

**WHERE DO PROFESSIONAL SERVICES BEGIN AND END
FOR PURPOSES OF PROFESSIONAL LIABILITY POLICIES?**

by Stephen Rosenberg

The overriding distinction between professional liability policies and general liability policies is the former's restriction of coverage to claims that arise out of the rendering of or failure to render professional services. As one court has phrased it, "[a] professional errors and omissions insurance policy provides limited coverage, usually as a supplement to a general comprehensive liability (CGL) policy, for conduct undertaken in performing or rendering professional acts or services." Medical Records Assocs., Inc. v. American Empire Surplus Lines Ins. Co., 142 F.3d 512, 513 (1st Cir. 1998); see also J. Appleman, 7A Insurance Law and Practice § 4504.01, at 310 (1979) ("An errors-and-omissions policy is professional liability insurance providing a specialized and limited type of coverage as compared to comprehensive insurance . . ."). A "widely accepted" characterization of the coverage afforded under a professional liability policy limits the scope of such coverage to conduct involving "specialized" skill or knowledge:

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.

Medical Records, 142 F.3d at 514 (citations omitted).

An important and widely accepted corollary is that only those acts of the insured that actually involve rendering the professional services to the insured's clients qualify as professional services for purposes of an insurance policy, while claims that arise from the business operations of the insured that are needed to support the provision of those services do not fall within the scope of professional services for purposes of an insurance policy. Among the quintessential cases that best illustrate this principle is Inglewood Radiology Medical Group, Inc. v. Hospital Shared Services, Inc., 217 Cal. App. 3d 1366 (1989), in which the insured, a medical group, was sued by a former employee (a physician) for various causes of action, all emanating from the employee physician's allegedly wrongful termination by the insured. The medical group had professional liability coverage under a policy issued by American Continental Insurance Company ("American"). The American policy covered "all sums for which the insured must legally pay as damages because of injury arising out of the rendering or failure to render during the policy period *professional services* by the insured" The policy defined "professional services" as "services performed in the practice of the profession of a physician, surgeon or dentist." The medical group tendered defense of the suit to American, which denied coverage on the ground that claims for wrongful termination do not arise from the rendering of "professional services." The medical group sued American and judgment was entered in favor of American.

On appeal, the medical group argued that the wrongful termination suit was covered because only a trained physician exercising a physician's expertise could determine whether a physician employee should be terminated. The court of appeals disagreed, finding that there was no potential for coverage under the policy. Id. at 1370. The court explained:

even though a physician's expertise may be required to properly evaluate a particular physician's performance as an employee, the decision to terminate that employee is not "rendering professional services." Rather, the decision to terminate employment is a business or administrative decision.

Id.

Federal and state courts in Massachusetts have issued a series of decisions that emphasize this exact segregation. See, e.g., Roe v. Fed. Ins. Co., 587 N.E.2d 214 (1992); Camp, Dresser & McKee, Inc. v. Home Ins. Co., 568 N.E.2d 631 (Mass. App. Ct. 1991). In Camp, Dresser & McKee, the insured was an engineering and consulting company supervising a municipal project, and the issue before the court was whether the insured's failure to warn municipal employees working on the project of certain job hazards constituted professional services. The Massachusetts Appeals Court found that the activities at issue were fairly characterized as "management tasks" rather than as part of the actual rendering of the insured's professional services, even though the activities occurred as part of the insured's consulting services that constituted its professional services for purposes of the policy. Camp, Dresser & McKee, 568 N.E.2d at 635.

In Roe v. Federal Insurance Co., the question before the court was whether a dental malpractice policy which provided coverage for claims "arising out of the rendering of or failure to render . . . professional services" covered a claim involving the insured dentist's improper sexual relationship with a patient. The Massachusetts Supreme Judicial Court held that the claim did not fall within the scope of the professional services insuring agreement even though the sexual activity occurred during the patient's appointments with the dentist. Roe, 587 N.E.2d at 218. The court explained that the simple fact that the actionable conduct occurred during, and as part of, the insured's rendition of its covered professional services, did not bring the actionable conduct within the scope of the policy's coverage. This was because:

Something more than an act flowing from mere employment or vocation is essential. The act or service must be such as exacts the use or application of special learning or attainments of some kind. 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. . . . [M]embership in a profession has traditionally been recognized as requiring the possession of special learning acquired through considerable rigorous intellectual training. . . . [T]he scope of professional services does not include all forms of a medical professional's conduct simply because he or she is a doctor or dentist [A]n act or service that requires no professional skill [is not a professional service]. Common sense, of course,

will always provide a useful guide in differentiating covered from uncovered cases.

Id. at 217 (internal citations and punctuation omitted).

The Massachusetts Appeals Court expounded on the reasoning and rulings in Roe and Camp, Dresser & McKee, in Jefferson Insurance Co. of New York v. National Union Fire Insurance Co., 677 N.E.2d 225 (Mass. App. Ct. 1997). The Appeals Court explained that even when the term professional services is construed liberally in favor of the insured, it does not extend “to conduct by a professional that was not an integral part of the specific treatment regimens ordinarily involved in the application of the relevant professional skills.” Jefferson Ins. at 229-30. The court explained that the term does not “apply to incidents involving ordinary tasks performed or achievable by those lacking the relevant professional training and expertise.” Id. at 230.

The Appeals Court concluded in Jefferson Insurance that the particular actionable conduct at issue in that case did not constitute professional services as a result. The insured was an ambulance service which was sued for its lack of timeliness in providing emergency services, which was due to alleged negligence in receiving messages from the police and relaying those messages or otherwise supplying the ambulance with the information necessary for the emergency medical technicians to render the emergency services. The Massachusetts Appeals Court concluded that:

the negligent conduct complained of did not constitute professional services. It was rather in the nature of nonspecialized, clerical or administrative activity requiring neither special learning, intellectual skill, nor professional judgment. Nothing in the record suggests that specialized training, skill or knowledge, beyond the normal intelligence of the ordinary prudent person, is required To the contrary, ordinary experience and common sense indicate that such activities require only the everyday, practical abilities of the average adult, not the art of the adept.

Id. at 230 -31. (Internal citations omitted.)

These decisions by the Massachusetts state appellate benches have been interpreted by the United States Court of Appeals for the First Circuit as meaning that:

“professional services” as covered by an E&O policy in Massachusetts embrace those activities that distinguish a particular occupation from other occupations—as evidenced by the need for specialized learning or training—and from the ordinary activities of life and business.

Medical Records Assocs., Inc. v. American Empire Surplus Lines Ins. Co., 142 F.3d 512, 515 (1st Cir. 1998).

In Medical Records, the insured argued that the back office operations that related to its billing practices, which gave rise to the claims against it, were linked to its professional activity and that a claim based on those practices was, therefore, within the scope of the professional services policy. The First Circuit rejected this argument on the ground that the activities at issue were simply “generic business practices” and not part of the actual professional services rendered by the insured that were supported by those generic business practices. Id. at 515-16.

Courts throughout the country have accepted this approach to professional services coverage. This approach was applied, for instance, by the Illinois Supreme Court in Crum and

Forster Managers Corp. v. Resolution Trust Corp., 620 N.E.2d 1073, 1078 (Ill. 1993). In Crum, the insured was a real estate firm, Mid-State Savings and Loan Realty, Inc. (“Mid-State”), that was sued by Dependable Realty, Inc. (“Dependable”), the former employer of one of Mid-State’s agents; Dependable alleged claims for interference with prospective economic advantage, interference with contractual relationships, breach of fiduciary duty and unfair competition.

Mid-State was insured under a real estate agents and brokers professional liability policy. Its professional liability carrier sought a declaratory judgment that it had no duty to defend the insured against the action. The Illinois Supreme Court agreed with the insurer, finding that the torts committed by the insured were not covered under the professional liability policy as they did not arise because of the insured's performance of real estate services. Id. at 1079. The court explained:

Essentially, Dependable's complaint alleges that the insureds committed intentional business torts and engaged in unfair competitive practices. The risk of conducting one's business in an unfair and tortious manner is certainly not one inherent in the practice of the real estate profession. Although the complaint contains allegations which refer to real estate matters such as listings and commissions, these are allegations which go to the injury or damage done to Dependable and which resulted from the insured's allegedly tortious conduct. These allegations do not form the genesis from which the claims made by Dependable first arose. Dependable's claims are not made against the insureds because the insureds somehow incorrectly performed real estate services such as the listing of properties. Dependable's claims are made against the insureds and have arisen *because of* the insureds [sic] allegedly tortious conduct and unfair business practices which are ancillary to the performance of real estate services.

Id. at 1079.

Numerous other cases are to the same or similar effect. For example, in Visiting Nurse Association of Greater Philadelphia v. St. Paul Fire and Marine Insurance Co., 65 F.3d 1097 (3rd Cir. 1995), a home health care service sought a declaratory judgment that its insurer was required under a professional services policy to cover a claim brought by a competitor alleging antitrust, RICO and interference with contractual relationship claims. The court ruled that the insured was not covered under the professional liability policy because the claims did “not result from any professional services, i.e., services that require specialized skill, knowledge, learning, or attainments that [the insured] provided or failed to provide.” Id. at 1104. The court based this determination on the reasoning that:

[the claimant] has not based its suit against [the insured] on any aspect of the application of any specialized skills, knowledge, learning, or attainments by the [insured’s personnel] [The insured’s] liability to [the claimant], if any, derives from [the claimant’s] claims that [the insured] conspired with hospitals to monopolize referrals, engaged in a pattern of racketeering activity, and interfered with [the claimant’s] prospective contractual relations with patients. Similar allegations could be made against any business competing for referrals or customers. These allegations stem from [the insured’s] effort to operate its business, not from any professional services that were or should have been provided.

Id. at 1102.

Similarly, in St. Paul Fire and Marine Insurance Co. v. National Real Estate Clearinghouse, Inc., 957 F. Supp. 187 (D. Minn. 1997), an auctioneer company, National Real Estate Clearinghouse (“National”) was sued by George Dress for declining a bid Dress had made to acquire certain property. Dress charged that National’s alleged misconduct constituted intentional interference with prospective economic advantage. National had professional liability insurance through St. Paul, which covered losses resulting from a “wrongful act,” which the policy defined as “an error, omission or negligent act committed in the conduct of [the insured’s] business.”

St. Paul sought a declaratory judgment that its policy did not cover interference with prospective economic advantage. The court agreed there was no coverage. It explained that coverage under professional liability policies “is designed to insure members of a particular professional group from the liability arising out of a special risk such as negligence, omissions, mistakes and errors inherent in the practice of the profession.” Id. at 189 (citations omitted). The court found that under the clear language of the policy:

coverage extend[ed] only to errors, omissions or negligent acts which are inherent in the practice of auctioneering. Furthermore, the Policy does not cover intentional acts. Thus, the claim alleged against National for intentional interference with prospective economic advantage is not covered by the Policy, as such claim is based on an intentional act that did not arise from the rendering of auctioneering services.

Id. at 191.

As these cases reflect, courts have created an extensive extracontractual “gloss” on professional liability insuring agreements, restricting their coverage on the basis of this type of line drawing between claims involving the professional expertise of the insured and those involving the business operations that support the rendering of those services. Where that line sits determines whether or not a particular claim can be within the scope of coverage.