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What are professional services? When is a mistake a professional error or omission, and when is it just a mistake? Courts differ, and sometimes policyholders suffer.

Pursuing “Professional” Coverage Under CGL Policies: Handling the Professional Services Exclusion

MARK GARBOWSKI, ESQ.

Typical professional liability and errors and omissions (E&O) liability policies require that the liability arise out of “professional services” on the part of the policyholder.^{1,2} Not surprisingly, some insurers have attempted to defeat insurance coverage for claims by arguing that the activity alleged by the claimant does not constitute a professional service — a term left undefined by most insurance policies. Once a claim is filed, many policyholders quickly learn that the quality of their E&O insurance coverage largely depends on the quality of their insurer’s claims-handling practices.³ As insurance brokers and risk consultants have cautioned, prospective policyholders should use only those in-

surers that will “‘stay the course’ and honor their commitments when the coverage is needed.”⁴

Most policyholders purchase other types of liability insurance as well: Virtually all buy commercial general liability insurance (CGL), and a good number also buy directors and officers liability insurance (D&O). When faced with a reservation of rights (where the insurer investigates a claim, but reserves the right to deny coverage at a later date) or an outright denial of coverage, these policyholders often will look to those other policies for coverage of these claims.

“[T]he number of professions which find it necessary to procure errors and omissions insurance is constantly expanding.”⁵ One result is that conflicts arise between policyholders and their insurers over which policy or policies, if any, provide coverage for any particular claim. Of course, whether a policyholder wants a particular claim to arise out of a professional service will depend, at least in part, on whether the policyholder is seeking the coverage under its E&O or its CGL coverage. Pursuing coverage under a CGL policy will entail different strategies than under an E&O policy.

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Even if a policyholder's E&O insurer does not contest coverage, it can be worthwhile for a policyholder to determine whether a claim might be covered under both its E&O coverage and under its CGL coverage, even if one policy requires that a claim concern professional services and the other policy contains a professional services exclusion. When the issue appears at all uncertain, probably the most prudent course is to give notice to *all* insurers under *all* possibly relevant policies.

The court noted that it was not unusual for an E&O policy and a CGL policy to overlap.

Dual Coverage

CGL coverage is likely the broadest form of insurance coverage available on the market, one that should cover all risks unless specifically excluded. Prior to Insurance Services Office, Inc. (ISO) revision in 1986, the initials "CGL" stood not for "commercial general liability," but for "comprehensive general liability."

The primary purpose of a comprehensive general liability policy is to provide broad comprehensive insurance. Obviously the very name of the policy suggests the expectation of maximum coverage. Consequently, the comprehensive policy has been the one most preferred by businesses and governmental entities over the years because that policy has provided the broadest coverage available. All risks not expressly excluded are covered, including those not contemplated by either party.⁶

Sometimes Covered by Both

While the ISO revision intended to create CGL coverage that is not exactly "comprehensive" or "all-encompassing," the scope of coverage provided remains quite broad. Consequently, it is entirely possible that certain liabilities could be covered under an E&O policy affording professional services coverage and a CGL or D&O policy containing a professional

services exclusion. For example, in *Medical Record Associates, Inc. v. American Empire Surplus Lines Ins. Co.*, the First Circuit noted that a liability could be covered under an E&O policy, yet not be excluded under a professional services exclusion contained in a CGL policy:

It is perhaps of some significance that [case law considered by the court] involved exclusions to CGL policies — removing professional services from the policies' otherwise comprehensive coverage — rather than professional E&O policies, in light of the well-established canon that insurance policies are to be construed in favor of the insured, [citations omitted]. A court applying that maxim might well be inclined to find certain conduct to be both covered by a professional E & O policy but not excluded by a CGL policy's professional liability exclusion.⁷

Similarly, in *Jefferson Insurance Co. of New York v. National Union Fire Ins. Co. of Pittsburgh, PA*, the Massachusetts court found in favor of the policyholder under both an E&O policy and a CGL policy containing a professional services exclusion for an underlying claim alleging negligence against the policyholder ambulance company in its response to an emergency call.⁸ The court noted that it was not unusual for an E&O policy and a CGL policy containing a professional services exclusion to "occasional[ly] overlap" in covering certain claims:

With a reasonably narrow reading of the professional services exclusion, the two policies at issue can be seen to complement each other and dovetail in most circumstances — the CGL policy providing general liability coverage except for medical treatment given by ambulance employees, which is covered by the E&O policy — with an occasional overlap in circumstances such as the present.

Sometimes Denied by Both

Despite this recognition of overlapping coverage, providing a policyholder with some comfort from purchasing multiple insurance policies, the likelihood that a policyholder's claim will be denied is not necessarily abated.⁹ Should a claim arise, the policyholder may encounter a situation where two or more

insurers deny coverage under their respective insurance policies. If the policyholder is fortunate, at least one insurer will defend and, possibly, indemnify the claim, then proceed with an action against the other insurer to determine which is liable.

For example, in one case, a policyholder was sued after it performed soil engineering work during a construction project. The policyholder had purchased a CGL insurance policy from one insurer and an E&O insurance policy from another. When the policyholder filed its claim with the insurers, both denied that they had any coverage obligations to the policyholder.

The E&O insurer flatly refused to provide insurance coverage to the policyholder. Fortunately, however, the insurer that sold the CGL insurance policy provided a defense and negotiated a settlement in the underlying suit on behalf of its policyholder. A lawsuit between the two insurers ensued to determine which, if either, of the insurers was obligated to provide insurance coverage to the policyholder. A federal court of appeals found that the E&O insurer improperly denied insurance coverage to the policyholder.¹⁰ The court determined that the policy exclusion on which the E&O insurer was relying was inapplicable to the circumstances surrounding the policyholder's claim. The court ruled in favor of the insurer that had sold the CGL insurance policy.¹¹

Professional Services Undefined

One of the main problems concerning professional services exclusions is that they are, often times, so broadly worded that an insurer may seize the opportunity to erode coverage that the policyholder otherwise anticipated having. The issue of just what constitutes professional services under the terms of an insurance policy has been debated. In the context of a policyholder that has purchased both E&O and CGL or D&O insurance, differentiating business conduct alleged to give rise to the policyholder's potential liability can be far from a precise endeavor.

In *National Union Fire Insurance Company of Pittsburgh, PA v. Cagle*, the court addressed insurance coverage under a D&O policy where the insurer argued, among other things, that there was no insurance coverage for the policyholder's claims due to a professional services exclusion contained in the policy.¹² In *National Union*, the insurer had sold a D&O insurance policy that contained a professional

services exclusion to a bank. The bank, along with its senior vice president who was supervisor of the bank's agricultural lending department, was sued. The claimants, cattle ranchers, brought a lawsuit alleging that the bank senior vice president "took advantage of his position at the bank and their vulnerability by requiring them to buy cattle and supplies at inflated prices from third parties who gave kickbacks to [him]."¹³

The insurer denied insurance coverage for the claim on numerous grounds, including an argument that the professional services exclusion contained in the D&O policy applied to the claim. The U.S. Court of Appeals for the Fifth Circuit held that the professional services exclusion could not be used to deny insurance coverage under the D&O policy because the bank's senior vice president's "actions were outside the course of his bank duties and no evidence of compensation for managing the [claimants'] operations was presented."¹⁴

In any given lawsuit, several theories of liability may be present.

Specifically Tailored Coverage — And Exclusions

Just as professional liability coverage is often specifically tailored to each particular profession, so are some of the professional services exclusions inserted into CGL policies. For example, CGL policies purchased by engineers, architects, or surveyors include a clause excluding insurance coverage for claims arising out of any professional service, defined as:

1. The preparing, approving, or failing to prepare or approve, maps, shop drawings, opinions, reports, surveys, field orders, change orders or drawings and specifications; and
2. Supervisory, inspection, architectural or engineering activities.¹⁵

The corresponding exclusion for health or exercise clubs excludes coverage for damage:

arising out of the rendering or failure to render any service, treatment, advice or instruction

relating to physical fitness, including services or advice in connection with diet, cardiovascular fitness, body building or physical training programs.¹⁶

In any given lawsuit filed against an architect or an exercise club, several theories of liability may be present, implicating insurance provisions — including exclusions — under both the policyholder's professional liability policy and its general liability policy. Each insurer may take advantage of the situation by disavowing any coverage obligation to its policyholder.

Another issue concerns different triggers of coverage under different types of policies.

Perhaps the most common area where such potential coverage gaps are created occurs when a third party alleges a bodily injury against a professional. Many E&O policies (apart from those in the medical services fields) are designed to cover economic injuries and provide little or ancillary coverage for bodily injury. It is in these cases that a policyholder will most commonly turn to its CGL policy for coverage, only to have the CGL insurer deny coverage under a professional services exclusion.

Avoiding Coverage Gaps

Policyholders have available to them various strategies to fill the potential gaps between CGL and E&O coverage.

Different Policies, Same Insurer

Some policyholders will purchase both their professional liability and their CGL policies from the same insurer. (Unfortunately, not all insurers that offer professional coverage also offer CGL coverage; thus, some professions with E&O needs served only by a small number of insurers might not have the option of coordinated coverage.) Some insurers even advertise the benefits of such coordinated coverage. For example, Crum & Forster's Web site advertises

the following benefits of its COMPAC Commercial Benefits package:

With its highly esteemed "COMPAC" Commercial Package Policy, Crum & Forster (C&F) makes available to you a state-of-the-art insurance product, distinguished by its comprehensive scope of coverages as well as by its valuable flexibility. Eminently adaptable to the specific requirements of each and every commercial or industrial client, no matter how varied or unique, COMPAC can be tailored to provide just the right combination of Property and Casualty coverages to suit your needs.

COMPAC simplifies your decisions and provides you with the peace of mind you should expect from your insurance purchase. COMPAC eliminates the costly redundancies usually associated with separate insurance policies, closes coverage gaps that separate contracts can leave open, and avoids the worrisome conflicts that, at time of loss, can arise from the often incompatible terms and conditions of separate policies or insurers.

Crum & Forster specifically lists both general liability and professional liability as among the coverages available under this program.¹⁷

Amending Coverage

Another possibility is either to purchase an E&O policy that includes contingent bodily injury and property damage coverage or a CGL policy that adds E&O coverage for professional services rendered.¹⁸ Of course, just because a policyholder buys both CGL and professional liability coverage from one insurer, it does not guarantee that all claims will be covered or that there will not be any gaps. In *Visiting Nurse Assoc. of Greater Philadelphia v. St. Paul Fire and Marine Ins. Co.*, St. Paul sold a policy to the Visiting Nurse Association (VNA) that included both professional liability and general liability coverage.¹⁹ When the VNA was sued by a competing organization for unfair competitive practices, St. Paul denied coverage under both portions of the policy.²⁰ The Third Circuit ruled that the VNA was not entitled to coverage under either part of the policy: There was no professional liability coverage because the alleged

injury did not arise out of the performance of professional services; there was no CGL coverage because the allegations did not fall under the CGL "personal injury" coverage.²¹

Beware Different Triggers

Whether a policyholder purchases its policy or policies from one or more insurers, another issue of which to be wary concerns different triggers of coverage under different types of policies. Professional liability policies commonly are written on a claims-made basis, while CGL coverage still is available on an occurrence basis. As a result, if the occurrence giving rise to the claim takes place during one policy period and the claim is not made until a later policy period, two policies with the same ostensible policy period might not cover the same claim. As a result, even if a policyholder has perfectly complementary coverage for a single year, its coverage might still generate gaps if the forms change or if the policyholder changes its insurer.

What Is Professional Service?

Whether a policyholder expects to receive coverage under its professional liability or its CGL policy, the issue of what constitutes a professional service usually will be partly determinative. Many standard professional services exclusions, as well as professional liability policies, neither define key terms nor clearly delineate what activities and losses are covered or excluded under the policies. Accordingly, many policyholders argue that the exclusions are ambiguous.

Possible Ambiguity

And courts nationwide have found that the term "professional services," as used in exclusionary provisions, is ambiguous. For instance, in *Home Ins. Co. v. Law Offices of Jonathan DeYoung, P.C.*, the court denied summary judgment, finding that:

[B]ecause the term "professional services" is undefined in the policy, it is possible for reasonable minds to reach varying conclusions as to whether [the policyholder] provided professional services to [the underlying claimant].²²

As these courts have recognized, it often is not clear from the policy language what activities and

losses are intended to be excluded by professional services exclusions. In *Abramson v. Florida Gas Transmission Co.*, the court denied the insurer's motion for summary judgment on the professional services exclusion because: "[I]t is, at the very least, unclear as to whether some if not all of the claims made by [underlying] plaintiffs arise out of the non-professional activities [of the policyholder]...."²³

Coverage is not barred by a professional services exclusion for liability arising from claims of ordinary negligence.

Building a Definition

On the other hand, many courts have found it possible to give meaning to the phrase "professional services." A leading case often cited when determining what constitutes a professional act or service is *Marx v. Hartford Accident & Indemnity Company*.²⁴ The court in *Marx* held that:

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.

Commentators have weighed in on the issue as well, criticizing the *Marx* formulation as improper.²⁵

Finding Coverage in CGL Policies

When trying to avoid a professional service exclusion in a CGL policy, policyholders often point to allegations of negligence in the underlying action. Courts addressing the limits of the professional services exclusion commonly have held that coverage is not barred by a professional services exclusion for liability arising from claims of ordinary negligence, especially when such liability arises in connection with activities outside the scope of the policyholder's ordinary business practices.

Negligence Not Professional — Take One

For example, in *Camp Dresser & McKee, Inc. v. The Home Ins. Co.*, an engineering firm faced allegations of negligence and wrongdoing that the court described as:

[I]ts failure to advise and warn of the limitations on the use of conveyor A and its failure properly and adequately to (1) exercise control over the operations of the plant, including conveyor A; (2) make recommendations concerning [*321] the safe operation of conveyor A “so as to protect against foreseeable hazards”; (3) “advise and warn of the dangers and hazards attendant upon the use of [conveyor A]”; and (4) “instruct on the operation, repair and maintenance of” conveyor A and its parts.²⁶

Policyholders with claims that potentially straddle both professional liability and general liability coverage should approach such claims carefully.

The Massachusetts court further stated:

The general allegations of the underlying complaint charging inadequate control and failure to warn, coupled with information, chargeable to CDM [Camp Dresser & McKee, Inc.], of the specific nature of the risk, were sufficient to alert Home that the underlying action encompassed a claim of ordinary negligence arising from CDM’s management or control of the plant.²⁷

The court found that merely because the work was performed by professionals did not mean that it was a professional service covered by the exclusion:

[T]he fact that CDM’s contracts with the city of Detroit may have been performed by engineers or other professionals does not compel

the conclusion that the contracts, in all respects, called for professional services. Such an interpretation would have the exclusion swallow the policy.²⁸

The court then analyzed the allegations against the exclusionary language:

Two aspects of Home’s exclusionary language are determinative: (1) claims of ordinary negligence or negligent management or control are not expressly precluded; and (2) the word “supervisory” in the clause excluding from coverage “supervisory, inspection or engineering services” is reasonably susceptible of ambiguous interpretation. It can be construed narrowly as describing supervision of purely professional activities or broadly as describing management or control of aspects of a project involving both professional and nonprofessional activities. The underlying claims of negligent management or control in this case properly can be treated as falling outside the former construction and within the latter. The burden of the failure clearly to exclude all of the claims in the underlying action must fall on the insurer.²⁹

Negligence Not Professional — Take Two

Similarly, in *GRE Insurance Group v. Metropolitan Boston Partnership*, the First Circuit reversed the trial court’s grant of summary judgment in favor of an insurer regarding the applicability of the professional services exclusion to underlying bodily injury claims.³⁰ The policyholder was in the business of disbursing housing subsidies to participating landlords and tenants. Bodily injury claims were asserted against the policyholder for its alleged failure to inspect adequately for lead paint. The First Circuit held, among other things, that even if alleged “inspections” performed by the policyholder were found to be “professional” and, thus, excluded under the professional services exclusion, the underlying claims alleged theories of recovery — such as negligence, negligent inspection, and failure to take corrective action — that arguably fell outside the exclusion:

[A]fter reviewing the complaints filed against

[the policyholder], we find that some of the claims raise legal theories of recovery broader than inadequate inspections. Taken collectively, the claims include negligence, negligent misrepresentation, negligently creating a lead paint risk, failing to require the owner to take corrective action, failing to correct a lead paint hazard, failure to obtain certificates of compliance with lead paint law and breach of contract and/or the implied covenant of habitability.

At least on their face, these claims are "reasonably susceptible" of being read to [state] claims that are beyond the inspection services exclusion [citation omitted]. For example, the claimed failure to correct a lead paint risk appears to rest on the theory that the very provision of rent subsidies carried with it the responsibility to make whatever lead paint safety improvements were necessary. Other claims might be based on the theory that the inspections were all perfectly adequate, but [the policyholder's] follow up with the landlords was lacking.³¹

Negligence Not Professional — Take Three

In comparable cases, a court found that a factual determination was necessary to decide whether the policyholder engineering company's alleged knowledge that a utility pole was in an unreasonably dangerous condition and its alleged failure to warn of such danger was outside the professional services exclusion in *Gregoire v. AFB Construction, Inc.*³² Similarly, *Complaint of Stone Petroleum Corp.*, held that allegations of negligent "failure to warn" against a marine surveyor were outside the purview of the professional services exclusion.³³

Conclusion

Policyholders with claims that potentially straddle both professional liability and general liability coverage should approach such claims carefully. With proper prior analysis of coverage and careful purchase of policies, coverage gaps should be rare. If there is any doubt about which policy applies, the best approach, if feasible, is to put both insurers on notice and allow them to fight each other.

Endnotes

- 1 One treatise notes that "Errors and omissions policies form the equivalent to malpractice insurance for occupations other than those in the legal and malpractice fields. Such policies are designed to insure members of a particular professional group from liability arising out of special risks such as negligence, omissions, mistakes and errors inherent in the practice of their profession" *Couch on Insurance*, 3rd ed. (1995-96): 131:38.
- 2 In this article, the terms "E&O insurance" and "professional liability insurance" will mean the same thing.
- 3 Anderson, Eugene R., and James J. Fournier, "The Reasonable Expectations Doctrine: Understanding the Law and the Lore Behind Upholding the Reasonable Expectations Of Insurance Policyholders," *Risk Management and Insurance Review* (Winter 1998): 72 (the authors represent policyholders in insurance coverage disputes). Some insurers handle claims in a manner that undermines the policyholder's intentions behind purchasing insurance in the first place. In such circumstances, policyholders forced into litigation against their insurers may invoke the reasonable expectations doctrine in seeking insurance coverage. This doctrine, an outgrowth of modern contract theory, is based in part on the understanding that most policyholders do not draft, negotiate, or assent to the specific provisions in standard-form insurance policies. Most policyholders do not see their policies until after they have purchased coverage; and after they receive the policies, most policyholders do not read them. In most cases, if the policyholder has assented to anything, it is only to the general scope or type of insurance coverage provided by the policy, the premium, or the amount of the policy limits.
- 4 Jensen, Kirk L., and Sanford Victor, "Update On D&O Coverage," *Corporate Board* (July/August 1995): 15, 16. Although Jensen and Victor address directors and officers liability insurance, the same principles are applicable to errors and omissions insurance.
- 5 *Couch on Insurance*, 3rd ed. (1995-96): 131:38.
- 6 *James Graham Brown Foundation, Inc. v. St. Paul Fire & Marine Ins. Co.*, 814 S.W.2d 273, 278 (Ky. 1991). See also *Quaker State Minit-Lube, Inc. v. Fireman's Fund Ins. Co.*, 868 F. Supp. 1278, 1295 (D. Utah 1994).
- 7 *Medical Record Associates, Inc. v. American Empire Surplus Lines Ins. Co.*, 142 F.3d 512, 515 (1st Cir. 1998) (emphasis added).
- 8 *Jefferson Insurance Co. of New York v. National Union Fire Ins. Co. of Pittsburgh, PA*, 677 N.E.2d 225, 231 n.18 (Mass. App. Ct. 1997).

- 9 Anderson, Eugene R., and Joshua Gold, "Multiple Policies Are False Security," *National Law Journal* (April 15, 1996): C27.
- 10 See *First Ins. Co. of Hawaii, LTD. v. Continental Cas. Co.*, 466 F.2d 807 (9th Cir. 1972). See also *Commercial Union Ins. Co. v. Walbrook Ins. Co.*, 7 F.3d 1047 (1st Cir. 1993).
- 11 Other instances in which insurers have sued each other to determine which type of policy covered a claim include *Continental Cas. Co. v. Hartford Accident & Indem. Co.*, 846 F. Supp 31 (E.D. Pa. 1994); *Imperial Cas. & Indem. Co. v. The Home Ins. Co. of Manchester, N.H.*, 727 F. Supp. 917 (M.D. Pa. 1990).
- 12 *National Union Fire Insurance Company of Pittsburgh, PA v. Cagle*, 68 F.3d 905 (5th Cir. 1995).
- 13 *Id.* at 906-907.
- 14 *Id.* at 909 n. 4 and 5.
- 15 Bregman and Gibson, *Professional Liability Insurance* (1999): VII.F17.
- 16 Bregman and Gibson, *Professional Liability Insurance* (1999): VII.F21.
- 17 Crum & Forster Web site, <http://www.cfins.com/service/index>. (May 16, 2000).
- 18 See discussion in Saunders, "Agility Breeds Success in Miscellaneous E&O Market" *National Underwriter Property Casualty-Risk & Benefits Management* (September 7, 1998).
- 19 *Visiting Nurse Assoc. of Greater Philadelphia v. St. Paul Fire and Marine Ins. Co.*, 65 F.3d 1097 (3d Cir. 1995).
- 20 *Id.* at 1099.
- 21 *Id.* at 1104.
- 22 *Home Ins. Co. v. Law Offices of Jonathan DeYoung, P.C.*, 32 F. Supp.2d 219, 230 (E.D. Pa. 1998). See also *Pacific Indem. Co. v. Linn*, 766 F.2d 754, 761-62 (3rd Cir. 1985); *Essex Ins. Co. v. Williams St. Ctr.*, 863 F. Supp. 1373, 1378 (D.C.Colo.1994), *rev'd*, 52 F.3d 894 (10th Cir.1995); *Atlantic Mut. Ins. Co. v. Acker*, 1993 WL 536133 at *8 (E.D. Pa. 1993); *American Motorists Ins. Co. v. Republic Ins. Co.*, 830 P.2d 785, 788 (Alaska 1992); *First Newton Nat'l Bank v. General Casualty Co. of Wis.*, 426 N.W.2d 618, 628 (Iowa 1988); *Shaw v. Fidelity & Casualty Ins. Co.*, 582 So.2d 919, 925-26 (La. Ct. App. 1991); *Camp Dresser & McKee, Inc. v. The Home Ins. Co.*, 568 N.E.2d 631, 635 (1991); *Williams V. Herrera*, 496 P.2d 740, 745 (1972); *Shapiro v. Aetna Insurance Company*, 208 N.Y.S.2d 83, 84-85 (1960).
- 23 *Abramson v. Florida Gas Transmission Co.*, 908 F. Supp. 1389, 1395 (E.D. La. 1995).
- 24 *Marx v. Hartford Accident & Indemnity Company*, 157 N.W.2d 870 (Neb. 1968).
- 25 Andrews, Walter J., "A More Reasonable Definition Of 'Professional Services'," *Coverage* (July/August 1995): 1 (the author is a lawyer who regularly represents insurers against policyholders in insurance coverage disputes).
- 26 *Camp Dresser & McKee, Inc. v. The Home Ins. Co.*, 568 N.E.2d 631 (Mass. App. 1991).
- 27 *Id.* at 634.
- 28 *Id.* at 634.
- 29 *Id.* at 635.
- 30 *GRE Insurance Group v. Metropolitan Boston Partnership*, 61 F.3d 70 (1st Cir. 1995).
- 31 *Id.* at 85.
- 32 *Gregoire v. AFB Construction, Inc.*, 478 So.2d 538 (La. App. 1985).
- 33 *Complaint of Stone Petroleum Corp.*, 961 F.2d 90 (5th Cir. 1992).