued that the media services it provided to NYU were not "professional services." Indeed, the record is clear that Planet Earth provides highly professional media campaigns that are professional services.

Planet Earth emphasizes its expertise in providing media work to its clients in its marketing materials:

Planet Earth Media provides a unique contribution by making our expertise available for socially beneficial messages at a cost far below the real market value of creating world-class advertising and communications – often a real market cost of many millions of dollars. And world-class materials are required in the twenty-first century, to achieve free airtime, or to impact the audience with paid time, or through other mechanisms. ... And lastly, even

when paid for, communicating social issue concerns is an expertise which requires years of full-time experience. ...

At the same time, at even greatly reduced rates, substantial costs are involved and organizations need to know that their resources will be well utilized. The Foundation's records and expertise guarantee such an outcome.

C.P. 549.

C. Planet Earth repeatedly made a business decision to forego obtaining professional errors and omissions insurance.

Planet Earth obtained a D&O policy in 1995. The same policy was renewed each subsequent year including the policy year of December 13, 2002 to December 13, 2003 which was policy number GU7977232 – the policy that is at issue here. (C.P. 606.) Planet Earth purchased this D&O policy for \$3,000 and the policy provided \$1,000,000 worth of coverage inclusive of defense costs. (C.P. 606.)

The formal name of the policy was a “Non-Profit Management and Organization Liability Insurance Policy.” (C.P. 607.) However, the common name for this policy was a Directors & Officers liability policy and in fact that is how Planet Earth’s insurance agent, Jim Miller and Planet Earth referred to it. *See* memo dated December 19, 2002, from Mr. Miller’s office to the Blumes stating, “Please find enclosed your Confirmation of Coverage for your Director & Officers policy.” (C.P. 885.)

As this was a D&O policy, and not a professional E&O policy, is was never intended to provide coverage for any causes of actions arising from Planet Earth providing professional services to third parties. This was plainly stated in Endorsement #3 to the policy:

In consideration of the payment of premium, it is hereby understood and agreed that the Insurer shall not be liable to make any payment for Loss in connection with any Claim made against any of the Insureds for, based upon, arising out of, directly or indirectly resulting from, in consequence of, or in any way involving any actual or alleged act, error or omission by any Insured with respect to the rendering of, or failure to render professional services for any party.

C.P. 617.

Because Planet Earth did not have coverage for claims based upon the professional services it was providing to third parties, beginning in 1995, Jim Miller, Planet Earth's insurance agent, began advising Planet Earth, and specifically the Blumes, that Planet Earth should obtain professional liability coverage as well. Planet Earth elected to forego such coverage.

Mr. Miller advised the Blumes that the D&O policy did not include professional liability coverage. He testified that he specifically informed Planet Earth of that fact:

A: Professional liability is usually excluded in just about all insurance policies.

Q: So when you have one of your clients asking, "What does this mean, this professional services exclusion," how do you explain it to them?

A: Normally, the professional services exclusion doesn't come up. I mean, you know, we say that there's no professional liability on the policy, and that usually takes care of it.

Q: So you've never had an instance in your professional career where one of your clients has looked and seen an endorsement where there's the professional services exclusion where they've asked you, "What does that mean?" Is that correct?

A: We usually – I'm not aware of that. I mean, if you're referring to the Blumes' case, the policy did not cover professional, and we advised them of that. It had no professional liability in it.

C.P. 724.

Mr. Miller testified:

Q: At that time, you realized that Planet Earth ran the risk of being sued for its actions arising out of providing these professional services; correct?

A: Correct.

Q: And you knew that they didn't have any policies providing coverage for that risk?

A: Correct.

Q: And so you were telling the Blumes that they had the opportunity to obtain insurance that would cover the risk of being sued for activities arising out of their providing these professional services?

A: Yes.

(C.P. 724-725.)

The fact that Planet Earth did not have E&O coverage, and the fact that the NYU lawsuit was an E&O claim, was reinforced by Mr. Miller in a telephone call he had with Thomas Rizzuto of Gulf. Mr. Rizzuto testified that Mr. Miller explained that he had tried to get Planet Earth to purchase E&O coverage and that the NYU claim was an E&O claim:

Q: All right. Tell me what you do specifically recall Mr. Miller saying then in whichever conversation it was.

A: I remember when I told first had told [sic] this doesn't really look like anything is provided by our policy. I said that it looked like an E&O claim and he had said that I felt the same way and I had told the client that they should have E&O coverage and they didn't want it.

C.P. 546.

A: Like I said, I remember him saying that he tried to offer that coverage and that they declined it and he had felt it was -- it was an E & O claim as well.

C.P. 547.

This was undisputed as Mr. Miller recalled the same conversation:

Q: Did you tell him [Rizzuto] that you had tried to get the Blumes to purchase professional liability coverage numerous times but they refused to do so?

A: We had offered, yeah, professional and --

Q: So you did tell him that during Telephone Conversation No. 1?

A: Yes.

Q: So tell me what you told him about that in Telephone Call No. 1.

A: We had offered them professional coverage in the past and they didn't take it.

C.P. 734 to 735.

The fact that Mr. Miller advised Planet Earth that it only had D&O coverage and not E&O coverage was well documented. Mr. Miller began advising the Blumes in writing as early as February 20, 1996 that professional E&O coverage was available for their business:

Dear Lisa and Keith,

...

Please see the enclosed Professional Liability Application and Policy. The Gulf Insurance Company does provide Professional E&O/ Liability for business entities in the broadcasting, publishing and advertising industries.

C. P. 501.

In a letter dated June 12, 1997 from Mr. Miller to the Blumes, he wrote:

Subject: Professional Liability Application & Update

Dear Lisa and Keith,

Thank you for meeting with me on Tuesday, June 10th regarding your business insurance.

...

Please see the enclosed Producer's Professional Liability Application which needs to be completed and returned to us in order to obtain a quote. A copy of the Professional Policy Form for your review which we will also send to you.

C.P. 504 (emphasis in original). Mr. Miller followed up a few months later once again confirming that the Blumes were looking for professional liability coverage for Planet Earth:

Subject: Business & Professional Insurance Update

Dear Lisa and Keith,

...

During our last meeting you had requested information on several items. Below is our response to the open items:

1. Quote on Professional Liability: On June 12 we sent over the Gulf Professional Coverage form and Application. However, at this point in time I would like to recommend another Professional Insurance Program which may be better suited to your needs for a blanket Professional Policy.

Please see the enclosed Media Professional Application to completed [sic] and returned to us for a Quote.

C.P. 511 (emphasis in original).

Once again, the above undisputed facts should be used when analyzing the parties' intent at the time of entering into this insurance contract.

D. The allegations in the NYU complaint all arose from the professional media services that Planet Earth was providing to NYU.

NYU, in its complaint, set forth the nature of the action:

2. NYU ... entered into a written agreement with defendant Planet Earth Foundation. ... NYU paid Planet Earth \$750,000 – the entire contract price – for advertising placement services in connection with what was supposed to be a year-long public service campaign to raise New Yorkers’ awareness of children’s mental health issues (the “Campaign”). The Campaign was composed of two elements: paid advertisements and public service announcements.
3. Planet Earth was obligated to create four different advertising concepts, a new one to be disseminated to the public during each quarter of the year. After twelve months, Planet Earth has provided only one advertising concept, has accomplished only one week of paid placement services, has failed to account for the use of NYU’s money, and has failed to pay media outlets for the television airtime that it purchased. The work that Planet Earth did perform on the campaign was shoddy, unoriginal, and of inferior quality compared to the level of creative work promised by the defendants. ...

C.P. 641-642.

New York University, in its amended complaint, provided more detail of the allegations against Planet Earth.

15. On ... October 30, 2001, ... an assistant to Lisa Bloom telephoned Catherine Collier ("Collier"), the Center's Director of Communications, in New York. ... The two did in fact speak on ... March 11, 2002, when Lisa Blume called Collier at Collier's office in New York.
16. During the March 11, 2002 call, Lisa Blume expounded on her superior knowledge and expertise in the area of public service advertising. ... These misrepresentations were designed to, and indeed did, induce NYU to part with \$750,000 in charitable contributions in the expectation of receiving million of dollars worth of coverage for a first class public service campaign. Specifically, Lisa Blume represented that Planet Earth had created successful media campaigns for many not-for-profit organizations
17. ... [I]n April 2002, Lisa Blume delivered to Collier a videotape and other materials that Lisa Blume said comprised examples of the original print and television spots that Planet Earth had created for prior clients. Lisa Blume falsely and intentionally represented that the work Planet Earth would undertake for NYU would be of similar quality to the marketing materials. Those materials included what appeared to be high-quality, originally scripted and filmed television commercials with professional actors, as well as originally produced print

advertisements with professional models.

...

- 20 ... Lisa Blume and Planet Earth represented that Planet Earth had special expertise and success in creating public service campaigns for charitable organizations and achieving effective placement of charitable messages in the media.

C.P. 687 to 690.

New York University described the terms of the Agreement into which it had executed with Planet Earth for Planet Earth's services.

- 29 ... Planet Earth ... agreed to donate all work related to the creation and production of television, radio, and print spots in furtherance of the Center's charitable mission.

30. In exchange, NYU agreed to pay Planet Earth \$750,000 for Planet Earth's costs and services to place the spots through New York media outlets. NYU paid the full \$750,000 on July 11, 2002.

...

39. Under the Agreement, Planet Earth retained any copyright and trademark rights to any original finished products and creative components, but specifically "excluding any rights to the name of NYU or the Child Study Center, any portion of the work created under this Agreement

which identifies NYU or the Child Study Center and any materials which was not created by [Planet Earth] pursuant to this Agreement, including without limitation, the Children's Artwork."

C.P. 692; 694.

NYU, in its complaint, set forth the nature of the errors and omissions committed by Planet Earth.

41... Lisa Blume submitted to the Center a written presentation setting forth the progress of the Campaign. Planet Earth chose as the campaign title and tag line, "Caring About Our Kids," which is an imitation of NYU's "About Our Kids" trademark. Planet Earth did this intentionally, acknowledging that its chosen title "directly incorporates [the Center's] web site address, aboutourkids.org which will close each concept."

...

48. Under the Agreement, NYU is entitled to 10 VHS video copies of all television spots "within two weeks of completion of production." Planet Earth did not deliver the VHS tapes within that time period.

...

53. Upon information and belief, the "Remember" television spot aired, in accordance with Planet Earth's paid placement and the approved Media Plan, during the week of September

9, 2002. However, upon information and belief, the “Remember” spot never appeared on television as a result of Planet Earth’s PSA placement services, if any, after the week of September 9, 2002.

54. Upon information and belief, no radio spots or print announcements for the “Remember” concept have ever appeared in any media outlet.

55. Upon information and belief, Planet Earth performed only paid placement services with regard to the “Remember” spot. Upon information and belief, Planet Earth did not provide any PSA placement services for the “Remember” concept as required under the Agreement and paid for by NYU.

...

57. Unbeknownst to NYU at the time, on September 16, 2002, Keith Blume, on behalf of Planet Earth, signed an “Intent to Use” trademark application with the United States Patent and Trademark Office to register as a trademark “CARING ABOUT OUR KIDS” in International Class 35. ...

...

59. Sometime in September 2002, when Lisa Blume and Keith Blume realized that NYU would not pay it any additional money and that NYU expected Planet Earth to comply with the terms of the existing

Agreement, Planet Earth all but ceased performing its obligations under the Agreement. It did not account to NYU for the placement of paid media. It did not furnish affidavits from media outlets showing that the advertisements were in fact broadcast. It did not make any attempts to place PSAs.

C.P. 694; 696 to 698.

E. All of the causes of actions that NYU alleged in its complaint arose from the professional media services that Planet Earth provided to NYU.

#1: Breach of Contract Against Planet Earth³

The majority of NYU's complaint against Planet Earth is that Planet Earth breached the Agreement it had with NYU.

C.P. 701 to 702.

#2: Fraud Against Planet Earth and Lisa Blume

NYU alleged that Planet Earth and Lisa Blume made several knowingly false representations and submitted false materials to induce NYU to enter into the agreement for Planet Earth to provide the media campaign for NYU.

C.P. 702 to 705.

³ As acknowledged by Planet Earth, NYU filed an amended complaint. Accordingly, any duty to defend must be analyzed under the amended complaint.

**#3: Trademark Infringement and Unfair Competition
Against Planet Earth and Keith Blume**

The last remaining claim asserted by NYU in its first amended complaint was that both Planet Earth and Keith Blume infringed upon NYU's trademark of "About our Kids." From the complaint, the acts causing the alleged trademark infringement arose from the media services that Planet Earth was providing to NYU.

C.P. 705 to 706.

**III.
ARGUMENT**

As a matter of law, Gulf does not owe a duty to defend Planet Earth in the NYU lawsuit because **all** of the allegations in the NYU complaint arose from the professional services that Planet Earth was providing to NYU.

An insurer owes a duty to defend only if the allegations contained in the complaint, if proven true, would render the insurer liable to pay out on the policy. *Kirk v. Mt. Airy Ins.*, 134 Wn.2d 558, 561, 951 P.2d 1124 (1998). Policies are interpreted as they would be by the average purchaser. *Roller v. Stonewall Ins.*, 115 Wn.2d 679, 682-83, 801 P.2d 207 (1990). Where an insurance policy exclusion clearly and unambiguously applies to bar coverage, the court's inquiry ends. *Scottsdale Ins. v. Int'l Protective Agency*, 105 Wn. App. 244, 249, 19 P.3d 1058 (2001). The

language in an insurance policy should not be strained to create an ambiguity where none exists. *Pacific Indemnity Co. v. Linn*, 766 F.2d 754, 761 (3rd Cir. 1985). Indeed, “a court should read policy provisions to avoid ambiguities, if possible, and not torture the language to create them.” *St. Paul Fire & Marine Ins. Co. v. United States Fire Ins. Co.*, 655 F.2d 521, 524 (3d Cir. 1981). Instead, policy language should be interpreted according to its ordinary meaning. *Dairyland Ins. v. Ward*, 83 Wn.2d 353, 517 P.2d 966 (1974). A policy provision is ambiguous if reasonably intelligent people would honestly differ as to its meaning when considering it in the context of the entire policy. *Northbrook Ins. v. Kuljian Corp.*, 690 F.2d 368, 372 (3d Cir. 1982). In construing key clauses and words, the court must attempt to ascertain what was probably contemplated by the parties when the contract was written. *Harris v. Fireman’s Fund Indemnity Co.*, 42 Wn.2d 655, 257 P.2d 221 (1953). Finally, an exclusion from coverage contained in an insurance policy will be effective against an insured if it is clearly worded and conspicuously displayed, regardless of whether the insured read the limitation or understood its import. *Pacific Indemn. Co.*, 766 F.2d at 761.

A. The trial court properly used the definition that has been used by numerous courts throughout the country.

The trial court, as part of its analysis, had to provide a definition for the term, “professional services.” Gulf provided to the trial court numerous citations as to how courts have interpreted the term. In contrast, Planet Earth did not provide a single term that was supported by case law.

Planet Earth, in a variation on this theme, is now trying to persuade this Court to use a definition of “professional services” that the Washington legislature used in an entirely different context and for a different purpose. Planet Earth’s contention should be rejected and instead the definition adopted by courts throughout the country should be used here.

In *Harad v. Aetna Casualty and Surety Co.* 839 F.2d (3rd Cir. 1988) the court held that a professional services exclusion contained within a business owners policy excluded coverage for a claim of malicious prosecution brought against the insured attorney. There, Aetna had issued a business owners policy to Harad, an attorney. Harad was sued by Catania for malicious prosecution arising from an verified answer that Harad had signed which alleged that Catania had conspired to defraud Harad’s client.

The trial court ruled that Aetna had a duty to defend Harad. On appeal, the court of appeals reversed and held, as a matter of law, that there was no duty to defend.

There, the policy specifically provided that it would cover claims against the insured that included malicious prosecution. However, there was the following exclusion:

This insurance does not apply ... when this policy is issued to a ... attorney ... to bodily injury, ... property damage or personal injury arising out of the rendering or failure to render any professional service.

Id. at 983.

The trial court ruled that the policy provisions were ambiguous and that the professional services exclusion did not apply because Harad was not providing professional services to Catania, the person suing Harad. The Third Circuit rejected the trial court's attempt to impose a privity limitation.

The term "professional services" was not defined in the policy. The Third Circuit adopted a definition of "professional services" used by many other courts.

[T]he definition of "professional services" articulated and applied by several courts, which have recognized it to mean:

Something more than an act flowing from mere employment or vocation ... [t]he act or service must be such as exacts the use or application of special

learning or attainments of some kind. The term “professional” ... means something more than mere proficiency in the performance of a task and implies intellectual skill as contrasted with that used in an occupation for production or sale of commodities. A “professional” act or service is one arising out of a vocation, calling, occupation, or employment involving specialized knowledge, labor, or skill, and the labor or skill involved is predominantly mental or intellectual, rather than physical or manual. In determining whether a particular act is of a professional nature or a “professional service” we must look not to the title or character of the party performing the act, but to the act itself.

Id. at 984, quoting, *Marx v. Hartford Accident and Indemnity Co.*, 183 Neb. 12, 13-14, 157 N.W.2d 870 (1968).

The Third Circuit ruled that Harad, by signing the answer and counterclaim, was providing a professional service. The court accordingly held, “Since Harad’s liability in this case flowed directly from his performance of a professional activity, and as the policy excluded coverage for any liability arising from the “rendering ... of any professional service,” the exclusion clearly obviates any duty to defend and indemnify.” *Id.* at 985.

The Third Circuit, however, did not end its analysis there but continued by examining the policy as a whole. The court noted that the policy was entitled “Business Owners Policy” which the court noted was a policy to cover liability arising from the business operations. Harad

argued that his business was the practice of law. The court, however, noted that in the practice of law, there are two components: (1) the professional and (2) the commercial. The court also noted that Harad in fact had purchased a separate professional liability policy from another insurer. The court ruled that applying the exclusion in the way that it did was consistent with the overall intent of the policy.

Here, a number of observations should be made. First, even under the restrictive manner the trial court interpreted the policy in *Harad* would mean that the professional services exclusion applies here because Planet Earth was in privity with NYU. Second, under the interpretation by the Third Circuit the professional services exclusion applies here: NYU's claims against Planet Earth arise from Planet Earth's providing a media campaign. Providing a media campaign involves specialized knowledge and skill which is predominantly mental and intellectual, rather than physical or manual. Third, the Gulf policy was not a professional E&O policy but instead a Directors and Officers policy. Fourth, Planet Earth had the opportunity to purchase E&O coverage but chose not to do so.

Another example of an insured attempting to obtain professional E&O coverage from a non-E&O policy in the face of a professional services exclusion is *American Motorists Ins. v. Southern Security Life Ins.*, 80 F. Supp.2nd 1285 (M.D. Ala. 2000). There, AMICO insured

Southern Security under a commercial general liability policy. Southern Security was sued for misrepresentation regarding a life insurance policy it sold to the underlying plaintiffs. The duty to defend was at issue in the lawsuit between AMICO and Southern Security. The court applied Florida law where, like Washington law, the duty to defend is determined by the allegations contained in the complaint and exclusionary clauses are narrowly construed and interpreted to their plain meaning. *Id.* at 1288.

The AMICO policy had a professional services exclusion and, as is here, the term was undefined. However, the court used the same definition as did *Harad*. The court held that applying the plain language in the professional services exclusion, there was no coverage for the allegations of misrepresentations in selling the life insurance policies:

In this case, the professional acts performed by Southern Security and its agents were the sale and preparation of insurance policies. In selling the insurance policies to Howard and the Olivers, Southern Security and its agents made representations about the terms and conditions of the insurance contracts – a pursuit which involves professional activity. ... If Southern Security and its insurance agents had performed no professional services relative to the sale and marketing of insurance products, then Olivers and Howard would have incurred no injuries.

Id. at 1289. The same is true here: all of the allegations arise from Planet Earth providing professional services to NYU. If Planet Earth had not

pursued that activity, then NYU would not have any claims against it.

What Planet Earth is attempting to do is to convert the D&O policy into an E&O policy. As the court in *American Motorists* noted:

To construe the exclusionary language in this case as Southern Security asks would result in making the AMICO's commercial general liability policy into a professional liability policy. [Footnote three to this quote added: "A commercial general liability policy provides comprehensive coverage to the insured and can cover the provision of general business activity, while a professional liability policy insures members of a profession from liability arising out of a special risk associated with practicing a particular profession.]

Id. at 1288.

In contrast, Planet Earth is urging this Court to use the definition provided in RCW 18.100.030(1). However, Planet Earth ignores the purpose of that statute: it was enacted to allow a professional services corporation to render services to clients and patients even though the corporation itself did not hold a license that was necessary to provide those services. In other words, the statute allows physicians to create a professional services corporation to treat patients even though the corporation itself does not hold a license to practice medicine. It included within this group all professions where it is required to hold a license issued by the state. As set forth in RCW 18.100.010: "It is the legislative intent to provide for the incorporation of an individual or group of

individuals to render the same professional service to the public for which such individuals are required by law to be licensed or to obtain other legal authorization.” The legislature did not intend to define the term “professional services” for insurance policy purposes.

Planet Earth also attempts to argue that a dictionary definition should be used to define “professional services.” However, Planet Earth has not shown that any court has used a dictionary definition to define such a term. In addition, Planet Earth only gives a partial rendition of the definition used by Miriam-Webster and does not provide the Court with the entire definition. Using the entire definition supports Gulf’s position, not Planet Earth’s:

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1 a : of, relating to, or characteristic of a profession **b :** engaged in one of the learned professions **c (1) :** characterized by or conforming to the technical or ethical standards of a profession **(2) :** exhibiting a courteous, conscientious, and generally businesslike manner in the workplace
2 a : participating for gain or livelihood in an activity or field of endeavor often engaged in by amateurs <a *professional* golfer> **b :** having a particular profession as a permanent career <a *professional* soldier> **c :** engaged in by persons receiving financial return <*professional* football>
3 : following a line of conduct as though it were a profession <a *professional* patriot>

The dictionary definition is indeed much broader in that it defines “profession” as one engaging in an activity for financial return. Moreover,

it acknowledges that a football player and a soldier can be considered to be engaging in a professional career and thus, by reasoning, providing professional services.

Once again, the important feature here is that Planet Earth was providing services that required a high degree of skill and was not simply done as a hobby or provided as menial labor.

Finally, Planet Earth argues that the term “professional services” is ambiguous and the same result could have been achieved if Gulf had used different language for the exclusion. However, Planet Earth is ignoring the fact that the fact that the trial court here applied the same definition of “professional services” that courts have been using since 1968. There is no reason for Gulf to try to fashion a different definition than trial court here applied the same definition of “professional services” one that has been used by courts interpreting this provision.

B. All of the NYU allegations arise from the professional services that Planet Earth was providing.

While Planet Earth, in one part of its brief attempts to argue that it was not providing professional media services to NYU, in the next part of its brief it admits just that fact:

Here, Planet Earth was hired for its skills in developing public service advertising content for NYU. Although the Complaint does contain allegations that Planet Earth failed to render these

services (e.g., claims that Planet Earth delivered sub-standard and insufficient advertising content) the Complaint also alleges that Planet Earth improperly accounted for NYU's money and failed to pay various media outlets that had distributed NYU's advertising. These accounting allegations relate to Planet Earth's administrative activities, and not to its "professional services" activities.

(Appellant's brief at p. 19.)

Planet Earth admits that it was providing professional services in the form of developing public service advertising for NYU. It is attempting to argue, however, that some of the allegations are separate from those professional services. It is arguing that NYU's allegations that it improperly accounted for NYU's money and failed to pay various media outlets was somehow separate from the professional services it was providing. However, that simply makes no sense: those are an integral part of the professional services and would not have occurred but for the providing of the professional services.

Planet Earth cites a number of construction cases involving general liability insurance policies where the courts have recognized that the insured is under a general duty to provide reasonable care toward the safety of others at a construction site and thus this general duty is separate and distinct from the insured's professional services responsibilities. As

the court in *Chemstress Consultant Co., v. Cincinnati Ins.*, 128 Ohio App.

3d 396, 401, 715 N.E.2d 208 (1998) stated:

Although exclusions from general liability insurance policies for professional services or liability have evaded precise definition, courts have repeatedly found that claims based on workplace safety do not fall within the exclusion. [Citations omitted.] In addition to its duty to perform professional or supervisory services at a construction site, an engineering firm has a general duty of reasonable care toward the safety of other workers. An engineer may have a general duty to look out for the safety of other workers even when he is also contractually obligated to do so. [Citation omitted.] When there is evidence that the engineer's job duties do not include overseeing the safety of others at the job site, however, his duty to look out for their safety may be more clearly a nonprofessional one.

In other words, the courts in the cases cited by Planet Earth have recognized that, in their jurisdictions, there is a general duty owed regarding safety in the workplace which would exist even in the absence of the insured being retained for professional services. Here, there is no general duty owed by Planet Earth to others to account for funds or a duty to pay media outlets as it promised to do so in its contract. In fact, just the opposite: these are duties that arise directly from the contract and only

exist because of that contract.⁴ Accordingly, the cases cited, and the arguments raised, by Planet Earth have no application to the analysis here.

C. The parties past dealings demonstrate that neither one intended that the D&O policy would cover any claims arising from Planet Earth providing professional services.

As the trial acknowledged in its analysis, the term “professional services” is not ambiguous and there is no need to consider extrinsic evidence. However, if extrinsic evidence is used to aid in determining the intent of the parties when entering into this insurance contract, then the evidence demonstrates that the parties both acknowledged that this was an D&O policy that would not cover professional liability claims. Instead, Planet Earth was given the opportunity numerous times to obtain professional E&O coverage but elected not to purchase such coverage.

In *Denny’s v. Security Union Title Ins.*, 71 Wn. App. 194, 859 P.2d 619 (1993) the court address the issue of whether the trial court erred in refusing to consider extrinsic evidence in construing whether or not there was coverage under an insurance policy. The court of appeals held that the trial court erred in construing the insurance policy without considering the extrinsic evidence.

⁴ Because of that reason, such claims would also be excluded section IV(9) of the insurance policy that excludes claims arising from any written, oral, or implied contract. C.P. 610.

The court began its analysis by citing *Berg v. Hudesman*, 115 Wn.2d 657, 801 P.2d 222 (1990) for the proposition that extrinsic evidence was admissible to interpret the meaning of a contract term. *Denny's*, 71 Wn. App. at 201. “In order to interpret the original meaning of a contract term, extrinsic evidence is admissible, even if the term appears unambiguous.” *Id.* The court noted that “[a]mbiguity may be found not only in the express terms of an insurance contract, but also when language clear on its face becomes unclear when considered in light of extrinsic or collateral circumstances.” *Id.* at 206.

Extrinsic evidence includes the circumstances of the contract formation, and the “subsequent conduct of the parties with regard to the extent of coverage.” *Id.* at 210. It is this latter category of evidence that clearly shows that Planet Earth never obtained professional errors and omissions insurance despite having that recommendation made by its insurance agent, Jim Miller. In fact, the evidence demonstrated that as soon as Planet Earth obtained the D&O policy at issue here, Mr. Miller was encouraging it to also obtain professional E&O coverage.

As noted by the trial court, if extrinsic evidence is considered, then the evidence demonstrates that the parties never intended the D&O policy to provide coverage for claims of professional errors and omissions.

CONCLUSION

The trial court correctly ruled that the policy language itself is clear that Gulf was not insuring the Plaintiffs against the risks they incurred as a result of their providing professional services to other parties. The definition of “professional services” the trial court used has been used by a number of courts and this definition has been in use since at least 1968. Planet Earth did not cite to the trial court, nor has it cited to this Court, any other definition of “professional services” used by a court in an insurance coverage case. The trial court used the correct definition. As Planet Earth itself concedes, using this definition, it was providing “professional services.”

Planet Earth is also attempting to argue that its administrative services that were provided in connection with the media campaign were somehow separate and should not be included in the analysis. Once again, Planet Earth has no support for this proposition. Instead, it merely has cited cases in the construction arena where some courts have held that there is a general duty upon all to ensure workplace safety and that this duty is separate from any other contractual duty. Here, the administrative

duties owed by Planet Earth to NYU arose strictly from the contract with NYU and there is no independent basis for those duties.⁵

Finally, as the trial court correctly ruled, if extrinsic evidence is considered, it is clear that the parties acknowledged that this was a D&O policy, that Gulf was not providing coverage for professional errors and omissions claims, and that if Planet Earth wanted such coverage, then it would have to obtain separate insurance.

The trial court's ruling was correct and should be affirmed.

Dated this 14 day of June, 2005.

Respectfully submitted,

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⁵ In addition, as stated earlier, Planet Earth failed to raise those claims at the trial court level and they should not be considered on appeal.

CERTIFICATE OF SERVICE

The undersigned certifies that on the 14th day of June, 2005, she placed with ABC Legal Messengers, Inc. a true and correct copy of the Respondent Gulf Underwriters Ins. Co. Opening Brief for hand delivery to counsel of record:

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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

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