PLUNKETT COONEY

# Professional Services Exclusion, Other Insurance Provision, Late Notice Coverage Update

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**Michigan, Oklahoma, New York Coverage Cases**
*The e-POST*

## Professional Services Exclusion – Sixth Circuit (Michigan Law)

***Orchard, Hiltz & McCliment, Inc. v. Phoenix Ins. Co.***
--- Fed. Appx. ---, 2017 WL 244787 (6th Cir. Jan. 20, 2017)

The U.S. Court of Appeals for the Sixth Circuit ruled that the professional services exclusion precluded coverage to Orchard, Hiltz & McCliment, Inc. (OHM) for services it rendered. OHM was hired to oversee upgrades at a wastewater treatment plant, and while OHM was overseeing the upgrades, an explosion occurred, injuring a worker and killing another. The injured worker and the estate of the deceased worker filed suit against OHM, which then filed a declaratory judgment action against its insurers seeking coverage for the underlying lawsuits. The appellate court held that the professional services exclusion "broadly exclude[s] coverage for liability 'arising out of' performing or failing to perform any professional architectural, engineering, or surveying service." The appellate court further recognized that Michigan courts have defined "professional services" as "those involving specialized skill of a predominantly intellectual nature." The appellate court determined that OHM's services were professional services because OHM was hired to oversee "all aspects of [the] treatment plant improvement project … designed the plans for every facet of the project, monitored their implementation, served as an on-site consultant, and supervised the work to ensure compliance with those plans and timely progress."

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## Other Insurance Provision – Tenth Circuit (Oklahoma Law)

***Philadelphia Indem. Ins. Co. v. Lexington Ins. Co.***
--- F.3d ---, 2017 WL 217974 (10th Cir. Jan. 19, 2017)

The U.S. Court of Appeals for the Tenth Circuit held that Lexington Insurance Company (Lexington) and Philadelphia Indemnity Insurance Company (Philadelphia) must share in the costs of approximately $6 million in fire damage that occurred to a school building on a pro rata basis because their respective and identical other insurance provisions cancelled each other out. The appellate court noted that the

other insurance provisions of both policies contained a pro rata clause and an excess coverage clause. The appellate court first ruled that the identical excess coverage clauses cancelled each other out, such that both policies would be considered primary. It further explained that "[b]ecause the policies have mutually repugnant excess-coverage provisions, we give effect to the policies' identical pro rata clauses." Pro rata distribution, according to the appellate court, requires apportioning the loss according to the ratio each respective policy limit bears to the cumulative limit of all concurring policies. While the parties agreed that Philadelphia's policy limit was $7 million, they could not agree on Lexington's policy limit. The appellate court recognized that Lexington's overall limit of insurance was $100 million, but that the policy also contained an occurrence limit of liability endorsement. Based on this endorsement, the appellate court ultimately found that the Lexington policy limit was confined to the actual adjusted amount of loss, less applicable deductibles, rather than the $100 million overall limit."

## Late Notice – Second Circuit (New York Law)

***Travelers Indem. Co. v. Northrop Grumman Corp.***
--- Fed. App'x ---, 2017 WL 391926 (2d Cir. Jan. 27, 2017)

The U.S. Court of Appeals for the Second Circuit held that Northrop Grumman Corp. (Grumman) was not entitled to insurance coverage for environmental cleanup claims as a result of inadequate and untimely notice. In 1984, the New York State Department of Environmental Conservation (NYSDEC) advised Grumman that it would potentially be held responsible for alleged contamination at a site. Grumman forwarded the information to its broker, and the broker allegedly forwarded it to Grumman's insurers. However, one of the insurers did not receive the information from the broker, and another insurer received it, but it did not identify the policies under which coverage was sought, addressed a different suit at a different site and was directed to a different insurer with different types of policies. In 2002, a municipality sent Grumman a letter indicating an intent to sue Grumman for the contamination. Grumman did not advise its insurers of that claim until suit was filed in 2005, and the insurers declined coverage on the basis of violation of the notice conditions of their policies.

"Under New York law, 'an insurer has the right to demand that it be notified of any loss or accident that is covered under the terms of the insurance policy." The appellate court held that Grumman's transmittal of the 1984 letter to its broker was not enough. "[I]n New York, the duty to provide notice is not satisfied merely by placing the notice in the mail; rather, the specific insurer to whom notice is due must actually or presumptively have received such notice." The appellate court further held that the information provided was inadequate, stating that "Grumman's obligation to provide separate notice as to each policy under which it seeks coverage was not fulfilled" by copying one insurer on a letter provided to a different insurer under different policies.

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