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FILED IN THE  
U.S. DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON **Jul 11, 2018**

SEAN F. McAVOY, CLERK

EVANSTON INSURANCE  
COMPANY,  
  
Plaintiff,  
  
v.  
  
RELLS FIRE PROTECTION INC., a  
Washington corporation; JAC'S  
MOUNTAIN GROUP LLC; and  
OREGON MUTUAL INSURANCE  
COMPANY, a foreign insurer,  
  
Defendants.

No. 2:17-CV-00249-SMJ

**ORDER DENYING PLAINTIFF'S  
MOTION FOR PARTIAL  
SUMMARY JUDGMENT**

Plaintiff Evanston Insurance Company (Evanston) seeks declaratory judgment that it has no duty to defend or indemnify subrogation claims asserted by its insured, Rells Fire Protection, in an underlying state court action. In the underlying action, Jac's Mountain Group (Jac's) and Oregon Mutual Insurance Company allege that Rells negligently and in breach of contract failed to properly inspect fire suppression equipment at a diner owned by Jac's, resulting in a fire that destroyed the diner. Evanston moves for summary judgment that it has no duty to defend the underlying action because the claims fall within the applicable insurance

1 policy's (the policy) breach of contract and professional liability exclusions.  
2 Evanston further argues that because it has no duty to defend, it necessarily also has  
3 no duty to indemnify and summary judgment should be granted in its favor on all  
4 claims.

5 The underlying breach of contract claim plainly falls within the policy's  
6 breach of contract exclusion. But that exclusion cannot bar coverage for claims of  
7 negligence. Whether the negligence claim falls within the professional liability  
8 exclusion cannot be resolved based on the allegations in the underlying complaint.  
9 It is at least conceivable that the underlying negligence claim is covered by the  
10 policy. Evanston therefore has a duty to defend. Accordingly, Evanston's motion for  
11 partial summary judgment is denied.

## 12 I. BACKGROUND

### 13 A. Factual and procedural background

14 As alleged in the underlying action, Defendant Jac's Mountain Group owned  
15 a diner in Leavenworth, Washington. ECF No. 28-3 at 3. Jac's property and casualty  
16 insurance provider, Oregon Mutual Insurance Company, contracted with Rells Fire  
17 Protection (Rells) to inspect the diner's fire suppression and exhaust system. ECF  
18 No. 28-3 at 3. Following each service inspection, Jac's "received notice that the  
19 restaurant's suppression and exhaust system exhibited no deficiencies." ECF No.  
20 28-3 at 3.

1 In June 2016, a grease fire started at the diner, the fire suppression system  
2 failed to stop the fire, and the diner was destroyed. ECF No. 28-3 at 3. An inspection  
3 revealed that the restaurant's fire suppression and exhaust system was deficient and  
4 prevented the flames from being extinguished. ECF No. 28-3 at 3.

5 Oregon Mutual and Jac's filed a lawsuit in state court alleging negligence  
6 and breach of contract against Rells. ECF No. 28-3. The amended complaint alleges  
7 that "prior to the fire, there were neither reasonable nor adequate measures taken by  
8 Rells's Fire in order to notify [Jac's] about the system's deficiencies." ECF No. 28-  
9 3 at 3. With respect to the negligence claim, the amended complaint alleges that  
10 "Rells's Fire was negligent in its inspection and diagnosis of the fire suppression  
11 and exhaust system because it failed to (1) notify Plaintiff that the system did not  
12 conform to applicable code/regulations, and (2) instruct Plaintiff about the need for  
13 repairs." ECF No. 28-3 at 3-4. With respect to breach of contract, the amended  
14 complaint alleges that "Rells's Fire entered into a contract with Plaintiff to inspect  
15 and service the building's fire suppression and exhaust system for the express  
16 purposes of maintaining safety and compliance with state and local requirements."  
17 ECF No. 28-3 at 4. The amended complaint further alleges that "Rells's Fire  
18 breached its contract and/or warranties when it failed to properly inspect the fire  
19 suppression and exhaust system, identify the deficiencies, notify Plaintiff of the  
20 deficiencies, and recommend repairs." ECF No. 28-3 at 4.

1 Rells provided notice of the lawsuit to its commercial general liability  
2 insurer, Evanston, which agreed to defend under a reservation of rights. ECF No.  
3 1-3 at 3. Evanston subsequently filed this declaratory judgment action asserting that  
4 the claims in the underlying action are not covered because they fall within Rells's  
5 policy's (the policy) breach of contract and professional liability exclusions. ECF  
6 No. 1 at 3; ECF No. 1-4 at 5–6.

7 **B. Relevant policy provisions**

8 Evanston issued an insurance policy to Rells covering the period from  
9 November 10, 2015, to November 10, 2016. ECF No. 26-1 at 4. The policy contains  
10 three primary areas of coverage: (A) bodily injury and property damage; (B)  
11 personal and advertising injury; and (C) medical payments. ECF No. 26-1. The  
12 policy contains two specific exclusions to coverages A and B that are relevant here.  
13 First, the coverage excludes “[c]laims arising out of breach of contract, whether  
14 written or oral, express or implied, implied-in-law, or implied-in-fact contract.”  
15 ECF No. 26-1 at 52. Second, the coverage excludes “[p]rofessional liability, errors,  
16 omissions, negligent acts, malpractice or acts of any type including rendering or  
17 failure to render any type of professional service, unless such coverage is  
18 specifically endorsed onto the policy.” ECF No. 26-1 at 53.

1 **LEGAL STANDARD**

2 Summary judgment is appropriate if the “movant shows that there is no  
3 genuine dispute as to any material fact and the movant is entitled to judgment as a  
4 matter of law.” Fed. R. Civ. P. 56(a). When considering a motion for summary  
5 judgment, the Court does not weigh the evidence or assess credibility; instead, “the  
6 evidence of the non-movant is to be believed, and all justifiable inferences are to be  
7 drawn in his favor.” *Sgt. Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).  
8 “In short, what is required to defeat summary judgment is simply evidence ‘such  
9 that a reasonable juror drawing all inferences in favor of the respondent could return  
10 a verdict in the respondent’s favor.’” *Zetwick v. Cty. of Yolo*, 850 F.3d 436, 441 (9th  
11 Cir. 2017) (quoting *Reza v. Pearce*, 806 F.3d 497, 505 (9th Cir. 2015)).

12 When interpreting insurance policies, a court must consider the policy as a  
13 whole, giving it “a fair, reasonable, and sensible construction as understood by the  
14 average person purchasing insurance.” *Key Tronic Corp. v. Aetna (CIGNA) Fire*  
15 *Underwriters Ins. Co.*, 881 P.2d 201 (1994). exclusionary clauses must be strictly  
16 construed against the insurer. *McGeevy v. Oregon Mut. Ins. Co.*, 876 P.2d 463  
17 (Wash. App. 1994).

18 **DISCUSSION**

19 An insurer’s duty to defend arises “if the insurance policy conceivably covers  
20 the allegations in the complaint.” *Woo v. Fireman’s Fund Ins. Co.*, 164 P.3d 454

1 (Wash. 2007). As the Court has previously stated, determining whether Evanston  
2 has a duty to defend Rells in the underlying suit turns on whether the claims alleged  
3 in the underlying complaint fall within the policy’s breach of contract or  
4 professional liability exclusions. *See* ECF No. 40. The underlying breach of contract  
5 claim plainly falls within the policy’s breach of contract exclusion. But that  
6 exclusion cannot bar coverage for claims of negligence. Whether the negligence  
7 claim falls within the professional liability exclusion cannot be resolved based on  
8 the allegations in the underlying complaint—it is at least conceivable that the  
9 underlying negligence claim is covered by the policy. Evanston therefore has a duty  
10 to defend Rells.

11 **A. The breach of contract claim is excluded from coverage.**

12 The breach of contract exclusion applies to “[c]laims arising out of breach of  
13 contract, whether written or oral, express or implied, implied-in-law, or implied-in-  
14 fact contract.” ECF No. 26-1 at 52. Washington courts have upheld general liability  
15 policy exclusions for breach of contract. *See W. Nat. Assur. Co. v. Shelcon Constr.*  
16 *Grp., LLC*, 332 P.3d 986 (Wash. Ct. App. 2014). This exclusion plainly applies to  
17 the breach of contract claim in the underlying action. However, it does not apply to,  
18 and cannot preclude coverage for, the underlying negligence claim.

1 **B. The negligence claim may not be excluded.**

2 The professional-liability exclusion applies to “[p]rofessional liability,  
3 errors, omissions, negligent acts, malpractice or acts of any type including rendering  
4 or failure to render any type of professional service, unless such coverage is  
5 specifically endorsed onto the policy.” ECF No. 26-1 at 53. The underlying  
6 amended complaint alleges that Rells was contracted to inspect the diner’s fire  
7 suppression and exhaust system for the express purposes of maintaining safety and  
8 compliance with state and local requirements, and that “Rells’s Fire was negligent  
9 in its inspection and diagnosis of the fire suppression and exhaust system because  
10 it failed to (1) notify Plaintiff that the system did not conform to applicable  
11 code/regulations, and (2) instruct Plaintiff about the need for repairs.” ECF No. 28-  
12 3 at 3–4.

13 Rells first argues that the allegations fall within the products/completed  
14 operations (PCO) coverage and professional liability exclusion does not apply to  
15 the PCO coverage because it is a specific endorsement covering professional  
16 services. ECF No. 43 at 5–6. The policy’s PCO coverage applies to “all ‘bodily  
17 injury’ and ‘property damage’ occurring away from premises you own or rent and  
18 arising out of ‘your product’ or ‘your work’ except: (1) Products that are still in  
19 your physical possession; or (2) Work that has not been completed or abandoned.”  
20 ECF No. 26-1 at 29. But the PCO coverage is not a separate endorsement covering

1 professional services, and it plainly modifies the existing coverages in the policy  
2 rather than creating a new category of coverage. Thus, to the extent PCO claims fall  
3 under the bodily injury and property damage coverage they remain subject to the  
4 exclusions to that coverage unless the exclusion specifically provides otherwise.  
5 The professional services exclusion therefore applies to claims even if those claims  
6 fall within the PCO coverage.

7       The dispositive question here is whether Rells’s inspection services were  
8 professional services. Evanston argues that the Central District of California’s  
9 reasoning in *Stone v. Hartford Casualty Company*, 470 F. Supp. 2d 1088, 1098  
10 (C.D. Cal. 2006), is applicable here. ECF No. 27 at 8–9. In that case, the court  
11 concluded that a similar exclusion applied to a contractor’s plans for room additions  
12 and construction or supervision of the additions. *Stone*, 470 F. Supp. 2d at 1098.  
13 The court cited California case law to define “professional services” as “those  
14 [services] arising out of a vocation, calling, occupation, or employment involving  
15 specialized knowledge, labor, or skill, and the labor or skill involved is  
16 predominantly mental or intellectual rather than physical or manual.” *Id.* And the  
17 court rejected the claimant’s attempt to circumvent the exclusion by making the  
18 conclusory assertion that the insured’s services were “non-professional.” *Id.*

19       While Washington law, not California law, governs the definition of  
20 professional services here, the general reasoning of *Stone* is persuasive. Whether



1 the services provided here were professional services is an objective question that  
2 does not depend on how Rells or Jac's characterized the services. The Ninth Circuit,  
3 addressed the definition of "professional service" under Washington law in *Bank of*  
4 *California v. W.H. Opie, et al.*, 663 F.2d 977, 981 (9th Cir. 1981). The court held  
5 that "a 'professional' act or service is one arising out of a vocation, calling,  
6 occupation, or employment involving specialized knowledge, labor, or skill, and  
7 the labor or skill involved is predominantly mental or intellectual, rather than  
8 physical or manual (citations omitted)." *Id.*

9 Evanston argues that the underlying complaint alleges that Rells failed in the  
10 performance of professional duties. ECF No. 27 at 10. While true, this is not  
11 inconsistent with the reasoning of *Stone* and *Bank of California*; whether a service  
12 is characterized as professional is not important, what matters is whether the service  
13 was in fact a professional service. Construing the facts alleged in the underlying  
14 complaint in Rells's favor, it is conceivable the services Evanston provided were  
15 not "professional services." Whether the negligence claim in the underlying  
16 complaint arises solely from professional services is a factual question that cannot  
17 be resolved based on the record currently before the Court. Accordingly, Evanston  
18 has a duty to defend Rells in the underlying action.

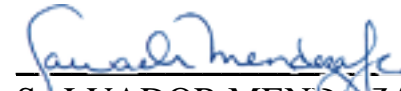
### 19 CONCLUSION

20 For the reasons discussed, **IT IS HEREBY ORDERED:**

1           1.     Plaintiff's Motion for Partial Summary Judgment, **ECF No. 27**, is  
2                     **DENIED.**

3           **IT IS SO ORDERED.** The Clerk's Office is directed to enter this Order and  
4 provide copies to all counsel.

5           **DATED** this 11th day of July 2018.

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7                                     \_\_\_\_\_  
8                                     SALVADOR MENDOZA, JR.  
                                      United States District Judge