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No. 55068-3-I

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**IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION I**

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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.*

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**PETITION FOR DISCRETIONARY REVIEW**

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## **I. IDENTITY OF PETITIONER**

Petitioners Planet Earth Foundation, John Keith Blume, Jr., and Lisa Blume (collectively, "Planet Earth") ask this Court to accept review of the decision designated in Part II of this motion.

## **II. DECISION**

Planet Earth seeks review of a decision of the Court of Appeals, Division I, filed December 5, 2005. The decision affirmed the trial court's denial of Planet Earth's motion for partial summary judgment against Gulf Underwriters Insurance Company ("Gulf"). A copy of the decision is included in the Appendix at pages 1 through 7.

## **III. ISSUES PRESENTED FOR REVIEW**

Where the liability insurance policy issued by Gulf to Planet Earth contained an exclusion for liability "with respect to the rendering of, or failure to render professional services for any party," and where: (1) the underlying claim against Planet Earth alleged fraud, trademark infringement, and other misconduct separate from Planet Earth's services to its client; and (2) the "professional services" exclusion was reasonably susceptible to multiple interpretations, some of which would lead to coverage, did the Court of Appeals err in failing to hold that the exclusion was ambiguous and must be interpreted in favor of coverage?

#### **IV. STATEMENT OF THE CASE**

##### **A. Planet Earth Foundation and Its Business**

Planet Earth is a Washington non-profit organization. It is a public-service media agency. Its work has included the production of public-service advertising for other non-profits. Clerk's Papers at 66 (hereinafter "CP \_\_"). Planet Earth has been in operation since 1977. As part of its purpose of creating awareness and action on social issues, locally and globally, Planet Earth has designed advertising campaigns for a wide variety of organizations. Clients have engaged Planet Earth in substantial part because of the creative abilities of its founder and principals, Keith Blume and Lisa Blume. It is undisputed that Planet Earth does not transmit or broadcast any of the advertising content it creates. CP 66-67.

##### **B. The Non-Profit Management and Organization Liability Policy Issued by Defendant Gulf Underwriters Insurance Company**

During the time relevant to this appeal, Gulf insured Planet Earth and/or the Blumes under three liability policies: (1) a commercial general liability ("CGL") policy; (2) an excess CGL policy; and (3) a "Non-Profit Management and Organization Liability Insurance Policy" (hereinafter "the Policy"). CP 67. The CGL policies insured Planet Earth against liability claims for property damage or bodily injury. CGL policies

protect the insured against claims for physical injury to a third party's property or person.

The Policy, which is the contract at issue in this appeal, granted coverage by the following insuring agreement:

The Insurer will pay on behalf of the Insureds Loss . . . which is incurred by the Insureds as the result of any Claim first made against the Insureds and reported in writing to the Insurer during the Policy Period . . . for a Wrongful Act.

CP 104.

The Policy further defines "Wrongful Act" in relevant part as follows:

Wrongful Act means any error, misstatement, misleading statement, act, omission, neglect, or breach of duty committed or attempted, by [Planet Earth] or by [the Blumes], individually or collectively . . . .

CP 105.

The Policy, then, in contrast to the CGL policy's requirement of physical injury to property or person, insured Planet Earth against liability claims resulting from non-physical "Wrongful Acts": errors, omissions, misleading statements, breaches of duty, and the like.

The Policy required Gulf to pay on behalf of Planet Earth any covered liability incurred by Planet Earth, whether by judgment in favor of or settlement with a third-party claimant. CP 104. This duty is commonly known as the "duty to indemnify" or the "duty to pay." The Policy also

required Gulf to defend Planet Earth: “The Insurer shall have the right and duty to defend any Claim covered by this Policy, even if any of the allegations are groundless, false or fraudulent.” Id. Planet Earth’s motion for summary judgment, and this motion, concerns Gulf’s duty to defend its insured.

**C. The Dealings Between Planet Earth and New York University**

On July 27, 2002, Planet Earth entered into a contract with New York University (“NYU”) to create, and coordinate paid and free distribution of a public-service advertising campaign to promote NYU’s child mental-health services. The work called for by the contract was to be completed within a 12-month period. The contract had a total value to Planet Earth of \$750,000. Neither of the Blumes contracted with NYU in their individual capacity. CP 67.

**D. The Dispute and Litigation Between Planet Earth and NYU**

In the ensuing months, the business relationship between Planet Earth and NYU deteriorated. These difficulties culminated on June 30, 2003, when NYU filed suit against Planet Earth and the Blumes in U.S. District Court for the Southern District of New York. NYU filed its First Amended Complaint on October 7, 2003 (hereinafter collectively “the NYU Action”). NYU’s allegations and claims included the following:

- Planet Earth and Lisa Blume breached fiduciary duties to NYU and committed fraud by inducing NYU and entering into a contract with Planet Earth and by allocating NYU's funds to non-charitable purposes. CP 158-60.
- Planet Earth infringed on NYU's trademark "About Our Kids" and tried to appropriate it for Planet Earth's uses. CP 139, 203.
- Planet Earth and Keith Blume made false statements on a trademark application to the U.S. Patent and Trademark Office for the phrase "Caring About Our Kids." CP 152, 203.
- Keith Blume's false statements and Planet Earth's infringement on NYU's trademark constituted tortious unfair competition. CP 203.

Based on these allegations, NYU's causes of action against Planet Earth and Lisa Blume included the following:

- Fraud against Planet Earth and Lisa Blume. CP 160-63; 199-202.
- Trademark infringement and unfair competition against Planet Earth and Keith Blume. CP 165-67; 202-03.
- Claims for injunctive relief against Planet Earth and the Blumes associated with the trademark-infringement and unfair-competition claims. CP 167, 204.

At the time of the commencement of the NYU Action, NYU had paid Planet Earth the full amount called for by the contract, \$750,000. NYU did not, however, seek merely a reduction or return of the contract payment. Instead, pursuant to its various tort claims, NYU pleaded for damages “not less than \$18,000,000 plus costs and interest.” CP 204.<sup>1</sup>

**E. Planet Earth’s Tender of the NYU Action and Gulf’s Refusal to Defend**

On or about August 14, 2003, Planet Earth tendered the NYU Action to Gulf. CP 67. By letter from Gulf’s outside counsel on October 14, 2003, the insurer denied coverage for the NYU Action, both for defense and indemnity. As relevant to this Petition, Gulf based its denial on the following exclusion that had been added to the policy by

Endorsement No. 3:

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 an 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.

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<sup>1</sup> At the time of the Superior Court’s ruling below, the NYU Action was proceeding but had not yet been tried. Subsequently, Planet Earth and the Blumes prevailed on summary judgment on NYU’s fraud claims, and NYU shortly before trial withdrew all of its claims other than the sole breach-of-contract cause of action against the Foundation. These facts are not part of the record on this appeal and are not material to the issues raised herein. Planet Earth nonetheless offers this information to heal some of the damage to its reputation inflicted by NYU’s suit.

CP 114 (emphasis added).

**F. The Litigation Over Gulf's Duty to Defend and the Proceedings Below**

On October 21, 2003, Planet Earth filed suit against Gulf. Planet Earth's Complaint sought damages for breach of the duty to defend against the NYU Action, a declaration that the NYU Action was covered under the Policy, and damages for breach of Gulf's duties of good faith and fair dealing to its insureds. CP 5-13. Planet Earth contends that Gulf was obligated to defend it against the NYU Action. In the alternative, however, were the courts to determine that the Policy does not cover the NYU Action, Planet Earth contends that its broker, ABPI, negligently failed to advise Planet Earth as to the scope of the Policy. Accordingly, Planet Earth also named ABPI as a defendant. CP 12.

Planet Earth filed a Motion for Partial Summary Judgment Re: Duty to Defend. CP 72. The Motion sought a ruling that: (1) the NYU Action satisfied the Policy's insuring agreement; (2) that the above-cited breach-of-contract and "professional services" exclusions did not apply to all of the allegations in the NYU Action and thus did not relieve Gulf of its duty to defend; and (3) Gulf was obligated to fund the defense of the entire NYU Action. The Motion did not seek judgment for a sum certain with respect to the costs of defense, nor did it address Planet Earth's

claims for indemnity coverage or for liability for insurance bad faith. Id. Gulf opposed the Motion. CP 558.

On August 19, 2004, the King County Superior Court, by Judge Steven Scott, denied Planet Earth's Motion. The court's letter ruling held that the "professional services" exclusion applied to all of the allegations and claims in the NYU Action. CP 948-50. Following that ruling and the Superior Court's denial of Planet Earth's Motion for Reconsideration, the parties filed a Stipulated Motion for Order Directing Judgment in Favor of Defendant Gulf Underwriters Pursuant to CR 54(b). CP 984. The Superior Court granted that Motion, finding no just reason for delaying entry of final judgment in favor of Gulf. CP 988-89. The parties further agreed to stay all remaining proceedings against defendant ABPI. Id. Planet Earth timely filed a Notice of Appeal. CP 974. On December 5, 2005, the Court of Appeals, Division I, issued an unpublished opinion affirming the trial court. This Petition for Discretionary Review timely follows.

## V. ARGUMENT

RAP 13.4(b) provides that a petition for review will be accepted by this Court:

- (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or

- (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or
- (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
- (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

Here, the Court of Appeals' analysis regarding the scope of the professional services exclusion is in conflict with Woo v. Fireman's Fund Ins. Co., 128 Wn. App. 95, 114 P.3d 681 (2005), a published decision issued by Division I just six months ago. Moreover, the decision below conflicts with Washington's well-established body of law regarding the broad scope of the duty to defend. Thus, the Court should accept review of this matter under RAP 13.4(b)(1), (2), and (4).

**A. The Decision Below is in Conflict with the Recent Decision of the Court of Appeals in Woo.**

The Complaint alleges wrongs that are independent of the professional services rendered by Planet Earth, and thus do not fit within the professional services exclusion. NYU alleged, among other things, that Planet Earth: (a) committed fraud by using false information to induce NYU to enter into a contract with Planet Earth; (b) infringed on NYU's trademark and tried to appropriate it for Planet Earth's own uses; (c) made false statements on a trademark application; and (d) committed

tortious unfair competition. CP 139, 152, 160-63, 165-67, 202-03. These claims do not arise from the professional services rendered by Planet Earth for NYU, i.e., the skilled, creative work for which Planet Earth was hired, but instead are incidental to that work. NYU alleges, in essence, that Planet Earth took advantage of its proximity to NYU to engage in misconduct wholly outside the realm of Planet Earth's work assignment. This purported misconduct did not require the existence of a professional-services relationship, and in fact—if true—was antithetical to the fulfillment of Planet Earth's professional obligations. Moreover, the fraud alleged to have been committed by Planet Earth and Lisa Blume was prior to the formation of a contract between NYU and Planet Earth. Planet Earth and Lisa Blume are alleged to have fraudulently induced NYU to retain Planet Earth. CP 160-63, 199-202. Thus, Planet Earth's purportedly fraudulent activity predate and was wholly unrelated to any professional services rendered to NYU.

The Court of Appeals recently recognized, in its decision in Woo v. Fireman's Fund Ins. Co., 128 Wn. App. 95, 114 P.3d 681 (2005), that misconduct by a professional, even if perpetrated in the workplace and while using the tools of the trade, does not arise from a professional service if the misconduct is unrelated to the services one would expect

such a professional to render. Inexplicably, the Court of Appeals in the instant case did not address Woo in its decision.

The Woo case involved a dentist who performed a cruel and elaborate prank on a patient (and employee) while that person was under general anesthesia. The dentist inserted false teeth shaped like boar tusks into the patient's mouth, and then pried the patient's eyes open and photographed the patient in a pose reminiscent of a hunting trophy. Id. at 98. The patient sued the dentist, claiming various causes of action arising from this intentional act. The insurer refused to defend, on the grounds that the complained of acts were far outside the scope of the dentist's professional activities. This Court agreed, noting that "no conceivably legitimate course of dental treatment includes boar tusks." Id. at 104.

The analysis in Woo is equally persuasive in the instant case. The plaintiff in Woo sued a "professional" for conduct that took place in a professional office, but which conduct was collateral to the true "professional services" performed by the defendant. This Court therefore held that the collateral misconduct was not part of the defendant's "professional services." In the case at bar, NYU alleged that Planet Earth engaged in misconduct, including fraud and trademark infringement, that was collateral to Planet Earth's purported "professional services."

Here, it is critically important that NYU's allegations of trademark infringement and unfair competition are distinct from the other allegations in that their existence did not logically depend on the contractual relationship between Planet Earth and NYU. Planet Earth could have misappropriated NYU's trademark after having become aware of it from all manner of public sources: the World Wide Web, NYU media campaigns, and the like. Gulf's professional-services exclusion applies only to: "an 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." CP 114 (emphasis added). Allegations of poor performance under the NYU contract, for example, would constitute an "omission . . . with respect to the rendering of, or failure to render professional services." Conduct such as alleged infringement of NYU's trademark by Planet Earth for Planet Earth's own benefit, which logically could have occurred whether or not Planet Earth had a business relationship with NYU, does not constitute the "rendering of, or failure to render professional services."

Gulf may argue that the Court of Appeals examined the scope of "professional services" coverage in the Woo decision, whereas the issue in the instant case is the scope of a "professional services" exclusion. That distinction does nothing to weaken the import of the central holding of Woo, that misconduct performed by a professional in his or her work

environment may nonetheless be wholly unrelated to that person's professional activities. Moreover, the fact that the Court of Appeals in this case was called upon to interpret a policy exclusion weighs in Planet Earth's favor, as exclusionary provisions must be strictly construed against the insurer so as to maximize coverage. Ross v. State Farm Mut. Auto Ins. Co., 132 Wn.2d 507, 523, 940 P.2d 252 (1997). Because the Court of Appeals' decision in the instant case is irreconcilable with Woo, this court should grant discretionary review pursuant to RAP 13.4(b)(2) and (4).

**B. The Holding of Woo, that Collateral Misconduct Does Not Arise from Professional Services, is Recognized by Numerous Other Jurisdictions.**

Courts outside of this jurisdiction also consistently distinguish between acts or omissions that arise out of the rendering of "professional services" and those acts or omissions that are unrelated or incidental to those services. The former are excluded while the latter are not. Multiple courts, for example, have held that "professional services" exclusions do not apply to bar an insurer's duty to defend where an insured contractor or engineer is alleged to have negligently either failed to warn of dangerous conditions or failed to ensure a safe work environment. The rationale is that the duty of care is a general one—and is not a duty that is tied to the specific professional services rendered. In Williams v. Insurance Co. of N. Am., 961 F.2d 90 (5<sup>th</sup> Cir. 1992), the insured, a marine surveyor, was

hired to determine the extent of damage to a barge and to hire contractors to fix the damage. An explosion occurred during the course of the repair work, and numerous injuries and deaths resulted. Williams, 961 F.2d at 91. The contractors sued the surveyor alleging negligence and gross negligence in failing to insure a safe work environment. Id. The surveyor's insurance company refused to defend, citing an exclusion that precluded coverage for "bodily injury of property damage due to the rendering of or failure to render any professional service." Id. (emphasis added). The Fifth Circuit reversed the dismissal of the policyholder's claim, holding that "liberally construed, these pleadings include claims that go beyond the purview of professional service." Id. at 92.

Similarly in Camp Dresser & McKee, Inc. v. The Home Ins. Co., 568 N.E.2d 631 (Mass. 1991), the court held that the insurer breached its duty to defend its policyholder, an engineering firm, against a negligence action. The court applied the following test: "in determining whether an omission or activity falls within the scope of a professional services exclusion, courts generally look to the nature of the conduct rather than to the title or the position of those involved." Camp Dresser, 568 N.E. 2d at 634; see also Gregoire v. AFB Construction, 478 So.2d 538, 541 (La. App. 1985) (suit against policyholder engineer for negligent supervision raises duty to defend despite professional services exclusion because "a duty to

warn could be found to be outside of the ‘professional’ . . . services [the policyholder] agreed to perform in its contract”); Chemstress Consultant Co. v. Cincinnati Ins. Co., 715 N.E.2d 208 (Ohio App. 1998) (same).

Even in cases in which the policies specifically provide coverage for “professional services” (and, therefore, in which the court is interpreting the term expansively in favor of coverage), courts have continued to distinguish between claims that arise out of the professional services rendered and claims that are incidental to those professional services. In Roe v. Federal Ins. Co., 587 N.E.2d 214 (Mass. 1992), for example, the court concluded that a dentist’s professional liability insurance did not cover a patient’s claims for sexual molestation committed in the dental office during the course of otherwise legitimate professional services. In relevant part, the policy provided coverage for:

injury arising out of the rendering of or failure to render during the policy period, professional services by the individual insured . . . performed in the practice of the insured’s profession as a dentist.

Roe, 587 N.E.2d at 216 (emphasis added). The court adopted the following interpretation of “professional services”:

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 predominately mental or intellectual, rather than physical or manual. . . . In determining whether a particular act is of a professional nature of 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 217 (emphasis added). The court went on to hold that no coverage applied because “[i]t is self-evident that [the dentist’s] professional services—the cleaning and examination of teeth—did not call for sexual contact between him and his patient.” Id. at 218.

The Court of Appeals dismissed this line of cases without analysis:

Planet Earth and the Blumes . . . cite cases focusing on worksite injuries, In re Complaint of Stone Petroleum Corp., 961 F.2d 90 (5<sup>th</sup> Cir. 1992), and Camp Dresser and McKee, Inc. v. Home Ins. Co., 30 Mass. App. Ct. 318, 568 N.E.2d 631 (1991), and on a dentist’s improper sexual relationship with a patient, Roe v. Fed. Ins. Co., 412 Mass. 43, 587 N.E.2d 214 (1992). Because these decisions are factually dissimilar from this dispute, they provide little support for Planet Earth’s position.

Appendix, p. 6.

With all due respect to the panel below, this cursory dismissal ignores the clear weight of authority in Planet Earth’s favor. There is no basis to deny coverage under a professional-services exclusion where some or all of the harm alleged is entirely collateral to the contracted-for services.

**C. The Decision Below is in Conflict with the Washington’s Robust Formulation of the Duty to Defend.**

In denying Planet Earth’s right to coverage, the Court of Appeals has acted in violation of the well-established principle of law that the duty

to defend is robust and weighs universally in favor of the insured. As such, review under RAP 13.4(1), (2), and (4) is additionally warranted.

An insurer's duty to defend is broader than its duty to indemnify. Hayden v. Mut. of Enumclaw Ins. Co., 141 Wn.2d 55, 64, 1 P.3d 1167 (2000). It is one of the main benefits of the insurance contract. Safeco Ins. Co. v. Butler, 118 Wn.2d 383, 392, 823 P.2d 499 (1992). If the underlying complaint is "subject to an interpretation that creates a duty to defend, the insurer must comply with that duty." APA – The Engineered Wood Ass'n v. Glens Falls Ins. Co., 94 Wn. App. 556, 562, 972 P.2d 937, 940 (1999). In sum, the duty to defend is robust—it is readily triggered and difficult to terminate, even in a case in which indemnity coverage is doubtful or potentially available only for a subset of the underlying causes of action. By affirming the denial of Planet Earth's tender, the Court of Appeals has issued a decision irreconcilable with the strength and breadth of the duty to defend in Washington. In fact, the Court of Appeals' decision effectively converts the professional-services exclusion into a "claim by client" exclusion—under the decision below, no claim brought by a client of the policyholder would be covered. This is entirely inconsistent with the duty to defend.

**D. The Decision Below Misconstrues the Definition of Professional Services Adopted by the Washington State Legislature.**

“Professional services” has been defined by the Washington State legislature to include only a narrow range of activities that require licensing or other governmental oversight:

The term ‘professional service’ means any type of personal service to the public which requires as a condition precedent to the rendering of such service the obtaining of a license or other legal authorization and which prior to the passage of this chapter and by reason of law could not be performed by a corporation, including, but not by way of limitation, certified public accountants, chiropractors, dentists, osteopaths, physicians, podiatric physicians and surgeons, chiropodists, architects, veterinarians and attorneys at law.

RCW 18.100.030(1) (emphasis added). Given this statutory language, the exclusion does not apply to Planet Earth, a Washington not-for-profit corporation consisting of unlicensed media consultants.

The fact that RCW 18.100.030(1) is not an insurance-oriented statute is irrelevant; the existence of the statute is conclusive evidence that the term “professional services” is reasonably susceptible to more than one meaning, one of which results in coverage. That meaning must control. See Greer v. Northwestern Nat’l Ins. Co., 109 Wn.2d 191, 201, 743 P.2d 1244 (1987).

To the extent that Gulf created an ambiguity in the policy by its inclusion of a boilerplate and unnecessary exclusion, that ambiguity must

be interpreted in Planet Earth's favor. See Phil Schroeder, Inc. v. Royal Globe Ins. Co., 99 Wn.2d 65, 69, 659 P.2d 509 (1983), corrected as modified, 101 Wn.2d 830, 683 P.2d 186 (1984) (Any "doubts, ambiguities and uncertainties arising out of the language used in the policy must be resolved in [the policyholder's] favor."). Exclusionary provisions especially are construed strictly against the insurer. Ross v. State Farm Mut. Auto Ins. Co., 132 Wn.2d 507, 523, 940 P.2d 252 (1997). This a well-established maxim of Washington law. The Court of Appeals' failure to find an ambiguity in the policy (and to read that ambiguity in Planet Earth's favor) warrants discretionary review pursuant to RAP 13.4(b)(1), (2), and (4).

**E. The Decision Below Renders the Policy Illusory.**

Under Gulf's reading of the policy, any claim even tangentially related to work for one of Planet Earth's clients would be excluded from coverage. To prevail, Gulf not only has to claim that this expansive reading of the exclusion is reasonable, but that Planet's Earth reading is unreasonable. The Washington Supreme Court has admonished that the insurance company's burden is to draft "clear and unmistakable [policy] language." Dairyland Ins. Co. v. Ward, 883 Wn.2d 353, 359, 517 P.2d 966 (1974). Had it wished to limit Planet Earth's coverage in the manner it now advocates, it could have easily and unequivocally included such

language in the Policy. “The [insurance] industry knows how to protect itself and it knows how to write exclusions and conditions.” Boeing v. Aetna Cas. & Sur. Co., 113 Wn.2d 869, 887, 784 P.2d 507 (1990). In the face of such compelling mandates from the Washington courts, had Gulf intended to exclude all claims brought by clients of Planet Earth, it could have written the following simple words:

This Policy does not cover Claims Against the Insured asserted by a client of the Insured or arising out of the Insured’s business relationship with any client.

Gulf did not do so. The Court of Appeals’ decision rendered the coverage under the policy illusory, in violation of well-established principles of insurance law requiring clear drafting by insurers. For this reason, too, review is warranted pursuant to RAP 13.4(b)(1), (2), and (4).

## VI. CONCLUSION

This Court should accept review for the reasons set forth in Section V, supra, and should reverse the decision of the Court of Appeals attached in Appendix A.

DATED this 4<sup>th</sup> day of January, 2006.

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## **APPENDIX**

1. Unpublished Opinion filed December 5, 2005

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

PLANET EARTH FOUNDATION,	)	NO. 55068-3-1
JOHN KEITH BLUME, JR. and	)	
LISA BLUME,	)	DIVISION ONE
	)	
Respondent,	)	
	)	
v.	)	
	)	
GULF UNDERWRITERS INSURANCE	)	Unpublished Opinion
COMPANY and AMERICAN BUSINESS	)	
& PERSONAL INSURANCE, INC.,	)	FILED: December 5, 2005
	)	
Appellant.	)	
	)	

**COLEMAN, J.**—Planet Earth Foundation, a nonprofit provider of advertising and public relations services, was insured under a nonprofit management and organization liability policy with Gulf Underwriters Insurance Company. The policy contained a professional services exclusion. Gulf Underwriters declined to defend Planet Earth Foundation in a lawsuit brought by one of its clients. Planet Earth brought suit against Gulf Underwriters and moved for partial summary judgment on the duty to defend. We affirm.

The trial court correctly ruled that the professional services exclusion encompassed the claims against Planet Earth and that Gulf did not have a duty to defend. The professional services exclusion unambiguously encompassed public relations and advertising services; the claims brought against Planet Earth, including the fraud, trademark infringement, and unfair competition claims, all arise from Planet Earth's rendering or failure to render professional services. The insurance policy therefore did not require Gulf Underwriters to defend Planet Earth.

### **FACTS**

Planet Earth Foundation is a nonprofit foundation that provides advertising and public relations services. Between December 13, 2002, and December 13, 2003, Planet Earth was insured by Gulf Underwriters Insurance Company under a nonprofit management and organization liability insurance policy ("the Policy"). The Policy imposes on Gulf "the right and duty to defend any Claim governed by the Policy, even if any of the allegations are groundless, false or fraudulent."

Gulf Underwriters issued Endorsement No. 3 to Planet Earth in December 2002.

It reads,

[T]he 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.

(Emphasis added.)

In June and July 2002, Planet Earth Foundation contracted with New York University ("NYU"), the umbrella organization of the NYU Child Study Center ("the Center"), to produce paid advertisements and public service announcements. In June

2003, NYU filed suit for breach of contract, fraud, trademark infringement, and unfair competition against Planet Earth and against director and president Keith Blume and director and chief economic officer Lisa Blume ("the Blumes"). The amended complaint alleged that Planet Earth and the Blumes committed numerous breaches of the contract. It also alleged that Lisa Blume made numerous misrepresentations to Center staff so that Planet Earth could acquire the Center as a client. It additionally contended that Planet Earth incorporated the Center's trademark "About Our Kids" into the tagline "Caring About Our Kids" for an advertising campaign for the Center, that Keith Blume later signed an "Intent to Use" trademark application on behalf of Planet Earth for the phrase "Caring About Our Kids," and that the Blumes' trademark application indicated that Planet Earth would use the phrase in competition with the Center.

Planet Earth and the Blumes tendered defense of the NYU action to Gulf. Gulf denied coverage and refused to defend. Planet Earth and the Blumes brought suit against Gulf, alleging a breach of a duty to defend and a breach of the duty of good faith and fair dealing. They moved for partial summary judgment on the issue of the duty to defend. The trial court denied the motion. The parties moved for a CR 54(b) order. The court granted the motion. Planet Earth and the Blumes appeal.

### **ANALYSIS**

We begin by analyzing the argument by Planet Earth and the Blumes that the phrase "professional services" does not encompass its advertising and public relations services and that the professional services exclusion in the Policy did not apply to NYU's lawsuit. They contend that the Legislature defined "professional service" in

RCW 18.100.030(1)<sup>1</sup> as a service that requires its practitioners to obtain specialized training or licensure by the state and that this definition does not encompass advertising and public relations. RCW 18.100.030(1), however, does not define professional services for insurance policy purposes. Instead, the Legislature enacted chapter 18.100 RCW to authorize the creation of professional corporations that provide services requiring legal authorization for individual practitioners.<sup>2</sup> RCW 18.100.030(1) is inapplicable to the Policy's professional services exclusion.

Planet Earth and the Blumes further argue that the phrase is still ambiguous and that the ambiguity must be construed in their favor as the insured and against Gulf. We disagree. The language in an insurance policy should not be strained to create an ambiguity where none exists. Pac. Indem. Co. v. Linn, 766 F.2d 754, 761 (3rd Cir. Pa. 1985). Where an insurance policy exclusion clearly and unambiguously applies to bar coverage, the court's inquiry ends. Scottsdale Ins. Co. v. Int'l Protective Agency, Inc., 105 Wn. App. 244, 249, 19 P.3d 1058 (2001). As the Supreme Court of Nebraska

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<sup>1</sup> RCW 18.100.030(1) provides:

"The term 'professional service' means any type of personal service to the public which requires as a condition precedent to the rendering of such service the obtaining of a license or other legal authorization and which prior to the passage of this chapter and by reason of law could not be performed by a corporation, including, but not by way of limitation, certified public accountants, chiropractors, dentists, osteopaths, physicians, podiatric physicians and surgeons, chiropodists, architects, veterinarians and attorneys at law." (Emphasis added.)

<sup>2</sup> RCW 18.100.010 reads, "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."

stated in Marx v. Hartford Accident & Indem. Co., 183 Neb. 12, 157 N.W.2d 870 (1968),

a “professional 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.

Marx, 183 Neb. at 14 (citations omitted).

Planet Earth’s public relations and advertising services clearly constitute professional services. They arose out of media-related occupations, and they required specialized knowledge and skills that were predominantly mental and intellectual. Indeed, the record contains a Planet Earth advertisement touting its contribution of “making our expertise available for socially beneficial messages at a cost far below the real market value of creating world-class advertising and communications.” The same advertisement states that the foundation “uniquely combines creative media skills with social issue and direct service experience. The Foundation’s work has been recognized by major regional, national and international advertising and media awards as preeminent in our field.” Because Planet Earth’s advertising and public relations services were professional services, the professional services exclusion applies.<sup>3</sup>

We next examine the argument by Planet Earth and the Blumes that NYU’s complaint contained allegations arising from conduct incidental to the services rendered by Planet Earth and thus not within by the exclusion. When an insurance policy covers

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<sup>3</sup> Because the exclusionary clause unambiguously encompassed Planet Earth’s advertising and public relations services, we do not reach Gulf’s argument that extrinsic evidence establishes that the parties understood the clause to apply to these services.

some but not all causes of action, the insurer must defend those causes. See Nat'l Steel Constr. Co. v. Nat'l Union Fire Ins. Co., 14 Wn. App. 573, 576, 543 P.2d 642 (1975). Planet Earth and the Blumes argue that NYU's allegations of fraud, trademark infringement, and unfair competition are independent of Planet Earth's professional services. We do not find this argument persuasive.

The fraud allegations derive from alleged misrepresentations made by Lisa Blume about Planet Earth's services. The trademark infringement and unfair competition claims derive from an alleged application by Keith Blume for a trademark for the phrase "Caring About Our Kids." Planet Earth allegedly developed this phrase for its services for the Center. The fraud, trademark infringement, and unfair competition claims therefore arise from Planet Earth's alleged rendering or failure to render advertising and public relations for the Center, and they are covered by the professional services exclusion.

Planet Earth and the Blumes argue otherwise, and they cite cases focusing on worksite injuries, In re Complaint of Stone Petroleum Corp., 961 F.2d 90 (5th Cir. 1992), and Camp Dresser & McKee, Inc. v. Home Ins. Co., 30 Mass. App. Ct. 318, 568 N.E.2d 631 (1991), and on a dentist's improper sexual relationship with a patient, Roe v. Fed. Ins. Co., 412 Mass. 43, 587 N.E.2d 214 (1992). Because these decisions are factually dissimilar from this dispute, they provide little support for Planet Earth's position. Planet Earth and the Blumes also contend that this interpretation of the professional services exclusion is so broad as to render the coverage illusory. We disagree. The Policy still provides the protection traditionally offered by directors and officers policies, such as protection for wrongful termination, discrimination, and other types of claims.

Planet Earth and the Blumes ask for attorney fees and costs for their appeal. Because we affirm the trial court's decision that the Policy does not impose on Gulf a duty to defend Planet Earth and the Blumes, their request is denied.

Affirmed.

Columan, J

WE CONCUR:

Schivelle, J

Cox, CJ