

**TOKIO MARINE AND FIRE  
INSURANCE COMPANY, LTD.**

**v.s.**

**MARIANAS OCEAN  
ENTERPRISES, INC.**

**Appellate No. 88-9018  
District Court NMI  
Appellate Division**

**Decided April 15, 1989**

**1. Appeal and Error - Standard of  
Review - Legal Conclusions**

The Appellate Division's review of  
conclusions of law is de novo.

**2. Insurance - Policy -  
Construction**

A term is ambiguous if it is reasonably  
susceptible of more than one construction  
or interpretation.

**3. Insurance - Policy -  
Construction**

The term "professional services" per se is  
ambiguous, and was clearly so as used in  
insurance policy issued to scuba diving  
business.

1 UNITED STATES DISTRICT COURT  
2 FOR THE  
3 NORTHERN MARIANA ISLANDS

4 APPELLATE DIVISION

5 TOKIO MARINE & FIRE INSURANCE )  
6 COMPANY, LTD., )

DCA No. 88-9018  
CTC No. 87-462

7 Plaintiff/Appellee, )

**FILED**  
Clerk  
District Court

8 v. )

APR 16 1989

9 MARIANAS OCEAN ENTERPRISES, )  
10 INC., )

OPINION

For The Northern Mariana Islands

11 Defendant/Appellant )

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(Deputy Clerk)

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14 BEFORE: MUNSON, and HILL,\* District Judges, and VILLAGOMEZ,\*\*  
15 Judge.

16 HILL, DISTRICT JUDGE:

17 Marianas Ocean Enterprises, Inc. ("MOE"), the insured,  
18 appeals the grant of summary judgment to its liability insurer,  
19 Tokio Marine & Fire Insurance Co., Ltd. ("Tokio"). The trial  
20 court granted summary judgment to the insurer, holding that the  
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24 \* The Honorable Irving Hill, Senior Judge, United States  
25 District Court for the Central District of California,  
sitting by designation.

26 \*\* The Honorable Ramon G. Villagomez, Judge, Commonwealth  
27 Trial Court, sitting by designation.

1 "professional services" endorsement attached to the policy  
2 excluded coverage for the acts of MOE's employees alleged in a  
3 wrongful death action filed against MOE. We reverse and remand  
4 the case for a trial.

#### 5 FACTS

6 Although it also had other businesses, MOE's principal  
7 business was scuba diving instruction and diving excursions on  
8 Saipan. Tokio had insured MOE since 1980. Its coverage  
9 explicitly included "marine tour and fishing operations,  
10 including diving." Until 1984, the policy limit was \$50,000 for  
11 each person and \$100,000 for each accident.

12 In 1984 MOE asked that the policy limits be enlarged to  
13 \$300,000 per person and \$500,000 per accident. Tokio raised the  
14 limits as requested beginning with its 1984-85 policy. In so  
15 doing Tokio charged a slightly higher premium and added to the  
16 policy a so-called "professional services" endorsement (labelled  
17 "Endorsement #2") which provided that

18 the insurance does not apply to bodily injury or  
19 property damage caused by any act, error or omission of  
20 the insured, or of any person for whose acts the  
21 insured is legally liable, and arising out of the  
22 performance of professional services for others in the  
23 insured's capacity as marine tour operator. (Emphasis  
24 added).

25 The coverage language of the policy was also changed to  
26 provide that the coverage included "diving (subject to special  
27 endorsement attached)".

28 Upon receipt of the 1984-85 policy, the first containing the  
new endorsement, MOE's managing director, Mr. Yamagishi contacted

Tokio to request an explanation of the exclusionary language.  
1 Yamagishi is apparently not proficient in English. The  
2 explanation he received from Tokio's general agent was oral and  
3 was apparently in English. It did not satisfy him. Yamagishi  
4 then requested that he be given a further explanation in Japanese  
5 of the coverage and the exclusionary language. Tokio's Guam  
6 representative, Mr. Ogura, attempted to explain the exclusionary  
7 language in a letter to Yamagishi written in Japanese. Still  
8 dissatisfied, Yamagishi requested that Ogura come to Saipan  
9 personally to explain the new endorsement. Ogura did so in March  
10 1984. Tokio heard nothing more from him and Endorsement #2 was  
11 included in identical language in the annual policies for both  
12 1985-86 and 1986-87.

13 Yamagishi's testimony about the inclusion of Endorsement #2  
14 and his several attempts to question and ascertain its meaning,  
15 were a part of the record in the summary judgment proceedings.  
16 He testified that after the various explanations and  
17 conversations he was of the belief that MOE was still covered for  
18 acts of ordinary negligence in its diving operations.

19 Tokio added to MOE's 1986-87 policy an additional  
20 endorsement containing further exclusionary language applicable  
21 to diving activity. This is referred to as "Endorsement #3." It  
22 unequivocally stated that "all underwater activities including  
23 scuba diving is [sic] excluded under this policy." MOE alleges  
24 that Tokio Marine added Endorsement #3 to the 1986-87 policy  
25 without informing MOE of its inclusion.  
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1 On November 2, 1986, during the 1986-87 policy year, a Mr.  
2 Ikewaki died while participating in a diving excursion operated  
3 by MOE. Ikewaki's personal representative filed a wrongful death  
4 action in the Commonwealth Trial Court against MOE on June 23,  
5 1987. The complaint in that action asserted that although MOE's  
6 agents knew Ikewaki was an inexperienced diver, they "equipped  
7 him with diving apparatus, and led him into the ocean deep water  
8 without proper instruction in the use of the equipment; and  
9 without proper supervision and guidance while using the equipment  
10 in the deep waters of the open sea." Tokio Marine defended the  
11 action on behalf of MOE under a complete reservation of rights.

12 On July 28, 1987, Tokio filed the instant action in the  
13 Commonwealth Trial Court against MOE seeking a declaratory  
14 judgment that coverage did not exist under the policy. The  
15 wrongful death action was thereafter settled.

16 Following the settlement, Tokio moved for a summary judgment  
17 in the instant case arguing that both Endorsement #2 and #3  
18 excluded coverage for accidents of the type involved in the  
19 wrongful death action. The trial court granted the motion  
20 relying exclusively on Endorsement #2. The trial court held that  
21 Endorsement #2 in and of itself, excluded coverage and it was  
22 thus unnecessary to resolve the dispute of whether Endorsement #3  
23 was validly in effect at the time of Ikewaki's death.

24 With respect to Endorsement #2 the trial court specifically  
25 held that the term "professional services" contained in that  
26 endorsement was unambiguous. The trial court went on to hold  
27  
28

1 that the unambiguous language of the endorsement excluded  
2 coverage for employees' acts of the type involved in the wrongful  
3 death action. The trial judge therefore did not consider, and  
4 apparently regarded as irrelevant, Yamagishi's testimony  
5 concerning his discussions about the meaning of Endorsement #2  
6 with Tokio's representatives and his expectation and  
7 understanding that it did not exclude coverage for diving  
8 operations of the type being conducted when the accident  
9 happened.

#### 10 DISCUSSION

11 [1] The trial court's holding that Endorsement #2 was  
12 unambiguous is a conclusion of law. United State v. Sacramento  
13 Mun. Util. Dist., 652 F.2d 1341 (9th Cir. 1981). Our review of  
14 such determinations is de novo. Id. We hold that the trial  
15 court erred in making that holding.

16 [2] A term is ambiguous if it is reasonably susceptible of more  
17 than one construction or interpretation. Casteneda v. Dura-Vent  
18 Corp., 648 F.2d 612, 619 (9th Cir. 1981).

19 [3] In our view the term "professional services" per se is  
20 ambiguous, and was clearly so as used in this policy. The trial  
21 judge defined the term "professional services" to include  
22 occupations "applying specialized knowledge and intellectual  
23 skills to the performance of their duties." He amplified this  
24 definition by stating that the occupation must involve the  
25 exercise of "labor or skill" which "is predominately mental or  
26 intellectual rather than physical or manual."

In our view, the term "professional services" when used in any contractual context might well be considered ambiguous. Many lay persons would regard "professionals" as being limited to the traditional learned professions such as physicians, lawyers and accountants.<sup>1</sup>

The trial judge construed the term "professional" to extend far beyond the traditional learned professions. He applied it to any occupation calling for predominately mental or intellectual skill and effort, as compared with the physical or manual activity required. As so defined, the term is obviously ambiguous. When so defined, the term would include within its ambit, office workers such as bookkeepers, computer operators and executive secretaries whose work is predominately mental or intellectual.

This emphasizes the inherent ambiguity in the term "professional services" and the general unsuitability of the trial judge's definition. When one considers that this case involves the use of the term in the particular insurance policy at issue, which has reference to the work done by employees of this particular entrepreneur, the ambiguity of the term becomes even more clear. A diving instructor or diving tour guide may or may not meet the trial judges' definition. The trial judge made

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<sup>1</sup> It is noteworthy that even when dealing with a practitioner of one of the traditional professions, such as a physician, a particular act performed by him or her can be the subject of a substantial dispute as to whether that act involves a "professional service." See, e.g., Hirst v. St. Paul Fire & Marine Ins. Co., 683 P.2d 440, 444 (Idaho App. 1984).

1 no analysis of whether the work of such persons was predominately  
2 intellectual or mental. Instead, when discussing these  
3 particular occupations, the trial judge seemed to adopt a  
4 different definition for "professional services", i.e., that such  
5 instructors and guides are "certified" by some certifying group  
6 or organization. This definition is likewise unworkable.  
7 Certifications of various sorts are available from private or  
8 public sources for purveyors of all kinds of services, including  
9 plumbers, electricians and pest control men, none of whom would  
10 qualify as "professionals." That factor underscores the  
11 ambiguousness of the term in question.

12 To summarize, the error of law committed in the trial court,  
13 i.e., holding the term "professional services" to be unambiguous  
14 requires reversal of this summary judgment. Extrinsic evidence  
15 presented at a trial will be required to determine the meaning of  
16 "professional services" as used in the policy at issue.

17 The judgment below is REVERSED and the case is REMANDED for  
18 trial.

19 DATED:

*April 15, 1989*

20  
21 *Alex R. Munson*  
\_\_\_\_\_  
ALEX R. MUNSON, District Judge

22  
23 *Irving Hill*  
\_\_\_\_\_  
IRVING HILL, District Judge

24  
25 *Ramon G. Villagomez*  
\_\_\_\_\_  
RAMON G. VILLAGOMEZ, Judge  
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