

ALERT

Breach of Contract Exclusion in E&O Policy Bars Coverage for Dispute Between Contractor and Subcontractor

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The Court of Appeals of Wisconsin has held that the contract exclusion in an errors and omissions policy precludes coverage for a claim for the cost of fixing a subcontractor's construction errors. *General Casualty Co. of Wisconsin v. Rainbow Insulators, Inc.*, No. 2010AP347, 2011 WL 1162088 (Wisc. Ct. App. Mar. 31, 2011).

The insured subcontractor faced a claim for construction mistakes that caused acoustical problems in the condominiums upon which it worked. The general contractor performed remedial work after the insured refused to correct the mistakes, and then filed suit against the insured. The insurer denied coverage under its contractors' errors and omissions policy based on an exclusion for "damages arising out of any . . . delay or failure by you or anyone acting on your behalf to perform a contract or agreement in accordance with its terms."

In the coverage litigation that followed, the court held that the exclusion applied to the claim for failure to perform according to the terms of the construction contract. The court rejected the insured's argument that since the claim alleged negligence in breaching the contract, the policy should cover the claim. The court noted that Wisconsin precedent permits contractual exclusions in errors and omissions policies. The court also rejected the insured's argument that so reading the exclusion would lead to illusory coverage because such a reading would "exclude all claims of any sort that might arise during the course of work performed under a contract." The court noted that contractors owe common law duties of care to all persons, and that the policy would cover tort claims that did not arise from the insured's breach of contract.

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