

# claims ADVISOR

INFORMATION FOR TODAY'S CLAIMS PROFESSIONALS

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## QUICK LOOK

- If policy language isn't tight, the court may rule that claims from outside parties or for seemingly outrageous behavior are covered.
- Even with anti-stacking provisions, a client could have coverage under its GL and professional policies.
- Courts consider both the actor and the nature of the conduct when determining coverage under professional insurance policies.



# Whose Line Is It?

BY LAWRENCE D. JACKSON

# Learn to determine when a claim is a **general liability claim** or a **professional liability claim**.

Part two of a two-part series. Be sure to check out part one online at [www.claimsadvisor.com](http://www.claimsadvisor.com).

General liability policies are designed to cover ordinary risks, those common to most businesses, so they contain exclusions in an attempt to rein in extraordinary exposures. One such exclusion is the “professional services” exclusion, which is often added by endorsement when the policyholder is a professional. Professional liability insurance is designed to fill the gap created by the professional services exclusion in the general liability policy.

One problem that arises in settling claims is that general liability and professional liability policies make little effort to define the term “professional services.” As a result, it is sometimes difficult for the claims professional to determine whether a claim is properly covered under the professional’s GL or professional policy.

## **SEXUAL MISCONDUCT IN THERAPEUTIC SETTINGS**

Sexual assaults committed by a professional are generally not considered by the courts to fall within the realm of professional services. Often, however, a different standard applies to psychologists and psychiatrists when it is alleged that the therapist

mishandled the patient’s transference. The transference phenomenon is the process by which a patient’s emotions and desires toward one person, such as a spouse, are unconsciously shifted to another person, usually the analyst. Numerous courts have held that a therapist is engaged in a professional service when the claim alleges an improper sexual relationship with a patient suffering from the transference phenomenon because the sexual conduct is related to the therapy and the transference phenomenon renders the patient particularly vulnerable.

For example, in *L.L. v. Medical Protective Co.*, a psychiatrist engaged in sex acts with a patient during therapy sessions. The court held that the professional liability policy covered the doctor’s conduct 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.” Thus, the sexual conduct had such a strong tie to the therapy that it was covered by the doctor’s professional liability policy. Similarly, in *St. Paul Fire & Marine Ins. Co. v.*

*Love*, a psychologist and his patient engaged in a two-month sexual relationship. The court held that the doctor’s actions 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.”

## **NON-PROFESSIONALS AND NON-CLIENTS COVERED**

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. *Utica Lloyd’s of Texas v. Sitech Engineering Corp.* dealt with an excavation project in which engineering and non-engineering personnel were working together when a trench caved in, 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.

In certain circumstances, coverage may extend to claims of non-clients when it is established that the claim arises from the insured’s rendering, or failure to render, professional services. This arises often in the context of financial lines coverage, such as directors and officers liability insurance and professional liability policies for investment bankers and underwriters. In some policies, however, the professional services definition may limit coverage for claims asserted by non-clients. When the definition does not, it is possible that there will be coverage for these claims. *Harad v. Aetna Casualty and Surety Company* involved a malicious prosecution claim filed against an attorney by a non-client. The court held that the claim constituted a professional services claim because the policy definition did not limit coverage to claims of clients and because the claim arose from the attorney’s rendering of professional legal services.

## **COVERAGE UNDER GL AND PROFESSIONAL**

Sometimes an insured will hold both a general liability policy and a professional liability policy, but the general liability policy

doesn't contain a professional services exclusion. In this situation, a problem arises if the policyholder files a claim that could lead to coverage under both policies. The outcome of such situations may depend on the court's interpretation of the language in both policies and other clauses, such as anti-stacking provisions, that may be contained in the policies. In *Royal Ins. Co. of America v. Hartford Underwriters Ins. Co.*, a nursing home was insured by both Royal and Hartford, and both policies offered primary general liability and professional liability coverage. But the general liability policy did not include a professional services exclusion. 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 render appropriate medical and nursing care in a timely manner.

The threshold issue for the court was whether the claim was covered by the general liability coverage or the professional liability coverage. The court held that the professional liability policy applied. The court applied a common sense approach, stating that the general liability insurance applied to accidents like slips and falls on the nursing-home premises, while the professional liability coverage applied to claims based on medical negligence occurring at the nursing home.

The court reached the opposite conclusion in *U.S. Fire Ins. Co. v. Scottsdale*

*Ins. Co.* 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, however, provided liability limits of \$2 million, while the professional liability coverage form provided liability limits of only \$1 million. As in the *Royal* case, the general liability coverage form didn't include a professional services exclusion.

A coverage dispute arose in the context of a wrongful death claim filed against the insured after U.S. Fire paid only its \$1 million limits under the professional liability portion of the policy. U.S. Fire argued that it would be unreasonable to afford general liability coverage to a professional liability claim because that would render the entire professional liability coverage form superfluous. Scottsdale, the excess insurer, argued that the wrongful death claim triggered both coverage parts and that, therefore, the claim was subject to the \$2 million general liability limit.

The court rejected U.S. Fire's contention that the professional liability coverage alone should apply to the underlying claim. First, the court observed that the underlying claim fell within the literal terms of both the general liability and the professional liability coverage parts. Second, the court reasoned that the general liability policy did not render the professional liability coverage superfluous. The court cited examples of certain claims that would fall

under the professional liability coverage but not the general liability coverage. Third, the court declined to insert an exclusion into the general liability coverage that simply wasn't present. And finally, the court held that the anti-stacking provision in the professional liability coverage part clearly indicated an awareness by the parties that the coverage provided by the professional liability coverage form could overlap with coverage provided by other forms within the same policy.

### SEPARATE AND INDEPENDENT VS. CONCURRENT CAUSATION

Making things somewhat more complex, lawsuits against professionals typically allege multiple acts of negligence, some of which might involve professional services and others of which may not. When an act of negligence that is covered by the general liability policy and an act of negligence that is excluded by the professional services exclusion combine to cause a plaintiff's injuries, some courts distinguish between "separate and independent" causation and "concurrent" causation to determine if the insurer is required to provide coverage.

In cases involving separate and independent causation, the covered event and the excluded event each independently cause the plaintiff's injury. In such cases, some courts have held that a general liability insurer must provide coverage despite the existence of the professional liability exclusion in the policy.

For example, *Guaranty Nat'l Ins. Co. v. North River Ins. Co.* involved the claim of an estate of a deceased psychiatric patient who committed suicide by jumping from a hospital window. The claimant alleged that the hospital's failure to properly secure its windows and its failure to properly supervise a psychiatric patient led to the patient's death. The hospital's GL policy contained a professional services exclusion. The court held that the failure to supervise the patient was a professional service and that the failure to secure the windows was a ministerial task, but because the two events separately and independently led to the patient's death, the insurer was required to provide general liability coverage despite the presence of the professional services exclusion.

In cases involving "concurrent" causation, the covered event and the excluded event combine to cause the plaintiff's injuries. Because the two causes cannot be separated, the professional services exclusion may apply to preclude coverage.

*Utica Nat'l Ins. Co. v. American Indemnity Co.* involved claims of patients who were injured by the administration of contaminated anesthetics. The plaintiffs alleged that a technician employed by the insured surgical center contaminated ampoules with a syringe he had used on himself. The technician had hepatitis C, which was subsequently transmitted to the plaintiffs. They alleged negligence in (1) the stor-

age of the ampoules and (2) the administration of the drug by the physicians. The court determined that the general liability insurer had a duty to defend because the plaintiff alleged both general negligence (storage of the ampoules) and professional negligence (administration of the drug). It also held that a fact issue remained as to whether the patients' injuries were caused at least in part by professional negligence. The court determined that the insurer would not have a duty to indemnify if a jury ultimately were to conclude that both negligent acts combined to cause the claimants' injuries.

**EVALUATING THE CLAIM**

In evaluating professional liability claims, insurance professionals should not focus exclusively on the title of the person who committed the act or omission because: (1) there is room for argument over who is or who is not a professional; and (2) that is not how the courts decide this issue. Although the identity of the actor matters, it is not by itself a determinant; not everything a professional does is a professional service.

When assessing whether or not something constitutes a professional service, most courts focus on the nature of the conduct, not just on the title or position of the

actor. 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. Further, the courts distinguish between whether the claim arises from a "professional" or a "commercial" activity. Marketing and administrative activities don't generally constitute professional services. Conduct may be a professional service even if performed by non-professionals, paraprofessionals, or independent contractors. Additionally, claims of non-clients may involve professional services.

Keep the policy's lan-

guage front and center. The context in which the policy uses the phrase "professional services" can make a difference in how a court interprets and applies it. Courts usually read insuring agreements broadly, in a way calculated to broaden coverage. Exclusions, on the other hand, are usually read narrowly and strictly. The precise definition of "professional services" can make a difference. **CA**

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