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INSURANCE AND REINSURANCE

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The Vermont Supreme Court recently held that an Errors & Omissions policy does not provide coverage for general business allegations as the policy provides narrow, limited coverage. Allegations relating to the insured's profession generally is insufficient to establish coverage. E&O coverage is available only when the allegations relate to the actual provision, or lack thereof, of the insured's professional service – the "application of special learning unique to the insured's profession."

Toeing the Line:
When Professional Services are not Professional Services

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The Insurance and Reinsurance Committee members, including U.S. and multinational attorneys, are lawyers who deal on a regular basis with issues of insurance availability, insurance coverage and related litigation at all levels of insurance above the primary level. The Committee offers presentations on these subjects at the Annual and Midyear Meetings.

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In a decision echoing holdings from other states, Vermont recently declared insurers shoulder no duty to defend under an Errors and Omissions (E&O) liability policy where the conduct alleged does not arise from actions undertaken in the course of rendering professional services. *Integrated Techs. v. Crum & Forster Specialty Ins., Co.,* 2019 VT 53, 2019 Vt. LEXIS 105, 217 A. 3d 528. Maintaining the difference between E&O policies and general business liability policies, Vermont's Supreme Court drew a distinction between actions taken in the rendering of, or failure to render, professional services to a client, and general business decisions finding the latter do not fall under the provision of "professional services," as outlined in the E&O policy.

Integrated Technologies, Inc. ("ITI"), an engineering and project management firm, contracted with a subcontractor ("Goad") to provide metal plating and finishing systems modernization work. By repeatedly undermining Goad to the general contractor through false statements such as Goad's work was not to industry standard and did not reflect the best practices of the industry, ITI convinced the general contractor to substitute it for Goad and allow ITI to complete the work.

Goad sued ITI for Breach of Contract of a Teaming Agreement, Breach of Contract of a Commission Agreement, Tortious Interference with Business Expectancy, and Injurious Falsehoods. ITI presented Goad's claim to its insurer, Crum & Forster Specialty Ins., Co. ("Crum"), who denied coverage. Crum contended the allegations in Goad's Complaint arose from claims of misrepresentations and falsehoods not arising from ITI's "professional services," but even if they did, the policy's language excluded coverage for claims based on "criminal, fraudulent, or dishonest acts."

The trial court granted Crum summary judgment concluding there was no duty to defend because the acts Goad complained of were (1) not "inherent" to the insured's profession, nor (2) directly linked to the insured's performance of professional services. The policy defined "professional services" to mean "those functions… that are related to your practice as a consultant, engineer, architect, surveyor, laboratory or construction manager."

In upholding the trial court's decision, the Vermont Supreme Court rejected ITI's argument that the phrase "related to," as used in the policy's definition of "professional services" means only "connected to" or "associated with." *Integrated Techs.,* 2019 VT 53, ¶26**.** Conversely, the Court found "professional services" unavoidably includes "an application of special learning unique to the insured's profession." *Id.* In other words, ITI did not commit the complained of wrongful acts through application of such special learning; rather, they are the product of ordinary business-decision making and too far removed from the focus of providing consulting and project management services to find the breach was "an act, error or

omission in the rendering or failure to render 'professional services' by any insured."

It is well settled that insurers have a duty to defend their insureds when claims are the type covered by the policy. The *Integrated Techs* case turned on comparing the policy's language against the language contained in the Complaint, as most such disputes do, but the Court was careful to state that it is the industry in question that will drive definition of what constitutes a "professional service":

> [N]o matter the occupation of the insured, the terms of the policies are quite similar, requiring that an act or omission arise out of the provision of 'professional services' in the context of the particular occupation of the insured. Accordingly, while certain general principles can be gleaned which apply to all such policies, the determination of what constitutes a 'professional service' is unique to each insured profession.
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> *Integrated Techs,* 2019 VT 53, ¶3.

Goad did not contend ITI's breach was based on ITI committing an act, error, or omission in providing, or failing to provide, professional services; the touchstone of an E&O policy. ITI was rendering project management services to the general contractor while acting as Goad's business associate and such is markedly different than ITI rendering professional services to Goad directly. Indeed, although it may require professional skill to "undermine and replace an intermediate contractor on a large-scale project, it was not inherent in a subcontractor's profession to do so." *Integrated Techs,* 2019 VT 53, ¶11. ITI's actions were not unique to its industry; rather, they were ordinary business decisions capable of being made in any ordinary business setting. Goad's claims were not based on malpractice but generalized business torts.

E&O policies provide specialized, limited coverage. *See Erie Ins. Grp. V. All. Envtl., Inc.*, 921 F. Supp, 537, 541 (S.D. Ind. 1996) (there is a noteworthy difference between "'an errors and omissions' policy or a professional malpractice policy' and a 'general business liability policy that expressly excludes coverage for liability for 'damages due to . . . any service of a professional nature'"). E&O policies only cover risks inherently arising out of the rendering of professional services. Expanding the policy to cover allegations such as those Goad brought against ITI stretches the concept of an E&O policy beyond its logical and intrinsic bounds.

The takeaway from *Integrated Techs* is that breaches of business agreements that do not entail the provision of professional services thereby necessitating the application of the special learning unique to the insured's profession do not evoke a duty to defend under E&O policies. Vermont joins several other states in toeing that line and keeping E&O policies sufficiently focused and naturally limited by requiring there be causal connection between the claim made against the insured and the insured's delivery of professional services.

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