



Dissecting the Professional Services Exclusion in a Commercial General Liability Policy

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Most commercial general liability policies contain a professional services exclusion that purports to exclude claims arising out of the rendering or failure to render a professional service. Professional services exclusions come in many different forms. The most generic professional service exclusions exclude coverage for bodily injury or property damage caused by the rendering or failure to render "any service of a professional nature." Other exclusions list a broad, non-exhaustive list of professional services that are excluded from coverage (*e.g.*, architectural services, medical services). Finally, some professional services exclusions are specifically tailored for the nature of the insured's business. For example, it is not uncommon for a salon's commercial general liability policy to specifically exclude damages arising out of cosmetic services and other services typically provided by a salon.

For policies that list specific excluded services, the application of the professional services exclusion can be a relatively straight-forward exercise. However, when the exclusion generically excludes coverage for losses arising out of the rendering or failure to render any professional service, application of the exclusion can be more complicated. The focus of this article is on defining a professional service and determining whether a particular act falls within a generic professional services exclusion.

General Purpose of the Professional Liability Exclusion

The operation of any regulated business activity typically has two separate components, 1) the professional, and 2) the commercial. Professional liability exclusions serve the purpose of limiting a general liability carrier's exposure in an area in which the insured should have separate errors and omissions coverage. While most general liability policies exclude damages arising out of professional services, errors and omissions policies often use the phrase "professional services" or a similar phrase within the insuring provision in the policy. Thus, most courts have found that losses that fall within the insuring provision of an errors and omissions policy are excluded by the typical professional services exclusion in a commercial general liability policy. See *Search EDP, Inc. v. Am. Home Assur. Co.*, 632 A.2d 286, 288 (N.J. Ct. App. 1993) ("It is clear that general liability policies and errors and omissions policies ordinarily cover and are intended to cover different categories of risk."). However, determining whether a particular act is a professional service is not always an easy determination.

The Definition of a "Professional Service"



Courts around the country have interpreted the phrase "professional service" in a variety of different ways. Some courts have found that the phrase is ambiguous. See *Danyo v. Argonaut Ins. Co.*, 464 A.2d 501, 502 (Pa. 1983) (finding "professional services" to be ambiguous because there "is much room for reasonable minds to differ in the interpretation of the term"). Other courts have found the phrase to be unambiguous. See *Am. Econ. Ins. Co. v. Jackson*, 476 F.3d 620, 624 (8th Cir. 2007) ("The professional services exclusion in the policy is not ambiguous."). Some courts have defined the phrase broadly. See *Ruel v. Fremont Indem. Co.*, 611 So.2d 171, 173 (La. Ct. App. 1992) (holding that professional service means "service performed by one in the ordinary course of practice of his profession, on behalf of another, pursuant to some agreement, express or implied, and for which it could be reasonably expected some compensation would be due"). Other courts have prescribed a more narrow construction. See *Potomac Ins. Co. of Illinois v. Jayhawk Med. Acceptance Corp.*, 198 F.3d 548, 552 (5th Cir. 2000) ("To qualify as a professional service, the task must arise out of the acts particular to the individual's specialized vocation.").

Despite the varying constructions of the professional services exclusion, a common theme can be found in the majority of decisions regarding the application of the exclusion. The most oft quoted definition of a professional service comes from the leading case of *Harad v. Aetna Casualty & Surety Co.*, wherein the court held that in order for a particular act to be found to be a professional service the act must be:

Something more than an act flowing from mere employment or vocation ... [t]he act or service must be such as exacts the use or application of special learning or attainments of some kind. The term "professional" ... means something more than mere proficiency in the performance of a task and implies intellectual skill as contrasted with that used in an occupation for production or sale of commodities. A "professional" act or service is one arising out of a vocation, calling, occupation, or employment involving specialized knowledge, labor, or skill, and the labor or skill involved is predominantly mental or intellectual, rather than physical or manual. In determining whether a particular act is of a professional nature or a "professional service" we must look not to the title or character of the party performing the act, but to the act itself.

839 F.2d 979, 984 (3dCir. 1988).

Consistent with the prevailing definition shown above, numerous courts have found that where the act at issue was performed by a non-professional, and the actor did not have any professional expertise other than "mere proficiency in the performance of a task," the professional services exclusion is not applicable. See *Progressive Youth Services, Inc. v. Dallas Fire Ins. Co.*, 2003 WL 1339700 (Tex. Ct. App. 2003) (finding that commercial general liability insurer failed to prove that the professional services exclusion of the policy applied to actions of the insured's employee in restraining a



resident of a juvenile facility because the employees involved in the incident were not professionals in any sense of the word); *Cunningham v. Middle Georgia Mut. Ins. Co.*, 601 S.E.2d 382 (Ga. Ct. App. 2004) (holding that liability coverage for a fire resulting from the insured's repair of a roof was not barred by the professional services exclusion because roofing was reasonably understood to be a trade or occupation, rather than a profession). Thus, where an actor is not a professional and is therefore incapable of exercising professional judgment, the professional services exclusion generally will not apply. However, the converse of the general rule that the actions of general laborers and non-professionals will not be found to be a professional service, *i.e.*, that the actions of qualified professionals will be deemed to be a professional service, is not always true.

Application of the Professional Services Exclusion for Lawsuits Against Professionals

When analyzing whether the act of a professional should be considered a professional service, the primary consideration is whether the alleged act or omission stemmed from the actor's use of professional judgment or expertise. See *N. Am. Treatment Sys., Inc. v. Scottsdale Ins. Co.*, 943 So.2d 429 (La. Ct. App. 2006). Demonstration of this point is best shown through the analysis of two cases in which patients at health care facilities were injured due to the negligence of the health care providers in performing seemingly ministerial acts where the respective courts arrived at different conclusions with respect to whether the professional services exclusion applied.

In *American Economy Insurance Co. v. Jackson*, an insurer that had issued a general liability policy to a corporation with an ownership interest in a nursing home filed a declaratory judgment action seeking a determination that it was not required to indemnify the nursing home owner for damages arising out of the wrongful death of a nursing home resident during a heat wave. 476 F.3d 620 (8th Cir. 2007). The facts revealed that a resident of the nursing home died due to excessive heat after the nursing home administrator failed to turn on the air conditioning at the facility. The administrator, a former nurse, drew upon her medical expertise and professional judgment when determining how to set the temperature. The Eighth Circuit Court of Appeals affirmed a trial court judgment for the general liability insurer and found that the resident's death arose out of the rendering of or failure to render a professional service, *i.e.*, nursing. According to the Court:

Here, the facts established at the Missouri state court jury trial show that the decision to refrain from switching the HVAC system to air conditioning for the medical benefit of the residents rested on Johnson's training and experience as a nurse, director of nursing and nursing home administrator. Nursing and nursing home administration are certainly occupations that require specialized knowledge and skill. Although we doubt that the professional services exclusion in the Policy, a general business liability policy, can be read so broadly as to include any act which occurs within the nursing home, the



acts in question fall within the exclusion. Johnson drew upon her training, knowledge and experience as a nurse and administrator when she made the decisions that led to Burns's death. Although the failure to engage the HVAC system's air conditioning could be considered a ministerial or administrative act, the undisputed facts show that Johnson considered the various medical conditions of Leland's residents before she exercised professional judgment and determined that the HVAC system would not be adjusted.

Id. at 625-26.

In *Guaranty Nat. Insurance Co. v. North River Insurance Co.*, the Fifth Circuit Court of Appeals was asked to determine whether a hospital's commercial general liability carrier, North River, was required to provide insurance coverage for a suit against the hospital arising out of a patient's death after the patient jumped out of a hospital window. 909 F.2d 133 (5th Cir. 1990). The policy contained a professional services exclusion that excluded coverage for bodily injury that occurs "due to ... the rendering of or failure to render ... any service or treatment conducive to health or of a professional nature...." *Id.* at 135. The court found that the professional services exclusion was inapplicable and offered the following rationale:

We interpret the North River exclusion to avoid coverage only for actions taken on behalf of a patient that are based on professional, medical judgment. The hospital's liability in this case, however, was founded, in part, on its negligent failure to maintain Wagner's window in such a manner as to prevent her from committing suicide through the window. The hospital's error was not that it decided as a matter of professional judgment not to protect the open unit patients from the perils posed by the windows. Instead, the error was that once the hospital decided to provide such protection, it did not do so adequately. Testimony at the original trial revealed that a psychiatric patient previously had escaped from the open unit through an opened window. The hospital then placed screws in the window sashes to prevent the windows from being opened more than a few inches. This protection, however, proved to be inadequate to prevent Wagner's death. The decision to protect the open unit patients through screws in the window sashes rather than through fixed, protective screens over the windows was an administrative, business decision and was not a professional, medical decision. We conclude, therefore, that the professional services exclusion in the North River policy does not reach the error for which the hospital was found to be liable.

Id. at 135.

The cases shown above demonstrate that in order to determine whether a particular act or failure to act constitutes a professional service, one should look at the act, itself, rather than the title of the actor. See also *Burton v. Choctaw County*, 730 So.2d 1, 7 (Miss. 1997) ("In determining whether or not a particular act or failure to act is of a



professional nature, we should look not to the title or character of the party performing the act, but to the act itself."). Further, it is sometimes insufficient to look only at the act. To determine whether a particular act is a professional service, one often has to analyze the reason that the act was or was not taken. In *American Economy*, the court found that the seemingly ministerial act of adjusting a thermostat was a professional service because the evidence showed that the actor "exercised professional judgment" when determining whether to adjust the thermostat. In contrast, the court in *Guaranty National* found that the failure to adequately secure a window was not the failure of a professional service. In doing so, the court found it important that the decision to secure the window had already been made by medical professionals. Because the method of securing the windows was not a decision that required professional expertise, and it was the insufficient manner of securing the windows that caused the accident, the accident was not caused by the failure to render a professional service. The logical import of the *Guaranty National* decision is that had the windows not been secured at all, the accident would have arisen out of the failure to perform a professional service because the decision to secure the windows in the first place required the decision maker to rely on his professional expertise.

Practice Pointers

The *Guaranty National* decision provides an excellent example of the fine line that can exist between a professional service and a non-professional service and underscores the importance of carefully considering the specific facts and allegations of a claim to determine whether the claim is excluded by a professional services exclusion. Too often when a claim is based on an accident or injury that occurred during the course of an insured's work as a professional, the gut reaction is to deny the claim outright based upon the professional liability exclusion. In contrast, where the allegedly negligent act by the insured does not appear on its face to be a professional service, too often the gut reaction is to merely accept the defense and indemnity of an insured without reservation of rights. This could result in the insurer being precluded from asserting the professional liability exclusion at a later time. This also may deter the insured from putting its errors and omissions carrier on notice, which is particularly harmful, as most errors and omissions policies are claims-made policies, and the failure to promptly report the claim could result in a denial of coverage. To avoid this scenario, when coverage is accepted for a claim against a professional, the insurer should make sure to notify the insured's errors and omissions carrier so that any rights are not waived and the opportunity for contribution or shifting of coverage is not lost. Remember, it only takes one person's testimony, for example, that she adjusted a thermostat based on her professional expertise, to turn a general liability claim into an errors and omissions claim.

Conclusion



The professional services exclusion found in most commercial general liability policies has been the subject of much litigation, and at first glance, many of the reported cases seem to be contradictory. However, upon a careful review of the decisions, one will find that in most cases the application of the professional services exclusion will turn upon whether the discrete act or omission complained of required the actor to draw upon his or her professional training or expertise. If the facts of the case reveal that the actor relied on his or her professional expertise, more often than not, even acts which appear to be ministerial will be found to be more properly covered under a professional liability policy than a commercial general liability policy.