

Whose Line Is It?
When Is a Claim a General Liability Claim or a Professional Liability Claim?


Pennsylvania Bar Institute
Claims Made and Professional Liability Insurance Coverage
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LIABILITY RISKS FACED BY PROFESSIONALS

- Bodily injury, property damage and financial losses suffered by clients arising out of the rendering or failure to render professional services;
- Bodily injury and property damage suffered by clients and non-clients *unrelated* to the rendering or failure to render professional services;
- Bodily injury suffered by employees;
- Wrongful termination, harassment and retaliation suffered by employees
- Libel and slander suffered by third parties
- Copyright, patent and trademark infringement suffered by third parties



PROFESSIONAL LIABILITY IS OFTEN EXCLUDED FROM GENERAL LIABILITY POLICIES

- Professionals must purchase separate professional liability coverage
- General liability and professional liability policies are designed to cover different risks
 - sometimes difficult to determine whether a claim implicates the general liability coverage or the professional liability coverage
 - some claims can conceivably trigger coverage under both types of policies
- Sometimes one coverage is broader than the other



GENERAL LIABILITY POLICIES AND PROFESSIONAL LIABILITY POLICIES ARE OFTEN SUBJECT TO DIFFERENT TRIGGERS

- **General Liability Policies**
 - occurrence based
 - triggered by “bodily injury” or “property damage” that occurs during the policy period
- **Professional Liability Policies**
 - claims-made
 - triggered by a claim made against the insured during the policy period
- Same injury may trigger general liability policy in year one, but professional liability policy in year two



CONTINUING INJURY CLAIMS

While a continuing injury or progressive loss claim may trigger **multiple general liability policies**, the same injury may trigger only **one professional liability policy** in force during the policy year in which the claim is made.

Example:

- Bodily injury claim against nursing home
- Claim contains allegations of pressure sores that developed during years one and two
- A lawsuit is filed against the insured in year two
- Professional Liability Policy: the triggering event—the filing of a claim—occurred in year two and triggers only the professional liability policy in effect during year two
- General Liability Policy: the triggering event—the development of pressure sores—occurred during years one and two, potentially triggering the policies in both years



LIMITS AVAILABLE FOR DEFENSE

- Professional Liability – Defense costs are typically *not payable* by the insurer *in addition to* the Limit of Liability stated in the policy declarations. Defense costs are part of the loss and, as such, are subject to the Limit of Liability for the loss.
- General Liability – Defense costs are typically supplementary payments paid by the insurer *in addition to* the Limit of Liability stated in the policy declarations.



COMMERCIAL GENERAL LIABILITY INSURANCE

- Forms backbone of liability protection for business owners
- Offers defense and indemnity for accidental bodily injury and property damage to third parties, subject to certain exclusions



WHAT IS COVERED UNDER STANDARD GENERAL LIABILITY POLICY?

Core Coverages:

- COVERAGE A—Bodily injury and property damage liability
- COVERAGE B—Personal and advertising injury liability
- COVERAGE C—Medical payments coverage
- SUPPLEMENTARY PAYMENTS – Coverages A and B



EXAMPLES OF CLAIMS COVERED UNDER GENERAL LIABILITY POLICIES

- slip and fall on the business premises;
- water damage to another's property caused by an employee's failure to shut off a faucet;
- misappropriation of advertising ideas;
- infringement of a copyright;
- an injury to someone's reputation caused by defamatory statements;
- damage caused by a component part manufactured by the business;
- negligent supervision or discrimination by employees;
- wrongful eviction of a tenant; and
- civil rights claims against security personnel



**STANDARD GENERAL LIABILITY
POLICY INSURING AGREEMENT**

We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. . . .



**PROFESSIONAL SERVICES
EXCLUSION**

- Intended to reign in extraordinary exposures
- Often added by endorsement when the policyholder is a professional
- Different endorsements for different professionals



**STANDARD PROFESSIONAL
LIABILITY EXCLUSION**

ISO's generic 1998 professional services exclusion endorsement:

"This insurance does not apply to 'bodily injury,' 'property damage,' or 'personal and advertising injury' due to the rendering of or the failure to render any professional service."



PROFESSION-SPECIFIC EXCLUSION

ISO's 1998 endorsement for druggists excludes:

1. "Bodily injury," "property damage" or "personal and advertising injury" arising out of the rendering or failure to render professional health care services as a pharmacist.
2. "Bodily injury" or "property damage" included within the "products-completed operations hazard"



PROFESSIONAL LIABILITY INSURANCE

- Designed to fill the gap created by the professional services exclusion in general liability policies
- Can provide coverage for a broader range of injuries, including financial losses not covered under general liability policies



WHO IS COVERED

Anyone engaged in a profession is subject to professional exposures, including:

- Lawyers
- Accountants
- Appraisers
- Architects
- Engineers
- Medical Doctors, Dentists, Psychologists
- Hospitals, Clinics and Nursing Homes
- Agents and Brokers
- Directors and Officers
- Bankers, Underwriters, and Investment Fund Managers



WHAT IS COVERED

This insurance provides coverage for the defense and indemnification of claims alleging errors and omissions in the rendering of or failure to render professional services.



COVERAGE TRIGGER

- Professional liability policies are most often “claims-made” policies. Under a claims-made policy, coverage is triggered by a “claim” made against the Insured during the policy period alleging a wrongful act, error, or omission.
- Some claims-made policies include the additional requirement that the claim be reported to the insurer during the policy period or during an “Extended Reporting Period.”
- Additionally, many claims-made policies include a “Retroactive Date” which requires that the wrongful act, error, or omission which is the subject of the claim take place on or after the Retroactive Date.



“PROFESSIONAL SERVICES” DEFINED

- Many general liability and professional liability policies make little effort to define the term *professional services*
- When defined, definitions are seldom more than statements to the effect that *professional services* means “any services of a recognized profession” or “includes but is not limited to” a designated list of services



**PROFESSIONAL SERVICE DEFINITIONS
CAN BE PROBLEMATIC**

- The term professional refers to a wide array of callings, vocations, occupations, and jobs
- Professionals are often assisted by non-professionals or paraprofessional personnel, who sometimes perform services requiring no particular technical expertise



Marx v. Hartford Accident and Indemnity Co., 157 N.W.2d 870, 871 (Neb. 1968)

- Landmark case discussing definition of "professional services" in a professional liability policy
- The Nebraska Supreme Court determined that the term "professional," in the context used in the policy provision, 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."



**AMBIGUITY WILL BE CONSTRUED
AGAINST THE INSURER**

- Inconsistent results depending on where the term "professional service" is located in the policy
- Professional services exclusion in a general liability policy may exclude a broader range of activities than those that are included within the basic coverage of a professional liability policy

Example: general liability exclusion may preclude coverage for conduct relating to any professional services, while the professional liability policy offers coverage only for a specific type of professional service, i.e., *medical professional services*



TERM PROFESSIONAL SERVICES DOES NOT INCLUDE GENERAL ADMINISTRATIVE ACTS

- Courts have generally held that policies covering "professional services" reach only those acts committed by the insured in his or her capacity as a professional.
- Professional services do not include general administrative activities that occur in all types of businesses.

Examples: billing practices of a professional office; employment decisions relating to non-professionals; professional's failure to pay for services rendered; and the renting of an office or the engagement of employees



EMPLOYMENT RELATED DECISIONS ARE NOT ALWAYS DEEMED ADMINISTRATIVE IN NATURE

A professional's employment related decisions and supervisory role may be held to constitute "professional services" where the selection and supervision of one's own employees is a component of a professional's job.

Example:

- Where a patient suffered a debilitating stroke when an unsupervised and untrained physician's assistant injected her with a contraindicated drug, the court held that the "professional services" exclusion applied to preclude coverage under the general liability policy because the insured physician in this case was "in the business of providing medical services to patients," which included hiring and supervising his non-professional employees.
- Court held that the "professional services" exclusion in a general liability policy applied to professional's action of hiring professional employees because, unlike performing an administrative act, the determination of whether a physician is qualified to render professional services requires specialized knowledge and skill.



TERM PROFESSIONAL SERVICES DOES NOT INCLUDE ACTS BY PROFESSIONALS THAT DO NOT REQUIRE SPECIALIZED EXPERTISE

Examples of Acts Not Constituting Professional Services:

- Where an engineer disconnected the control panel of an incinerator, causing a fire, the professional services exclusion in the general liability policy did not exclude coverage because that task could have been performed by individuals who had neither engineering training nor the ability to exercise special judgment unique to the engineering field
- Where a patient fell after an EKG technician placed him on the examination table, claim was covered under general liability policy because it was purely mechanical and administrative, and did not require the exercise of special training



TERM PROFESSIONAL SERVICES MAY INCLUDE CERTAIN ADMINISTRATIVE ACTS BY PROFESSIONALS THAT DO REQUIRE SPECIALIZED EXPERTISE

An act which may appear to be administrative or ministerial can be held to constitute a professional service if the court deems that the seemingly administrative act arises from the performance of professional services.

Example:

- Claims against nursing home administrator who allegedly failed to engage the facility's air conditioning system during a heat wave, causing four deaths from heat exposure, were excluded under the home's general liability policy's "professional services" exclusion because the administrator's decisions were made using specialized training, skill, experience, and knowledge.



IMPROPER SEXUAL ACTS COMMITTED BY PROFESSIONALS

Sexual assaults committed by a professional are generally not professional services.

Example: Where a physician sexually assaulted three minor patients during the course of a medical examination at his clinic, the court held that the professional liability policy did not cover the physician's conduct because his "acts of sexual contact were not part of medical treatment and involved neither the providing nor withholding of professional services."



EXCEPTION FOR TRANSFERENCE PHENOMENON - PSYCHIATRISTS

Several courts have held that the "professional services" exclusion in a general liability policy, or a professional liability policy, applies to claims against psychologists and psychiatrists who engage in sexual activity with patients suffering from the transference phenomenon because the sexual conduct is *related* to the rendering of professional services.

Examples:

- Claims against a psychiatrist who engaged in sex acts with a patient during therapy sessions constituted claims under the professional liability policy because "a sexual relationship between therapist and patient [suffering from the transference phenomenon] cannot be viewed separately from the therapeutic relationship that has developed between them."
- Claims against a psychologist after engaging in a two-month sexual relationship with a patient were covered under the professional liability policy because the "sexual conduct between the therapist and patient arising from the transference phenomenon may be viewed as the consequence of a failure to provide proper treatment of the transference."



ACTS OF NON-PROFESSIONALS MAY CONSTITUTE PROFESSIONAL SERVICES

Sometimes actions of *non*-professionals are held to constitute professional services. This is because the nature of the conduct (and not the job position of the actor) ultimately controls the outcome.

Example: Both engineering and non-engineering personnel were working together on an excavation site when a trench caved, killing an employee. The court held that the "professional services" exclusion in a general liability policy applied to both the engineering and non-engineering personnel because the corporation, as a unit, was engaged in the "professional service" of excavation.



ACTS OF NON-PROFESSIONALS THAT DO NOT CONSTITUTE PROFESSIONAL SERVICES

Examples:

- A patient at a dialysis center suffered fatal injuries when employees dropped her on the floor while attempting to move her from a dialysis chair to her wheelchair. The court held that stabilizing the patient and securing the dialysis chair did not constitute a "professional service" because "these tasks are purely manual" and their performance "would not require any special skills or training."
- A non-professional employee was injured while removing a cement head from a casing on the top of a drilling rig. The employee alleged that the contractor's failure to adequately supervise his employees caused the injury. The court held that the routine task of removing a cement head was not a professional service, stating that the contractor's supervisory role would only be classified as a "professional service" if he were to supervise an action which necessitated the employee's specialized expertise or skill.



CLAIMS THAT POTENTIALLY TRIGGER BOTH GENERAL LIABILITY AND PROFESSIONAL LIABILITY COVERAGE

- Insured holds both general liability and professional liability coverage
- General liability policy does not include a professional services exclusion
- Coverage could depend on the court's interpretation of the language in both policies and other clauses



CLAIM COVERED UNDER PROFESSIONAL LIABILITY POLICY ONLY

Example:

- A nursing home was insured by both Royal and Hartford, and both policies offered primary general liability and professional liability coverage. A wrongful death claim was made against the insured which potentially triggered coverage under both policies. The claimants in the underlying suit alleged that the defendants failed to properly and timely render appropriate medical and nursing care. The threshold issue for the court was whether the claim was covered by the general liability coverage or the professional liability coverage. The court, applying a common sense approach, held that only the professional liability coverage applied. Court's decision was based on understanding that general liability coverage applied to accidents like slip and falls on the nursing home premises, while the professional liability coverage applied to claims based on medical negligence occurring at the nursing home.



CLAIM COVERED UNDER BOTH PROFESSIONAL LIABILITY POLICY AND GENERAL LIABILITY POLICY

Example:

- U.S. Fire issued the insured nursing home a liability policy containing both a general liability coverage form and a professional liability coverage form. The general liability coverage form lacked a professional services exclusion. A wrongful death claim was filed against the home, and the home sought coverage. U.S. Fire paid only the million professional liability limits, arguing that it would be unreasonable to apply general liability coverage to a professional liability claim. Court held that both coverages applied.
 - First, the underlying claims fell within the literal terms of both the general liability and the professional liability coverage parts.
 - Second, the general liability policy did not render the professional liability coverage superfluous.
 - Third, the court declined to insert an exclusion into the general liability coverage that simply was not present.
 - Fourth, the professional liability coverage could overlap with coverage provided by other forms within the same policy as evidenced by anti-stacking language.



TAKE AWAY POINTS

- Insurance professionals should not focus exclusively on the title of the person who committed the act or omission when determining whether a *Professional Service* is implicated because: (1) there is room for argument over who is or who is not a professional; and (2) the identity of the actor matters, but is not, by itself, determinative.
- When determining whether conduct constitutes a *professional service*, most courts focus on the nature of the conduct. That is, the question of coverage usually turns on the nature and context of the alleged conduct.
- Professional services involve the use of specialized training or knowledge and do not typically involve physical endeavors that do not require a specific skill.



TAKE AWAY POINTS

- Conduct may be a professional service even if performed by non-professionals, paraprofessionals, or independent contractors.
- The location and context within the policy of the term professional services may influence how a court interprets and applies it.
- The precise definition of professional services, if any, will likely impact a court's determination.