

## **Broad Interpretation of Professional Services Exclusion Bars Coverage for Pipeline Explosion Liability**

Celia B. Waters and Richard Brown – August 21, 2017

Policyholders should be aware of professional services exclusions in their liability policies that may be broadly interpreted to exclude liability arising out of operations that, while traditionally not regarded as professional in nature, may include professional elements or duties. Furthermore, it should never be assumed that an umbrella or excess policy will provide follow-form coverage to a primary policy that does not contain a professional services exclusion. Accordingly, when relying upon additional insured coverage as a principle means of risk transfer, a thorough review of all relevant policies should be undertaken whenever possible.

These points are underlined by an unpublished decision issued in July 2017, the California Court of Appeals determined that the failure to properly mark a petroleum pipeline, which led to a massive explosion and the death of five individuals, arose from the performance or non-performance of professional services. See [Energy Ins. Mut. Ltd. v. Ace Am. Ins. Co.](#), No. A140656, 2017 WL 2953677 (Cal. Ct. App. July 11, 2017). Accordingly, the court found that the professional services exclusion of an umbrella liability policy operated to bar additional insured coverage.

Kinder Morgan, Inc., hired two temporary employees through Comforce Corporation to work as construction inspectors on a large water supply line project in Walnut Creek. The inspectors were required “to have knowledge of the practices, principles, procedures, regulations and techniques as they related to terminal pipeline construction.” Kinder Morgan’s own employee also served as a line rider on the Project, performing duties, such as, pipeline identification, locating and marking lines, as well as replacing damaged or missing markers. On November 9, 2004, an excavator working at the Project, punctured a high-pressure petroleum line owned by Kinder Morgan, which resulted in an explosion and fire injuring and killing numerous individuals. The underlying lawsuits alleged that the pipeline rupture was caused by the negligence of Kinder Morgan and Comforce.

Kinder Morgan, was insured under a liability policy issued by Associated Electric and Gas Insurance Services Limited (AEGIS). Kinder was also insured under a follow-form excess liability policy from Energy Insurance Mutual Limited (EIM). American Insurance Company (ACE) insured Comforce under two policies: a primary liability policy, and a stand-alone umbrella policy. AEGIS and EIM defended Kinder Morgan against the underlying lawsuits, while ACE also agreed to defend Kinder Morgan as an additional insured under its primary policy, pursuant to a reservation of rights. Under the umbrella policy, ACE declined to provide Kinder Morgan coverage, based in part, on its professional services exclusion. EIM commenced an action against ACE seeking reimbursement of payments made to Kinder Morgan under its excess policy. EIM alleged that Kinder Morgan was an additional insured on the Umbrella Policy and that the Umbrella Policy should have paid Kinder Morgan’s defense fees before EIM.

EIM argued that the professional services exclusion, which provides, “[t]his insurance does not apply to any liability arising out of the providing or failing to provide any services of a professional nature,” should be narrowly applied. The court observed, however, that the professional services exclusion has been broadly construed by California courts, and that the mapping and marking of underground installations by Comforce and Kinder Morgan required specialized knowledge of pipeline identification, making it analogous to other activities found to be “professional services.”

EIM further argued that a separation of insureds provision effectively results in coverage applying separately with respect to the named insured and additional insured, including the application of any relevant exclusions. EIM claimed that even if Comforce’s employees were providing professional services, Kinder Morgan’s line rider was not, and the professional services exclusion, therefore, should not apply. Although the court agreed that the separation of insureds provision results in exclusions applying separately to each insured, it also found that Kinder Morgan’s line rider was providing professional services. Accordingly, the court held that EIM was not entitled to equitable subrogation from ACE, as coverage for Kinder Morgan was barred by the professional services exclusion in the umbrella policy.

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