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SUPREME COURT OF THE STATE OF WASHINGTON

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

Petitioners,

v.

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

Respondents.

**PETITIONERS' ANSWER TO BRIEF OF AMICUS CURIAE
WASHINGTON STATE ASSOCIATION FOR JUSTICE
FOUNDATION**

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TABLE OF CONTENTS

I. INTRODUCTION1

II. ARGUMENT1

 A. This Court’s Decision in *Woo* Confirmed That a Liability Insurer Must Resolve All Legal Uncertainty in Favor of Defending its Insured.1

 B. Dictionary Definitions Demonstrate That a Reasonable Interpretation of “Professional” Includes Only the Traditional Learned Professions—Law and Medicine—and Thus the Applicability of Gulf’s Undefined “Professional Services” Exclusion Was Legally Uncertain at the Time of Planet Earth’s Tender.2

 C. Even Under the Broadest Definition of “Professional Services,” the Case Law Created Legal Uncertainty as to Whether the Allegations of Collateral Tortious Conduct Fell Within the Exclusion.....9

III. CONCLUSION.....10

TABLE OF AUTHORITIES

Cases

<i>Lynott v. Nat'l Union Fire Ins. Co.</i> , 123 Wn.2d 678, 871 P.2d 146 (1994).....	3
<i>Woo v. Fireman's Fund Ins. Co.</i> , 161 Wn. 2d 43, 164 P.3d 454 (2007).....	1, 2, 4

Other Authorities

<i>Black's Law Dictionary</i> 1210 (6 th ed. 1990).....	6
<i>Merriam-Webster's Collegiate Dictionary</i> 991 (11 th ed. 2003)	4
<i>Random House Webster's Unabridged Dictionary</i> 1544 (2 nd ed. 2001)	5
<i>The American Heritage Dictionary of The English Language</i> 1400 (4 th ed. 2000)	5
XII <i>The Oxford English Dictionary</i> 572-73 (2 nd ed. 1989).....	6

I. INTRODUCTION

Petitioners, Planet Earth Foundation, John Keith Blume, Jr., and Lisa Blume (collectively “Planet Earth”), concur with the arguments advanced by *amicus curiae* Washington State Association for Justice Foundation (“WSAJ”). Although the WSAJ’s arguments are consistent with those previously made by Planet Earth in its own briefs already before this Court, the WSAJ has made certain specific arguments that are new and to which a response by Planet Earth is appropriate. Planet Earth hereby responds to those new arguments, including by amplifying certain of the materials in Planet Earth’s prior briefing.

II. ARGUMENT

A. **This Court’s Decision in *Woo* Confirmed That a Liability Insurer Must Resolve All Legal Uncertainty in Favor of Defending its Insured.**

This Court’s decision in *Woo v. Fireman’s Fund Ins. Co.*, 161 Wn. 2d 43, 164 P.3d 454 (2007), broadened and strengthened Washington’s already-robust duty to defend.¹ The WSAJ’s brief focuses on an aspect of *Woo* that had not previously been clearly articulated in Washington’s body of law governing the liability insurer’s duty to defend: the rule that the insurer, in determining whether to defend, must resolve in favor of its insured any **legal** uncertainty concerning the application of the relevant

¹ Supplemental Brief of Petitioners 4-7; Brief of WSAJ 7-9.

policy terms to the allegations of an underlying liability claim. *Woo*, 161 Wn.2d at 59-60.

Planet Earth concurs with the WSAJ's articulation of the rule established in *Woo*. Planet Earth has already established that the application of the disputed "professional services" exclusion to the tender of the NYU lawsuit was, at a minimum, legally uncertain—indeed, Planet Earth submits it has established that Gulf **clearly** should have defended its insured and that Planet Earth need not rely on any notion of legal uncertainty. However, the WSAJ has posed the question whether additional authorities demonstrate that the term "professional," undefined in the Gulf policy, could reasonably have been interpreted to apply only to the traditional learned professions, and not to Planet Earth's activities as a public-service media agency.² The balance of this brief responds to that question raised by the WSAJ.

B. Dictionary Definitions Demonstrate That a Reasonable Interpretation of "Professional" Includes Only the Traditional Learned Professions—Law and Medicine—and Thus the Applicability of Gulf's Undefined "Professional Services" Exclusion Was Legally Uncertain at the Time of Planet Earth's Tender.

This Court often has referred to dictionary definitions in determining whether a particular insurance-policy term is reasonably

² Brief of WSAJ 10-11.

susceptible to more than one meaning and thus ambiguous.³ Because Gulf chose not to define the term “professional services” as used in its exclusion,⁴ the Court may consider dictionary definitions of the term “professional.”

A review of the range of dictionaries reveals that the usage of the terms “profession” and “professional” has broadened over the years. One definition of those words includes virtually any skilled activity undertaken by individuals for pay—for example, we commonly refer to “professional athletes” and the like. Certainly, that exceedingly broad definition of “professional” constitutes **one** reasonable interpretation of the term.

However, the dictionaries also reveal a second and more time-honored definition of the word at issue: virtually every dictionary definition of “profession” or “professional” includes a meaning restricted to **only** the traditional “learned professions” of law, medicine, and, in some cases, the priesthood or military:

1 pro-fes-sion-al *adj* (1606) **1 a:** of, relating to, or characteristic of a profession **b :**

³Brief of WSAJ 10. As the Court has established, time and again: (a) ambiguous policy terms must be interpreted in favor of the insured, particularly where the term in question appears in an exclusion and the issue is whether the insurer must defend the insured; and (b) the test for ambiguity is whether the term is reasonably susceptible to more than one interpretation, one of which leads to coverage. Brief of Appellant, pp. 12, 18; *Lynott v. Nat'l Union Fire Ins. Co.*, 123 Wn.2d 678, 690, 871 P.2d 146 (1994).

⁴ This is in contrast to the Fireman's Fund policy at issue in *Woo*, in which Fireman's Fund supplied a definition for the analogous term, “dental services.” *Woo*, 161 Wn.2d at 55.

engaged in one of the learned professions
c (1): characterized by or confirming 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 < ~ golfer >
b. having a particular profession as a permanent career < a ~ soldier >
c : engaged in by persons receiving financial return < football >
3 : following a line of conduct as though it were a profession < a ~ patriot > -
pro-fes-ion-al-ly adv

Merriam-Webster's Collegiate Dictionary 991 (11th ed. 2003) (emphasis added).

pro-fes-sion-al . . . 4. engaged in one of the learned professions: A lawyer is a professional person. *n.* **10. A person who belongs to one of the professions, esp. one of the learned professions.**

Random House Webster's Unabridged Dictionary 1544 (2nd ed. 2001) (emphasis added).

pro-fes-sion-al *adj.* **1a.** Of, relating to, engaged in, or suitable for a profession: *lawyers, doctors, and other professional people.* **b.** Conforming to the standards of a profession: *professional behavior.* **2.** Engaging in a given activity as a source of livelihood or as a career: *a professional writer.* **3.** Performed by persons receiving pay: *professional football.* **4.** Having or showing great skill; expert: *a professional repair job.* * *n.* **1. A person following a profession, especially a learned profession.** **2.** One who earns a living in a given or implied occupation: *hired a*

professional to decorate the house. **3.** A skilled practitioner; an expert.

The American Heritage Dictionary of The English Language 1400 (4th ed. 2000) (bold emphasis added).

profession III. 6. The occupation which one professes to be skilled in and to follow. a. A vocation in which a professed knowledge of some department of learning or science is used in its application to the affairs of others or in the practice of an art founded upon it. Applied *spec.* to the three learned professions of divinity, law, and medicine; also to the military profession.

professional a. (sb.) [f. prec. + -AL1. Cf. mod.F. *professionel*.] **3.** Engaged in one of the learned or skilled professions, or in a calling considered socially superior to a trade or handicraft. *professional (middle) class*, members of the learned and skilled professions regarded collectively.

XII *The Oxford English Dictionary* 572-73 (2nd ed. 1989).

Profession. A vocation or occupation requiring special, usually advanced, education, knowledge, and skill; e.g., law or medical professions. Also refers to whole body of such profession.

The labor and skill involved in a profession is predominantly mental or intellectual, rather than physical or manual.

The term originally contemplated only theology, law, and medicine, but as application of science and learning are extended to other departments of affairs, other vocations also receive the name, which

implies professed attainments in special knowledge as distinguished from mere skill.

Act of professing; a public declaration respecting something. Profession of faith in a religion.

Professional. One engaged in one of learned professions or in an occupation requiring a high level of training and proficiency. *Reich v. City of Reading*, 3 Pa. Cmwlth. 511, 284 A.2d 315, 319.

Black's Law Dictionary 1210 (6th ed. 1990).

These definitions establish that **one** reasonable definition of “professional services” in the Gulf policy is that the term includes only liability stemming from the practice of the traditional learned professions. It is undisputed that Planet Earth engaged in no such activity. During the time relevant to this case, Planet Earth’s core work was creating content (that is, producing advertising and public-relations campaigns) for non-profit entities. Their work required only the broad range of basic intellectual and communications skills—creativity, analysis, writing, and speaking—that virtually any non-manual-labor job requires. CP 66-67. Its work never required any licensure or **specialized** training or education.

When interpreting insurance policy language determined to be reasonably susceptible to more than one interpretation, the inquiry for the Court is not whether any of those reasonable alternatives is the “best”

alternative or would be the choice of the Court were it sitting in an insurance underwriter's office drafting policy-term definitions on a blank slate. The inquiry, instead, is whether the interpretation leading to coverage is a **reasonable** interpretation; if so, that interpretation must govern. *See supra* n.3. Planet Earth respectfully submits it has overwhelmingly demonstrated that its interpretation of "professional services" is a reasonable one and does not include Planet Earth's work.

The legal uncertainty created by the traditional "learned profession" definition is further reinforced by the nature of the insurance policy in which the disputed "professional services" exclusion appears. The insurance policy at issue here is **not** a general liability policy, which insures the policyholder against liability for causing damage to the tangible property of a third party, or causing bodily injury to a third party. Were an insurer to include a "professional services" exclusion in such a general liability policy, the insurer might have some basis to argue that the exclusion was intended to apply to all liability stemming from any communication or intellectual output by the insured. In other words, the insurer might take the position that a general liability policy is fundamentally intended to cover liability arising from physical impacts and occurrences in the "real world"—automobile accidents and the like—and in such policies a broad interpretation of "professional services" might

at least be supported by some common-sense notion of the purpose of the policy at issue.

The policy at issue here, in contrast, is a “Non-Profit Management and Organization Liability Insurance Policy.” CP 67. The Gulf policy is in the nature of an errors and omissions policy in that it covers liability incurred for commission of a “Wrongful Act” by the insured. CP 104. The policy defines “Wrongful Act” in relevant part as: “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 insuring agreement thus is exceedingly broad, and covers precisely the kind of intellectual and communication-related liability that a business such as Planet Earth might expect to encounter. Particularly when included in such a policy, Gulf’s “professional services” exclusion cannot be interpreted as Gulf would have it without rendering the coverage illusory. As Gulf interprets its exclusion, it encompasses any reasonably conceivable liability that Planet Earth could incur for a “Wrongful Act” as broadly defined above. This disconnect between the nature of the Gulf coverage grant and Gulf’s interpretation of its exclusion is yet another source of legal uncertainty that should have been, and must now be, resolved in favor of the duty to defend.

C. Even Under the Broadest Definition of “Professional Services,” the Case Law Created Legal Uncertainty as to Whether the Allegations of Collateral Tortious Conduct Fell Within the Exclusion.

Planet Earth contends that, even under the broadest possible interpretation of the word “professional,” Gulf was obligated to defend Planet Earth because a substantial portion of the allegations in the NYU lawsuit did not claim harm resulting from Planet Earth’s intellectual work product. Instead, NYU alleged a variety of tortious conduct that was separate from and collateral to Planet Earth’s work product—the allegations of financial mismanagement, misrepresentations prior to entering into the contract, conversion of NYU’s intellectual property, and unfair competition. Planet Earth will not repeat those arguments here, but instead refers to them only for the sake of clarity and completeness.

III. CONCLUSION

For the foregoing reasons, and all the reasons set forth in Planet Earth's prior briefs and the brief of *amicus curiae* WSAJ, this Court should reverse the holding of the Court of Appeals and remand the case to King County Superior Court for further proceedings.

DATED this 17th day of February, 2009.

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