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Wisconsin Court Enforces Breach of Contract Exclusion in E&O Policy

BY:

In its recent decision in *Crum & Forster Specialty Ins. Co. v. GHD Inc.*, 2018 U.S. Dist. LEXIS 111827 (E.D. Wisc. July 5, 2018), the United States District Court for the Eastern District of Wisconsin had occasion to consider the application of a breach of contract exclusion in a professional liability policy.

Crum's insured, DVO, was sued in connection with its contract to construct a biogas converter mechanism. The underlying suit alleged a sole cause of action; namely, breach of contract based on DVO's failure to have fulfilled its obligations to design the mechanism to specification.

Crum initially provided DVO with a defense to the lawsuit, but later denied coverage on the basis of an exclusion applicable to any claim:

Based upon or arising out of

1. breach of contract, whether express or oral, nor any "claim" for breach of an implied in law or an implied in fact contracts, regardless of whether "bodily injury", "property damage", "personal and advertising injury" or a "wrongful act" is alleged.

DVO argued that the exclusion effectively rendered the policy's coverage illusory, since the basis of any errors and omissions claim is the failure to fulfill a contractual obligation.

In considering this question, the court observed that an entity performing professional services has more than contractual obligations – it has duties to exercise reasonable care in performing its work that are owed to the world at large. These duties, explained the court, are what is insured under a professional liability policy. The court cited as an example personal injuries or property damage resulting from DVO's negligent errors or omissions in performing its design work. Such damages are exactly what is insured under a professional liability policy. By contrast, the breach of contract exclusion, reasoned the court, manifested Crum's intent to not be the guarantor of DVO's work. As the court noted, "Crum & Forster agreed to insure DVO against liability it incurred to third parties for its negligent error or omissions; it chose not to insure DVO for liability it incurred to its own customers for failing to meet its contractual obligation."

The court concluded, therefore, that the exclusion was a reasonable restriction of coverage in a professional liability policy and not overly broad as drafted, at least in the context of the underlying suit.