
DOES YOUR CLAIM ARISE OUT OF PROFESSIONAL SERVICES?

PROFESSIONAL LIABILITY POLICIES AND PROFESSIONAL SERVICES EXCLUSIONS

John Zulkey

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Abstract

This article reviews over five hundred decisions across the country which analyzed whether the underlying claims arose out of professional services for operation of either a professional liability coverage grant or professional services exclusion. It is broken up in to three parts, with the first part addressing broad issues such as when something is deemed "professional," what it means to be a "service," and when a claim is deemed to "arise from" a professional service rather than being tangential to it.

The second section analyzes common disputes that arise in this context, such as if a claim arises out of professional services if it involved: 1) billing and payment; 2) advertising and referrals; 3) defamation; 4) employment; or 5) sexual assault.

The last section groups together professional services decisions by profession, specifically reviewing claims against: 1) attorneys; 2) medical professionals; 3) banking and investment professionals; 4) insurance agents/brokers; 5) accountants; 6) realtors and property managers; and 7) technology professionals.

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INTRODUCTION

It is not uncommon for an insured who holds a professional liability policy to be told that there is no coverage for a given claim because the insurer does not deem the claim to arise from professional services. After all, a prerequisite for nearly all professional liability policies is that the claim arises from professional services.¹ The insured often will respond to such a denial by tendering the claim under another type of policy (such as a Commercial General Liability (CGL) or Directors and Officers (D&O) policy), at which point the claim may be denied because that insurer deems that the claim does arise from professional services, as such policies typically contain exclusions for such claims.² These circumstances pose a dilemma for the insured and the insurers which can be solved only by answering two questions: 1) what is a “professional service”; and 2) when does a claim “arise from” it? The purpose of this article is to aid the reader in answering those questions and to help advocates in finding decisions which will strengthen their arguments on these points.

As always, the first place to look for answers is the text of the policy(ies), which may contain a definition of “professional services.”³ Where the policy does

¹ The coverage grant in a professional liability policy typically will look something like the following:

The Insurer shall pay on behalf of the **Insured**, that **Loss** which the **Insured** becomes legally obligated to pay resulting from a **Claim** for a **Wrongful Act** solely in rendering or failing to render **Professional Services**.

² CGL and D&O policies often will contain professional services exclusions such as the following:

The Insurer shall not be liable to pay any **Loss** in connection with any **Claim** made against any **Insured** . . . based upon or arising out of any **Wrongful Act** in connection with the performance of professional services by or on behalf of the **Insured Entity** for the benefit of any other entity or natural person.

³ Examples of such definitions include the following:

“Profession” means services performed by the Insured or by another party for whom the Insured is responsible for a policyholder, customer or client of the Insured, which, alone or in combination with other services, are performed for monetary consideration pursuant to a policy of insurance or other contract or agreement.

not define professional services, courts are left to parse which vocations are professional and which are not. But even where it is clear that a given service is professional, it may still be unclear whether a given claim arises from those services or is instead ancillary to them.

The pre-eminent decision on the matter is *Marx v. Hartford Accident & Indemnity Company*, in which the Nebraska Supreme Court found that the plaintiff's malpractice insurer had no obligation to provide coverage for a claim arising out of fire damage caused when an employee of the plaintiff mistakenly poured benzene into a hot water sterilizer.⁴ In finding that the employee's actions did not involve professional services, the court limited the scope of the coverage as follows:

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.

Accordingly, *Marx* sets forth two conditions that must be met for a claim to arise out of a professional service, and several courts have added a third. First, the claim must involve a "profession." Second, the claim must "arise out of" acts taken in the course of practicing that profession rather than from an act that is merely

or
"Professional services" shall mean all goods provided and services rendered or intended or required to be rendered in the conduct of the business of the Insured or of others for whom or which an Insured is legally responsible.

or
"Professional services" means only services performed for others for a fee and which are listed in ITEM X of the Declarations.

⁴ *Marx v. Hartford Accident & Indem. Co.*, 157 N.W.2d 870, 872 (Neb. 1968).

incidental to the provision of those services. Finally, several courts (and many policies) have clarified that to be a “service,” the act must be performed for a client or customer rather than for the benefit of the professional.

Section I. of this article will discuss each of these conditions in greater detail. Section II. will then describe how courts apply these factors in the context of specific types of claims, and Section III. will address how they apply in the context of specific professions. Decisions which find coverage under a professional liability policy will be grouped together with decisions which deny coverage under a professional services exclusion (and vice versa) where those decisions are based on consistent reasoning as to what constitutes a claim arising from professional services. However, a holding on professional services under one type of policy is not necessarily binding on a dispute involving another type, so this article will take pains with respect to each decision to spell out whether a professional liability policy or professional services exclusion was at issue.⁵

I. NECESSARY CONDITIONS TO “ARISE OUT OF A PROFESSIONAL SERVICE”

A. “Professional”

Determining whether a job is a “profession” is easy to define at the extremes but can become muddled in between. As will be amply demonstrated in Section III. of this article, courts have had no difficulty finding that “professional services” encompasses services performed by lawyers, doctors, and other professionals who require specialized education to perform those services. Several states suggest that some formal education or degree is necessary for a service to qualify as “professional.” For example, in *Gulf Insurance Co. v. Gold Cross Ambulance Services Co.*, the U.S. District Court for the Western District of Oklahoma held that a professional services exclusion did not bar coverage for a claim against an

⁵ *E.g.*, *Am. Nat’l Fire Ins. Co. v. Harold Abrams, P.C.*, No. 99 C 5807, 2002 U.S. Dist. LEXIS 2577 (N.D. Ill. Feb. 15, 2002) (holding that a state court’s decision that insured attorney’s alleged fraud was precluded by CGL policy’s professional services exclusion does not preclude the federal court from ruling that the fraud did not arise from professional services under professional liability policy); *Pac. Indem. Co. v. Linn*, 766 F.2d 754 (3d Cir. 1985) (holding that professional liability policies provided coverage for suits against insured osteopath by claimants who followed diet prescribed in insured’s book, and that ambiguously-worded professional liability exclusions in other policies did not bar coverage); *Am. Cas. Co. v. Hartford Ins. Co.*, 479 So. 2d 577 (La. Ct. App. 1985) (holding that professional liability insurer and general liability insurer both were liable for injuries of patient who fell in physician’s office).

ambulance service that refused to transport the claimant. The basis for the court's decision was that those services were "primarily manual" and did not "require knowledge of an advanced type in a field of learning customarily acquired after a long period of specialized intellectual instruction."⁶

⁶ *Gulf Ins. Co. v. Gold Cross Ambulance Serv. Co.*, 327 F. Supp. 149, 154-55 (W.D. Okla. 1971); *see also* *Am. Med. Response v. New Hampshire Ins. Co.*, No. CV 950373810, 1997 WL 139452, at *6 (Conn. Super. Ct. Mar. 10, 1997) (noting that ambulance services had become more sophisticated since *Gulf Insurance* had been decided); *Hayes v. Sec. Nat'l Ins. Co.*, No. H027754, 2006 WL 259696 (Cal. Ct. App. 2006) (holding that a professional services exclusion did not apply to claim for selling and distributing a book with reckless disregard for its truth because there was no showing that the act involved the application or misapplication of technical skills); *Noyes Supervision, Inc. v. Canadian Indem. Co.*, 487 F. Supp. 433 (D. Colo. 1980) (holding that a claim against gas well completion supervisor/consultant/completion foreman did not trigger professional services exclusion because he was not allowed to exercise discretion); *Sheinbaum v. Am. Cas. Co. of Reading, Pa.*, No. CIV.A. 09-273 CKK, 2010 WL 3909209, at *9 (D.D.C. Oct. 1, 2010) ("Because [the insured] did not hold a valid registered nursing license when performing services for [the claimant] in the District of Columbia, the Policy does not cover [the insured's] alleged provision of nursing services in the District of Columbia."); *Aerothrust Corp. v. Granada Ins. Co.*, 904 So. 2d 470 (Fla. Ct. App. 2005) (holding that a professional services exclusion did not apply to insured's negligent inspection of hoist because people who inspect the hoists were "not required to have any specialized training or experience, or even a college or high school diploma"); *Auto-Owners Ins. Co. v. E.N.D. Serv., Inc.*, 506 F. App'x 920, 924 (11th Cir. 2013) (holding that a professional services exclusion barred coverage for claim against home inspector for failing to discover infestation and water damage because professional standards and training existed for home inspectors); *Evanston Ins. Co. v. Budget Grp. Inc.*, 199 F. App'x 867, 868 (11th Cir. 2006) (holding that a professional services exclusion did not apply to services performed by employees of a car rental agency because they did not require special training); *Evanston Ins. Co. v. Gaddis Corp.*, 145 F. Supp. 3d 1140, 1148 (S.D. Fla. 2015) (holding that a professional services exclusion did not apply to the driving of a taxicab); *Monroe Guar. Ins. Co. v. TEE Engineered Co.*, No. Civ. A. 04-58, 2005 WL 1503219, at *2 (E.D. Ky. June 23, 2005) (holding that a professional services exclusion did not bar coverage for claim for negligent insertion of mining markers ["spads"] because "if a job could be and in fact is rendered by a layman, it is inherently not a professional service"); *Vulcan Chloralkali, L.L.C. v. Applied Indus. Refrigeration Tech., Inc.*, No. CV 04-18-D, 2005 WL 8155242, at *6 (M.D. La. June 29, 2005) (holding that a professional services exclusion did not apply to claim against refrigeration company where employee took sample from an inappropriate location because the employee's "on-the-job experience in the greater field of refrigeration combined with a one-time certification to handle refrigerant do not 'involve discretion acquired by special training and the exercise of special judgment'"); *Westfield Ins. Co. v. D & G Dollar Zone*, No. 306408, 2013 WL 951086 (Mich. Ct. App. Feb. 28, 2013) (holding that a professional services exclusion did not encompass selling goods at a dollar store); *Cincinnati Ins. Co. v. Harding*, No. 2:06-CV-205, 2007 WL 3124654 (W.D. Mich. Oct. 24, 2007) (holding that a professional services exclusion did not apply to insured's work as a

pipe welder because it was predominantly physical or manual); *Essex Ins. Co. v. Ragland Mills, Inc.*, No. 06-0737, 2008 WL 351014 (W.D. Mo. Feb. 6, 2008) (holding that a professional services exclusion did not preclude coverage for elevator inspection claim where professional service was not defined in the policy); *Maxum Indem. Co. v. Certified Elec. Testing, Inc.*, No. 10-CV-681-MJR-DGW, 2011 WL 13234719, at *3 (S.D. Ill. Sept. 29, 2011) (holding that a professional services exclusion did not apply to claim for failure to perform a proper inspection of a hydraulic boom because the inspectors did not belong to a recognized profession); *St. Paul Fire & Marine Ins. Co. v. Three “D” Sales, Inc.*, 518 F. Supp. 305 (D.N.D. 1981) (holding that a professional services exclusion did not bar coverage for claim arising from insured’s sale of potato seeds); *Burlington Ins. Co. v. PMI Am., Inc.*, 862 F. Supp. 2d 719, 742 (S.D. Ohio 2012), *clarified*, No. 2:08-CV-1054, 2012 WL 1665867 (S.D. Ohio May 10, 2012) (declining to apply professional services exclusion because “the failure to align the kiln prior to welding each section lies much closer to the ‘performance of routine, manual, or physical processes’ than to the advanced knowledge ‘acquired by a prolonged course of study or specialized intellectual instruction’” (quoting *Leighton v. Am. Econ. Ins. Co.*, No. 1997CA0197, 1997 Ohio App. LEXIS 5361, at *8 (Ct. App. Nov. 10, 1997))); *Encore Receivable Mgmt., Inc. v. Ace Prop. & Cas. Ins. Co.*, No. 1:12-CV-297, 2013 WL 3354571, at *11 (S.D. Ohio July 3, 2013), *vacated*, (May 19, 2014) (“[T]he operation of customer call centers on behalf of its clients [] does not constitute ‘professional services’ like those performed by lawyers or doctors to which courts apply the [professional services] exclusion.”); *Cincinnati Ins. Co. v. Am. Line Builders Apprenticeship Training Program*, 638 N.E.2d 1047 (Ohio Ct. App. 1994) (declining to find that trade school teacher was a professional with respect to application of exclusion to claim by student who suffered electrocution injury); *CDL, Inc. v. Certain Underwriters at Lloyd’s of London*, No. 2860 EDA 2013, 2014 WL 10914098, at *6 (Pa. Super. Ct. July 22, 2014) (holding that professional services exclusion did not apply to claim arising out of truck driver placement because it did not require specialized training or licensing); *Scottsdale Indem. Co. v. Hartford Cas. Ins. Co.*, No. 06-5339, 2008 WL 131105 (E.D. Pa. Jan. 10, 2008) (holding that a professional services exclusion did not apply to claim for negligent safety inspection of construction site because despite six-to-eight weeks of training, job of identifying safety violations did not come with authority to make changes and was thus “something less than a ‘vocation’ or ‘calling’ and was closer to a ‘proficiency in the performance of a task’”); *Am. W. Home Ins. Co. v. Donnelly Distribution, Inc.*, No. CIV.A. 11-1415, 2011 WL 3330655, at *4 (E.D. Pa. Aug. 2, 2011) (holding that a professional services exclusion did not bar coverage for claim against newspaper distribution company arising out of slip-and-fall on newspaper tie because the delivery of newspapers was “physical or manual” rather than “predominantly mental or intellectual”); *Rodriguez-Vicente v. Hogar Bella Union, Inc.*, 106 F. Supp. 3d (D.P.R. May 29, 2015) (holding that a professional services exclusion did not apply to claim against an assisted living facility for neglect of patients because no professional or specialized knowledge was required to provide the patients with food and water or to seek medical attention for their deteriorating health); *Navigators Specialty Ins. Co. v. Double Down Interactive, LLC*, No. 2:18-CV-01514-BJR, 2019 WL 3387458, at *5 (W.D. Wash. July 26, 2019) (“While designing and coding online games might be considered a professional service, simply playing the game is not because it only requires the computer to execute a function that it was programmed to do.”); *Leverence v. U.S. Fid. & Guar.*, 462 N.W.2d

In contrast, other jurisdictions have been more liberal regarding the degree of training required. For example, in *Hollingsworth v. Commercial Union Insurance Co.*, the owner of a cosmetics store unsuccessfully argued to the California Court of Appeals that a professional services exclusion should not apply to a claim arising from ear-piercing services. The insured asserted that the services were not professional because the workers who performed them did not have a high school diploma or specialized training in ear piercing when they were hired. But the court disagreed, finding that the services were professional because they constituted an aspect of the cosmetics sales profession rather than an activity that was incidentally related to everyday operations.⁷

218, 226 (Wis. Ct. App. 1990) (“[P]rofessional service exclusion does not bar the occupants' claims because the claims arise out of manufacture of an allegedly defective product and not malpractice in rendering of a professional service.”), *overruled on other grounds by* *Wenke v. Gehl Co.*, 682 N.W.2d 405 (Wis. 2004); *Golden Bear Ins. Co. v. Evanston Ins. Co.*, No. 2:20-cv-00027-RFB-EJY, 2021 U.S. Dist. LEXIS 188234, at *18-19 (D. Nev. Sept. 30, 2021) (holding that a professional services exclusion did not apply because management of a waterpark was not a service the court deemed professional); *Gage Cnty., Neb. v. Emp. Mut. Cas. Co.*, 937 N.W.2d 863, 874 (Neb. 2020) (holding that law enforcement did not qualify as a profession, reasoning that it was not listed as such in the policy, and it was instead listed as an “occupation”).

⁷ *Hollingsworth v. Com. Union Ins. Co.*, 208 Cal. App. 3d 800, 806 (Ct. App. 1989); *see also* *Shelter Mut. Ins. Co. v. Tara's Nails & Spa, Inc.*, No. 4:14-CV-00039-SWW, 2014 WL 11510431, at *4 (E.D. Ark. Apr. 17, 2014) (holding that manicurist and pedicurist are professions for purposes of applying exclusion); *St. Paul Mercury Ins. Co. v. Chilton-Shelby Mental Health Ctr.*, 595 So. 2d 1375 (Ala. 1992) (holding that insured was covered by professional malpractice policy for claim regarding death of infant who insured had been hired to transport but left unattended in van, reasoning “learned” profession not required); *Golden Eagle Ins. Corp. v. Lemoore Real Est. & Prop. Mgmt.*, No. F061735, 2012 WL 1670475 (Cal. Ct. App. May 14, 2012) (“California cases do not hold that only skilled tasks performed by a business or professional in the course of providing its services constitute professional services within the meaning of a professional services exclusion.”); *Amex Assur. Co. v. Allstate Ins. Co.*, 112 Cal. App. 4th 1246 (2003) (rejecting argument that professional services exclusion was inapplicable because plumbing is a “craft or trade and does not qualify as a professional service”); *Atain Specialty Ins. Co. v. Szetela*, No. 214CV02991KJMKJN, 2016 WL 1138139, at *6 (E.D. Cal. Mar. 23, 2016) (holding that pilot car services fell within scope of professional services exclusion); *Energy Ins. Mut. Ltd. v. Ace Am. Ins. Co.*, 14 Cal. App. 5th 281 (2017) (holding that owning and operating a petroleum pipeline, including mapping and marking underground installations, constituted professional services for application of exclusion); *Burlington Ins. Co. v. German Motors Corp.*, 788 F. App'x 486, 487 (9th Cir. 2019) (holding that a professional services exclusion applied to suit arising from security guard's negligent failure to watch a video monitor, finding that the activity was predominantly mental); *Begun v. Scottsdale Ins. Co., Inc.*, No. C-12-03649 EDL, 2013 WL 12077974, at *6 (N.D. Cal. May 16, 2013)

(holding that services performed by payroll agent were professional for purposes of exclusion because they required knowledge of the tax laws of the jurisdictions in which they performed the services and utilized more than basic accounting skills), *aff'd sub nom.* *Begun v. Scottsdale Ins. Co.*, 613 F. App'x 643 (9th Cir. 2015); *Discover Specialty Ins. Co. v. Certain Underwriters at Lloyd's London*, No. B205333, 2008 WL 4225885, at *10 (Cal. Ct. App. Sept. 17, 2008) (“Construction management and property management are both professional services that would come under [professional services] exclusion.”); *Blue Ridge Ins. Co. v. Jacobsen*, 210 F.3d 381 (9th Cir. 1999) (professional services exclusion applied to claim against dog importer who sold a dog that attacked buyer), *certified question answered*, 22 P.3d 313 (Cal. 2001), *and opinion after certified question answered*, 10 F. App'x 563 (9th Cir. 2001); *Spa De Soleil, Inc. v. Gen. Star Indem. Co.*, 787 F. Supp. 2d 1091, 1097 n.3 (C.D. Cal. 2011) (noting “[t]he creation of formulas for cosmetic products can constitute a professional service” under a professional liability policy); *Tradewinds Escrow, Inc. v. Truck Ins. Exch.*, 97 Cal. App. 4th 704 (2002) (finding that provision of escrow services fell within professional services exclusion); *Chicago Title Ins. Co. v. St. Paul Mercury Ins. Co.*, No. B221489, 2011 WL 6276097, at *11 (Cal. Ct. App. Dec. 16, 2011) (holding that claim against title insurer regarding escrow services is barred by professional services exclusion); *Yasuda Fire & Marine Ins. Co. v. Heights Enter.*, 1998 Guam 5 (Guam Dec. 11, 1997) (holding that pest control was a professional service within meaning of exclusion); *Neighborhood Hous. Serv. of Am., Inc. v. Turner-Ridley*, 742 F. Supp. 2d 964, 971 (N.D. Ind. 2010) (holding professional services exclusion applied to claim arising from specialized knowledge, experience and training required to protect claimant’s interests in purchased loans and properties); *Tri-Etch, Inc. v. Cincinnati Ins. Co.*, 909 N.E.2d 997 (Ind. 2009) (holding professional services exclusion encompassed claim against alarm services company for failure to report a missed arming of system); *Nat'l Ben Franklin Ins. Co. of Illinois v. Calumet Testing Serv., Inc.*, 60 F. Supp. 2d 837, 846 (N.D. Ind. 1998) (holding professional services exclusion barred claim for negligent testing of weld on pressure tank because “while the actual testing itself may be close to ‘physical or manual,’ the interpretation of that testing beyond question involves professional knowledge, experience, and training. In order to interpret the test, [the insured] had to have extensive classroom instruction and 160 hours of on-the-job training. His helper, a level one technician, could perform the tests, but could not interpret them.”), *aff'd*, 191 F.3d 456 (7th Cir. 1999); *Merlin B. Smith, Inc. v. Travelers Prop. Cas.*, 811 So. 2d 1097 (La. Ct. App. 2002) (holding professional services exclusion encompassed claim against forestry company for marking the wrong trees for cutting because exclusion applied to services that required “training, skill, experience, judgment and the use of specialized tools . . . especially when that service is an *essential* part of the [insured’s] business”); *United Fire & Cas. Co. v. Hixson Bros., Inc.*, 453 F.3d 283 (5th Cir. 2006) (holding professional services policy provided coverage for suit against funeral home for alleged failure to provide goods and services specified in burial policy because “[a]n untrained or unskilled employee could not deliver the goods and services to be provided under the policy. Providing a casket, burial garments, embalming, a funeral coach, a funeral home and flowers together in a proper funeral service requires many decisions for which skilled judgment is required.”); *Nat. Gas Pipeline Co. of Am. v. Odom Offshore Surv., Inc.*, 889 F.2d 633 (5th Cir. 1989) (holding professional services exclusion precluded coverage for claim against surveyors in directing anchor placement for dive vessel with regard to

inspection of natural gas pipeline); *Thermo Terratech v. GDC Enviro-Sols., Inc.*, 265 F.3d 329 (5th Cir. 2001) (holding professional services exclusion did not apply to claim arising out of fire caused by hazardous waste incinerator designer's engineer's negligent act of disconnecting power to incinerator's cooling system because, although act of disconnecting power after assessing status of system could not have been performed by someone not trained to operate incinerator, act was not required to satisfy engineering portion of insured's sales agreement with designer and could have been performed by non-engineer); *W. World Ins. Co. v. Am. & Foreign Ins. Co.*, 180 F. Supp. 2d 224 (D. Me. 2002) (holding professional services exclusion precluded coverage for claim against police department for a baton policy that allegedly led to the fatal shooting of a suspect, reasoning "enforcement of a police baton policy requires not just visual inspection but also professional judgment"); *Lansing Cmty. Coll. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, No. 1:09-CV-111, 2010 WL 774877, at *9 (W.D. Mich. Mar. 1, 2010) (holding professional services exclusion applied to *Bivens* action for *Brady* violations because police officers receive specialized training and education and often are called upon to make decisions using this specialized training); *W. Nat. Mut. Ins. Co. v. Structural Restoration, Inc.*, No. A09-1598, 2010 WL 1753336, at *5 (Minn. Ct. App. May 4, 2010) (holding professional services exclusion barred coverage for claim against concrete restoration company for negligently failing to discover cracks during inspection of silo because the work required "using a mental rather than physical skill"); *Hermitage Ins. Co. v. Brewer*, 57 F. App'x 210 (5th Cir. 2002) (holding that, although insureds did not have advanced degrees, their years of experience in handling electrical breakers had made them experts for application of a professional services exclusion); *Reinhardt v. Certain Underwriters at Lloyd's, London*, No. A06-949, 2007 WL 900731, at *5 (Minn. Ct. App. Mar. 27, 2007) (holding that acting as equity-investment manager of a trust is a professional service for application of exclusion); *Great-W. Life & Annuity Ins. Co. v. Am. Econ. Ins. Co.*, No. 2:11-CV-02082-APG, 2015 WL 128704, at *4 (D. Nev. Jan. 9, 2015) (holding healthcare management is a professional service in applying exclusion); *Tagged, Inc. v. Scottsdale Ins. Co.*, No. CIV. JFM-11-127, 2011 WL 2748682, at *1 (S.D.N.Y. May 27, 2011) (holding claim against social networking website for failure to remove offensive material fell within professional services exclusion because maintenance of the site was "intellectual and mental – rather than physical or manual"); *Yatsko v. Graziolli*, No. 1:18 CV 1675, 2019 WL 2497794, at *5 (N.D. Ohio June 17, 2019) (holding professional services exclusion barred coverage for claim against police officer who fatally shot someone while the officer was off duty and working as a security guard, reasoning "[insured] was hired as a security guard because of his specialized skills as a police officer. Therefore, he used the same specialized training to perform his security guard duties."); *Nationwide Mut. Ins. Co. v. Am. Reinsurance Co.*, 796 F. Supp. 275, 281 (S.D. Ohio 1991) (holding operation of an employment agency was a professional service for purpose of applying exclusion for professional services to claim arising from sexual assault by a candidate that had been referred by agency), *aff'd*, 961 F.2d 1578 (6th Cir. 1992); *Campayno v. Auto-Owners Ins.*, No. 1210 WDA 2016, 2017 WL 3613412, at *10 (Pa. Super. Ct. Aug. 23, 2017) (holding professional services exclusion applied to claim against insured spa by customer who developed burns from a foot bath); *Cincinnati Ins. Co. v. Stonebridge Fin. Corp.*, 797 F. Supp. 2d 534 (E.D. Pa. 2011) (holding a bank's professional liability policy provided coverage for claim for failure to extend credit), *vacated*, No. 10-CV-4131, 2011 WL 10977963 (E.D. Pa. Nov. 17, 2011);

B. “Arising Out Of”

Turning to the second condition, claims must “arise out of” or “arise from” the provision of professional services.⁸ As explained by the First Circuit Court of Appeals, “even tasks performed by a professional are not covered if they are ‘ordinary’ activities ‘achievable by those lacking the relevant professional training and expertise.’”⁹ In other words, even if the insured has a professional job, not every action is a professional service.

Instead, courts have frequently held that claims arising from ministerial actions performed by a professional do not qualify as arising out of professional services. For example, in *Delaware Insurance Guarantee Association v. Birch*, the

Lumbermens Mut. Cas. Co. v. Erie Ins. Co., 296 F. App’x 251, 253 (3d Cir. 2008) (holding professional liability policy provided coverage for claim arising from contractor’s roadside inspections and arrangements for other contractors to perform their labor, “[the insurer’s] efforts to minimize [the defendant’s] education, training, and job function do not diminish the fact that the services he performed were professional services”); *Admiral Ins. Co. v. Ford*, 607 F.3d 420, 426 (5th Cir. 2010) (holding professional services exclusion precluded coverage for a claim involving oil blowout because taking, or not taking, measures to prevent blowout required specialized knowledge); *Essex Ins. Co. v. McFadden*, No. 6:09-CV-193, 2010 WL 2246293, at *7 (E.D. Tex. June 3, 2010) (declining to apply a professional services exclusion where insurer failed to demonstrate that welding is a professional task that arises out of the acts particular to the insured’s specialized vocation, nor that it was necessary for the insured to use specialized knowledge or training); *Planet Earth Found. v. Gulf Underwriters Ins. Co.*, No. 55068-3-I, 2005 WL 3275619 (Wash. Ct. App. Dec. 5, 2005) (holding professional services exclusion applied to claim against public relations provider because media-related occupations are professional services); *Burns v. Scottsdale Ins. Co.*, No. C08-1136RSL, 2010 WL 2947345 (W.D. Wash. July 23, 2010) (holding professional services exclusion applied to insured tattooing and piercing business); *Auto-Owners Ins. Co. v. E.N.D. Servs., Inc.*, No. 8:10-CV-2387-T-30EAJ, 2011 WL 6319189, at *1 (M.D. Fla. Dec. 15, 2011) (rejecting argument by insured that home inspection was not a profession in applying professional services exclusion), *aff’d*, 506 F. App’x 920 (11th Cir. 2013); *Truck Ins. Exch. v. Pacificare Health Sys., Inc.*, No. B166377, 2005 WL 715976 (Cal. Ct. App. Mar. 30, 2005) (rejecting argument that healthcare management services were not professional services within context of a professional liability policy purchased by healthcare management company; insurer argued that policy was limited to claims arising from direct treatment which the insured did not provide).

⁸ Courts typically “interpret[] the phrase ‘arising out of’ synonymously with the term ‘arising from.’” *Penn-Am. Ins. Co. v. Lavigne*, 617 F.3d 82, 87 (1st Cir. 2010) (quoting *Spirtas Co. v. Fed. Ins. Co.*, 521 F.3d 833 (8th Cir. 2008) (citations omitted)); *see also St. Paul Fire & Marine Ins. Co. v. Med. Protective Co. of Fort Wayne, Ind.*, No. 2:04CV0391-FTM, 2006 WL 3544817, at *7 (M.D. Fla. Dec. 8, 2006) (“the term ‘based on’ is effectively as broad as the term ‘arising out of.’”), *aff’d*, 257 F. App’x 232 (11th Cir. 2007).

⁹ *Med. Records Assocs., Inc. v. Am. Empire Surplus Lines Ins. Co.*, 142 F.3d 512, 514 (1st Cir. 1998) (quoting *Jefferson Ins. Co. of N.Y. v. Nat’l Union Fire Ins. Co. of Pittsburgh, Pa.*, 677 N.E.2d 225, 229 (1997)).

Delaware Superior Court held that there was no coverage under a malpractice policy for a claim against a physician for inadvertently disclosing to a patient's mother that the patient was pregnant because the claim arose from a mere ministerial act in conveying information rather than from the professional services required to perform the test.¹⁰

However, not all ministerial actions are so removed from professional services. For example, in *Alpha Therapeutic Corp. v. St. Paul Fire & Marine Insurance Co.*, the insured contracted to provide plasma and was sued when – due to a transcribing error by a technician – it shipped plasma that had been tainted with hepatitis. The Eleventh Circuit Court of Appeals found that a professional services exclusion precluded the coverage because even if a medical technician was not a professional, the professionals providing the care were ultimately responsible.¹¹

¹⁰ Del. Ins. Guar. Ass'n v. Birch, No. 02-C-06-025FRS, 2004 WL 1731139, at *17 (Del. Sup. Ct. July 30, 2004) (finding that a professional services exclusion in a separate policy did not apply); *see also* D'Antoni v. Sara Mayo Hosp., 144 So. 2d 643, 645 (La. Ct. App. 1962) (finding hospital's failure to install guardrails on bed as ordered by doctor was ministerial and did not trigger professional services exclusion (as opposed to doctor's decision of whether to install the guardrails)); *Essex Ins. Co v. Berkshire Env't Consultants, Inc.*, No. CIV. A. 99-30280-FHF, 2002 WL 226172 (D. Mass. Feb. 7, 2002) (holding professional services exclusion did not relieve insurer of duty to defend environmental consulting firm where complaint alleged both claims for professional misjudgment and for administrative and clerical errors); *Caley v. Nat'l Union Fire Ins. Co. of Pittsburgh*, No. EDCV1300863VAPOPX, 2013 WL 12114014, at *3 (C.D. Cal. Oct. 30, 2013) (holding malpractice insurer was not required to provide coverage for claim against insured dentistry office for failing to provide ADA-compliant parking); *Saint Consulting Grp., Inc. v. Endurance Am. Specialty Ins. Co.*, 699 F.3d 544, 555 (1st Cir. 2012) (holding claim against insured consulting firm for negligent spoliation did not trigger coverage under professional liability policy, reasoning that negligent disposal of files by a consulting firm did not qualify as professional services); *Fed. Ins. Co. v. Healthcare Info. & Mgmt. Sys. Soc'y*, No., 2021 U.S. Dist. LEXIS 201161 (holding professional services exclusion did not apply to claim against insured for cancelling a conference due to the COVID-19 pandemic).

¹¹ *Alpha Therapeutic Corp. v. St. Paul Fire & Marine Ins. Co.*, 890 F.2d 368 (11th Cir. 1989); *see also* *Bohreer v. Erie Ins. Grp.*, 475 F. Supp. 2d 578, 587 (E.D. Va. 2007) (holding professional services exclusion precluded coverage for claim against insured crematorium that, due to a clerical error, sent widow the ashes of an animal rather than those of her husband); *Colony Ins. Co. v. Suncoast Med. Clinic, LLC*, 726 F. Supp. 2d 1369 (M.D. Fla. 2010) (holding professional liability policy covered claims arising out of the insured's hiring of medical staff, purchasing diagnostic technology, and establishing procedures for foreign diagnostic testing and communication among medical staff, reasoning "[a]dministrative functions that are an intricate part of the provision of medical services implicate [professional services exclusion]"); *Alayon Del Valle v. Kenyon*, No.

Similarly, seemingly mundane actions can be deemed to arise out of professional services under the right circumstances. An example of this is *American Economy Insurance Co. v. Jackson*, in which the Eighth Circuit Court of Appeals held that a professional services exclusion precluded coverage for a nurse's failure to turn on air conditioning in the nursing home at which she worked, which led to the death of a resident.¹² The court found that while non-professionals frequently turn on air conditioning, the determination of whether the air conditioning needed to be turned on under those circumstances drew upon the insured's knowledge and experience as a nurse.

C. Service

Lastly, several courts have indicated that to arise out of a professional service, the act or omission must be performed on behalf of a client rather than for the insured's own benefit. For example, in *Mendelsohn v. CBA Insurance Co.*, an insured attorney was sued by his ex-wife over his handling of their divorce, and the Illinois Court of Appeals found that the matter was not covered under the attorney's malpractice policy.¹³ The opinion implied that a claim by a client for

CIV. 06-2105CCC, 2009 WL 3299373, at *1 (D.P.R. Oct. 9, 2009) (holding professional services exclusion precluded coverage for claim against medical director for failure to establish adequate protocols for screening patients for LASIK); *Goldberg v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA.*, 143 F. Supp. 3d 1283, 1300 (S.D. Fla. 2015) (rejecting argument of insured bank that some of the wrongful acts alleged in connection with claim for complicity with a Ponzi scheme were "purely internal management and regulatory" and thus not barred by professional services exclusion), *aff'd sub nom. Stettin v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA.*, 861 F.3d 1335 (11th Cir. 2017); *Williams v. Crawford*, No. 77445, 2000 WL 1594114 (Ohio Ct. App. Oct. 26, 2000) (holding professional liability policy covered claim against medical provider arising out of failure to provide certain medical records, reasoning medical records providers supplying such records exercise judgment in determining what portions of the record will be useful or necessary to the recipient).

¹² *Am. Econ. Ins. Co. v. Jackson*, 476 F.3d 620 (8th Cir. 2007).

¹³ *Mendelsohn v. CBA Ins. Co.*, 451 N.E.2d 919 (Ill. App. Ct. 1983); *see also Felice v. St. Paul Fire & Marine Ins. Co.*, 711 P.2d 1066 (Wash. 1985) (holding professional liability policy did not provide coverage for suit seeking to discharge insured attorney as guardian); *EFGGroupATL, LLC v. Eat Fit Go Healthy Foods, LLC*, No. 8:20-CV-286, 2020 WL 7493220, at *8 (declining to apply professional services exclusion to claim for false representations intended to induce the plaintiff to buy into the insured's franchise); *DeMarco v. Everest Indem. Ins. Co.*, No. SACV0722DOCRNBX, 2008 WL 11336494, at *4-5 (C.D. Cal. Aug. 18, 2008) (holding professional liability policy did not cover claim against insured alarm company for fraudulent sale of company's own stock). *But see Impac Mortg. Holdings Inc. v. Houston Cas. Co.*, No. SACV 11-1845-JST JCG, 2013 WL

performing the same services might have been covered, but that it was axiomatic that the practice of law involved service to another. Similarly, in *Williams v. Herrera*, an insurer unsuccessfully attempted to disclaim coverage under a homeowner's policy for a claim by a stone mason who was injured while on the insured's property.¹⁴ The New Mexico Court of Appeals found that the professional services exclusion did not apply where the claim did not arise out of any professional services performed by the insured homeowner, as opposed to those performed by the claimant stone mason.¹⁵

Even when professional services must be performed for another, courts have routinely rejected arguments that to arise out of professional services, a claim must be brought by the party for whom those services are performed. For example, in *Harad v. Aetna Casualty & Surety Co.*, the Third Circuit Court of Appeals found that a professional services exclusion applied to a malicious prosecution claim against the insured attorney. The court reversed the lower court's determination that such an exclusion applied only to claims brought by clients of the insured. The court held that so long as the claim arose out of professional services performed for a client, it was of no significance whether the claimant was the intended beneficiary of those services.¹⁶

792790, at *7 (C.D. Cal. Feb. 26, 2013) (rejecting the insurer's argument that the insured's buying/selling of mortgages for its own account did not constitute services; the court found that a professional liability policy provided coverage because the underlying risk was nonetheless inherent to the insured's profession).

¹⁴ *Williams v. Herrera*, 496 P.2d 740 (N.M. Ct. App. 1972); *see also* *Amco Ins. Co. v. Chin*, No. CV 09-8140 PA (AGRX), 2010 WL 11597422, at *5 (C.D. Cal. Mar. 15, 2010) ("Plaintiff has not cited to any case in which the Professional Services Exclusion has been extended to include those professional services rendered by third parties for the sole benefit of the insureds."); *Ill. Union Ins. Co. v. Brookstreet Sec. Corp.*, No. SACV0701095CJCRNBX, 2009 WL 10675258, at *3 (C.D. Cal. Oct. 15, 2009) (finding a claim against insured broker-dealer for failure to pay its former employee did not arise from professional services because payment to employees is not a service performed for a customer or client).

¹⁵ *Cf. Home Ins. Co. v. Greenfield & Chimicles*, No. 97-7797, 1999 WL 286440, at *24 (E.D. Pa. May 5, 1999) (finding coverage under a professional liability policy for a claim that an insured attorney filed lawsuits purportedly on behalf of parties who had not consented, reasoning the attorney had been rendering a service, albeit on behalf of parties who did not consent to it).

¹⁶ *Harad v. Aetna Cas. & Sur. Co.*, 839 F.2d 979 (3d Cir. 1988); *see also* *HotChalk, Inc. v. Scottsdale Ins. Co.*, 217 F. Supp. 3d 1058, 1066 (N.D. Cal. 2016), *aff'd*, 736 F. App'x 646 (9th Cir. 2018) (rejecting argument that professional services exclusion applied only to claims brought by the party for whom the services had been performed); *Amco Ins. Co. v. Chin*, 2010 WL 11597422 (C.D. Cal. Mar. 15, 2010) (finding scope of professional

services exclusion is not limited to services provided to the claimant); *Vogelsang v. Allstate Ins. Co.*, 46 F. Supp. 2d 1319 (S.D. Fla. 1999) (finding professional services exclusion applied to malicious prosecution claim against insured attorney by nonclient); *Hartford Cas. Ins. Co. v. Conrad & Scherer LLP*, No. 15-61360-CIV, 2015 WL 13260391, at *5 (S.D. Fla. Dec. 17, 2015) (holding professional services exclusion barred claim alleging that insured law firm engaged in a media campaign against the nonclient claimant intended to pressure the claimant into a settlement via false allegations); *Erie Ins. Grp. v. All. Env't'l, Inc.*, 921 F. Supp. 537, 542 (S.D. Ind. 1996), *aff'd sub nom. Erie Ins. Grp. v. Sear Corp.*, 102 F.3d 889 (7th Cir. 1996) (holding professional services exclusion is not limited to "first party" claims in which the claimant is the professional's client); *Carpenter, Weir & Myers v. St. Paul Fire & Marine Ins. Co.*, No. 96-4076, 1998 WL 976309 (D. Kan. Oct. 30, 1998) (holding malicious prosecution claim against insured attorney is barred by professional services exclusion); *Home Ins. Co v. Bullard*, 850 F.2d 692 (6th Cir. 1988) (holding attorney's professional liability policy was not limited to claims brought by clients, but instead provided coverage for claim brought by former colleague over fee dispute); *Murray v. Royal All. Assocs., Inc.*, No. CV 06-617-JJB, 2008 WL 11408432, at *3 (M.D. La. Aug. 29, 2008) (holding attorney's professional liability policy was not limited to claims brought by clients); *UTICA Mut. Ins. Co. v. Herbert H. Landy Ins. Agency, Inc.*, No. 1:13-cv-11471-IT, 2014 WL 5475038 (D. Mass. Oct. 29, 2014) (holding professional liability policy provided coverage for claim against insurance agency by competitor alleging that insured had been selling surplus line policies to customers who did not require them); *Biborosch v. Transamerica Ins. Co.*, 603 A.2d 1050, 1054 (Pa. Super. Ct. 1992) (rejecting argument that professional liability policies issued to insurance agent responded only to claims brought by clients and holding that they provided coverage with respect to claim brought by former employee); *Matrix Health Mgmt., Inc. v. W. World Ins. Co.*, No. 93-1750, 1994 WL 378986, at *1 (3d Cir. Mar. 4, 1994) (rejecting argument that professional liability policy issued to health care company responded only to claims by patients and holding that it provided coverage for claim based upon a fraudulent billing scheme to collect money for in-patient psychiatric services that were unnecessary and for other health care services that were not delivered); *Westport Ins. Corp. v. Cotton Schmidt, LLP*, 605 F. Supp. 2d 796 (N.D. Tex. 2009) (holding professional liability policy provided coverage for claim against insured attorney brought by opposing party for wrongfully obtaining a default judgment against the claimant who was not a client of the insured); *Thomas J. Sibley, P.C. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 921 F. Supp. 1526 (E.D. Tex. 1996) (holding professional liability policy provided coverage for claim brought by claimant who had purchased oil and gas lease interests from insured's clients and alleging RICO and unfair trade practices; claim did not have to be brought by client); *Boggs v. Camden-Clark Mem'l Hosp. Corp.*, 693 S.E.2d 53 (W. Va. 2010) (holding professional services exclusion applied to malicious prosecution claim filed against insured attorney by nonclient); *Allstate Ins. Co. v. Punturo*, 407 F. Supp. 3d 700 (W.D. Mich. 2019) (rejecting argument that professional services exclusion in general liability policy applied only to claims of malpractice by clients of the insured attorney); *Records v. Aetna Life & Cas. Ins.*, 683 A.2d 834 (N.J. Super. Ct. App. Div. 1996) (holding medical malpractice policy provided coverage to insured physician for claim by nurse who suffered injuries as the result of an argument over whether to transfer a patient); *St. Paul Fire & Marine Ins. Co. v. Med. Protective Co. of Fort Wayne, Ind.*, No. 2:04CV0391-FTM, 2006 WL 3544817, at

In determining whether an insured provided a service, courts may look to whether the insured is typically paid in exchange for the act at issue. However, (unless required by the policy language) it is ordinarily not relevant whether the claimant in the underlying dispute was paid for the services. This was demonstrated in *Amex Assurance Co. v. Allstate Insurance Co.*, in which the California Court of Appeals rejected an argument that a professional services exclusion was inapplicable to a claim against an insured plumber for negligently installing a water heater because the insured had not been paid for the work:

Amex argues that at the time Cox was installing the water heater, he was neither providing professional services to Zumbrun nor was he engaged in business activities. He was simply helping out a friend. But the undisputed evidence is that Zumbrun had

*2 (M.D. Fla. Dec. 8, 2006) (professional liability policy provided coverage for claim brought by technologist who injured his back lifting a patient who fell off of table as the insured was performing surgery; professional services exclusion in CGL policy barred coverage), *aff'd sub nom.* *St. Paul Fire & Marine Ins. Co. v. Med. Protective Co. of Fort Wayne, Ind.*, 257 F. App'x 232 (11th Cir. 2007); *Lincoln Cnty. Ambulance Dist. v. Pac. Emp. Ins. Co.*, 15 S.W.3d 739, 744 (Mo. Ct. App. 1998) (holding professional liability policy provided coverage to suit against insured ambulance company by employees arising from wage agreement that excluded meal and sleep time in calculating overtime compensation); *Bolton Partners Inv. Consulting Grp., Inc. v. Travelers Indem. Co. of Am.*, No. CIV.A. RDB-05-2724, 2007 WL 776675, at *9 (D. Md. Mar. 15, 2007) (holding professional liability policy provided coverage for insured investment advisor for lawsuit brought by plaintiff who had offered an annuity that the insured had recommended against purchasing to his client); *Fed. Ins. Co. v. Hawaiian Elec. Indus., Inc.*, No. CV 94-00125 HG, 1997 WL 35428196, at *9 (D. Haw. Dec. 23, 1997) (“Application of the Professional Services Exclusions is based upon whether the claim arises out of the rendering of or failure to render professional insurance services to actual or potential . . . clients, and is not dependent upon the status of the party harmed or the identity of the claimant.”). *Contra* *Welch Foods, Inc. v. Nat'l Union Fire Ins. Co.*, No. CIV A. 09-12087, 2010 WL 3928704, at *5 (D. Mass. Oct. 1, 2010) (holding professional liability policy did not provide coverage for false advertising claim by competitors because such coverage was intended only to apply to claims by clients of the insured), *aff'd sub nom.* *Welch Foods, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 659 F.3d 191 (1st Cir. 2011) (strongly criticized by *Utica Mut. Ins. Co. v. Herbert H. Landy Ins. Agency, Inc.*, 820 F.3d 36, 44 (1st Cir. 2016)); *Com. Ins. Co. v. Mass. Med. Pro. Ins. Assoc.*, 4 Mass. L. Rptr. 88 (Mass. Super. 1995) (holding professional services exclusion did not preclude coverage for suit against surgeon for cutting the hand of a nurse during surgery because the exclusion contemplated a suit brought by a patient; professional services policy did not provide coverage); *cf.* *Sentinel Ins. Co., Ltd. v. Cogan*, 202 F. Supp. 3d 831 (N.D. Ill. 2016) (holding defamation claim arising out of insured attorney's e-mail to court accusing opposing firm's attorney of ethical and professional misconduct did not trigger professional services exclusion because reporting unethical behavior was a professional obligation rather than a service performed for a client).

sometimes paid Cox for similar work in the past, and that Cox was installing the water heater in the hope it would induce Zumbrun to pay him for prior work. Cox was more than simply helping out a friend, he was seeking compensation.¹⁷

In other words, it is more important whether the activity at issue was the type of work for which the insured would normally be paid than whether the insured was actually paid in the claim at issue. That being said, where a policy explicitly states that coverage is provided only for services performed in exchange for compensation, that language typically will be enforced.¹⁸

II. COMMON TYPES OF CLAIMS

Having covered how courts approach this topic generally, this section will address common categories of claims made against professionals and whether courts deem them to arise from the insured's professional services. Specifically, this section will address claims against professionals over billing and advertising practices, defamatory statements, employment practices, and sexual assault.

A. Billing and Payment

Courts have generally held that claims arising from a professional's billing disputes with clients do not arise from professional services. As explained by the Massachusetts Court of Appeals, "[t]he billing function is largely ministerial. There are elements of experience and judgment in billing for legal services, but the same goes for pricing shoes. As billing is not a professional service, it does not

¹⁷ *Amex Assurance Co. v. Allstate Ins. Co.*, 5 Cal. Rptr. 3d 744, 749 (Ct. App. 2003); *see also* *Hollingsworth v. Com. Union Ins. Co.*, 256 Cal. Rptr. 357 (Ct. App. 1989) (holding professional services exclusion applied to claim arising from ear-piercing services that had been provided for free along with the purchase of earrings); *Nat. Gas Pipeline Co. of Am. v. Odom Offshore Surv., Inc.*, 889 F.2d 633, 636 (5th Cir. 1989) ("Professional services, in its usual connotation, means services performed by one in the ordinary course of the practice of his profession, on behalf of another, pursuant to some agreement, express or implied, and for which it could reasonably be expected some compensation would be due." (quoting *Aker v. Sabatier*, 200 So. 2d 94, 97 (La. Ct. App. 1967))); *Tagged, Inc. v. Scottsdale Ins. Co.*, No. CIV. JFM-11-127, 2011 WL 2748682, at *1 (S.D.N.Y. May 27, 2011) (holding claim against social networking website by non-paying users fell within professional services exclusion because the website was operated for the purpose of obtaining advertising revenue).

¹⁸ *E.g.*, *Admiral Ins. Co. v. Marsh*, No. 3:12CV601-JAG, 2013 WL 3270555, at *6 (E.D. Va. June 26, 2013).

come within the coverage of a professional liability insurance policy.”¹⁹

Most courts have agreed that this reasoning applies to claims involving

¹⁹ *Reliance Nat'l Ins. Co. v. Sears, Roebuck & Co.*, 792 N.E.2d 145 (Mass. App. Ct. 2003); *see also Redlands Country Club Inc. v. Cont'l Cas. Co.*, No. CV101905GAFDTBX, 2011 WL 13224844, at *6 (C.D. Cal. Oct. 4, 2011) (“Ninth Circuit courts have consistently held that mere billing services do not qualify as ‘professional services’ for the purpose of professional liability insurance policies.” (quoting *Horizon W., Inc. v. St. Paul Fire & Marine Ins. Co.*, 45 F. App'x 752, 754 (9th Cir. 2002))); *Wittmack v. Fed. Ins. Co.*, No. D044764, 2005 WL 2633071, at *7 (Cal. Ct. App. Oct. 14, 2005), *as modified*, (Nov. 9, 2005) (finding an interior designer’s professional liability policy did not cover claim for overpricing because “billing, and specifically the addition of 35 percent overhead markups to the actual cost of goods, was an administrative task not requiring any design expertise”); *Med. Records Assocs., Inc. v. Am. Empire Surplus Lines Ins. Co.*, 142 F.3d 512 (1st Cir. 1998) (finding professional liability policy did not provide coverage for claim that insured medical records processing company had overbilled for copies); *Jerome Grp., Inc. v. Cincinnati Ins. Co.*, 257 F. Supp. 2d 1217 (E.D. Mo. 2003) (finding professional liability policy did not cover claim against company for the amount charged for document scanning work that was contracted out to another company); *Hampton Med. Group, P.A. v. Princeton Ins. Co.*, 840 A.2d 915 (N.J. Super. Ct. App. Div. 2004) (finding professional liability policies did not provide coverage for insured psychiatrist over fraudulent billing practices); *Davis & Meyer Law, Ltd. v. Pro-Nat'l Ins. Co.*, No. 06AP-730, 2007 WL 2009666 (Ohio Ct. App. July 12, 2007) (finding professional liability policy did not provide coverage for claim against title insurance agency arising out of billing, which was ministerial rather than professional); *Princeton Ins. Co. v. Kosoy*, No. CIV. A. 98-4985, 1999 WL 79055, at *3 (E.D. Pa. Feb. 9, 1999) (finding professional liability policy did not cover claims against insured chiropractor which arose solely out of negligence, fraud, and breach of contract in billing), *aff'd*, 281 F.3d 223 (3d Cir. 2001); *Bennett v. U.S. Liab. Ins. Grp.*, No. 3:13-CV-01565-SI, 2014 WL 1660654, at *5 (D. Or. Apr. 25, 2014) (finding professional liability policy did not provide coverage for claim over billing dispute because “persuasive sources from both the courts and insurance treatises support the Court's conclusion that ‘professional services’ do not include billing actions”); *Chicago Ins. Co. v. Ctr. for Counseling & Health Res.*, No. C10-0705 RSM, 2011 WL 1222792 (W.D. Wash. Mar. 31, 2011) (finding the “administration of billing does not require the training and specialized skill associated with professional services” covered by professional liability policy). *Contra* *Drs. Harold & Jack Kahn, O.D., Inc. v. Cincinnati Ins. Co.*, No. L-83-309, 1984 WL 7758 (Ohio Ct. App. Feb. 3, 1984) (finding professional liability policy covered claim against optometrist arising from billing dispute, reasoning billing was incidental to professional services); *Matrix Health Mgmt., Inc. v. W. World Ins. Co.*, No. 93-1750, 1994 WL 378986, at *1 (3d Cir. Mar. 4, 1994) (finding professional liability policy issued to health care company provided coverage for claim based upon a fraudulent billing scheme to collect money for in-patient psychiatric services that were unnecessary and for other health care services that were not delivered); *Cont'l Cas. Co. v. Physicians Weight Loss Cntr. of Am., Inc.*, 61 F. App'x 841 (4th Cir. 2003) (holding professional liability policy provided coverage for claim against insured weight loss center that overcharged members for weight loss medication, finding that the dispute was not merely about pricing but also about the insured’s failure to write prescriptions to buy same medication for lower costs).

attorneys,²⁰ but some have found billing disputes to be inextricably tied to an

²⁰ *E.g.*, *Great Am. Ins. Co. v. Baddley & Mauro, LLC*, No. 2:07-CV-01909-JEO, 2008 WL 11422549, at *7 (N.D. Ala. Nov. 17, 2008) (holding professional liability policy did not provide coverage for claim against insured attorney which did not arise out of the representation of the defendants but rather out of a dispute over the fee arrangement), *aff'd*, 330 F. App'x 174 (11th Cir. 2009); *Clermont v. Cont'l Cas. Co.*, 778 F. Supp. 2d 133, 140 (D. Mass. 2011) (holding professional liability policy did not provide coverage for claim against insured attorney where underlying claim sought relief for the alleged violation of a fee-sharing arrangement with a former employer, which the court considered part of the billing function of a lawyer rather than a professional service); *Gregg & Valby, LLP v. Great Am. Ins. Co.*, 316 F. Supp. 2d 505 (S.D. Tex. 2004) (professional liability policy did not provide coverage for insured law firm for claims arising from billing and fee-setting); *Cohen v. Empire Cas. Co.*, 771 P.2d 29 (Colo. Ct. App. 1989) (holding insured attorney's professional liability policy did not provide coverage for claim to recover fees brought by second attorney hired by first attorney to assist in case); *Evanston Ins. Co. v. Law Office of Michael P. Medved, P.C.*, 890 F.3d 1195 (10th Cir. 2018) (holding professional liability policy did not provide coverage for class action against law firm based on overbilling practices); *Garland, Samuel & Loeb, P.C. v. Am. Safety Cas. Ins. Co.*, 651 S.E.2d 177 (Ga. Ct. App. 2007) (holding professional liability policy did not provide coverage for suit against law firm for alleged breach of a fee-splitting arrangement following referral); *Cont'l Cas. Co. v. Donald T. Bertucci, Ltd.*, 926 N.E.2d 833 (Ill. App. Ct. 2010) (holding professional liability policy did not cover claim against attorney over legal fees charged); *Ill. State Bar Ass'n Mut. Ins. Co. v. Coleman L. Firm*, 2014 IL App (1st) 133518-U, ¶ 44 (holding suit against insured law firm for return of retainer was not covered by professional liability policy); *Mandel Resnik Kaiser Moskowitz & Greenstein P.C. v. Exec. Risk Indem. Inc.*, No. 03 CIV 8019 (BSJ), 2005 WL 1712024, at *3 (S.D.N.Y. July 15, 2005) (finding that a professional liability policy covered a claim against the insured law firm because it was not merely a billing dispute but required resolution of issues such as whether the insured's legal services benefitted the debtors in the underlying bankruptcy and who could be charged for the legal work provided); *Hummer v. St. Paul Fire & Marine Ins. Co.*, 936 F.2d 573 (6th Cir. 1991) (holding attorney's malpractice policy did not cover dispute with his client over contingent fee agreement); *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Shane & Shane Co., L.P.A.*, 605 N.E.2d 1325 (Ohio. Ct. App. 1992) (holding professional liability policy did not cover claim by client arising from improperly retained money from settlement); *Okla. Atty. Mut. Ins. Co. v. Capron*, 250 P.3d 916 (Okla. Ct. App. 2011) (holding professional liability policy did not cover suit against insured law firm concerning the division of fees); *John M. O'Quinn P.C. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 33 F. Supp. 3d 756, 773 (S.D. Tex. 2014) (holding claim against insured attorney over billing practices did not arise out of professional services for coverage under professional malpractice policy), *aff'd sub nom. John M. O'Quinn, P.C. v. Lexington Ins. Co.*, 906 F.3d 363 (5th Cir. 2018); *Pias v. Cont'l Cas. Ins. Co.*, No. 2:13-CV-00182-PM-KK, 2013 WL 4012709, at *5 (W.D. La. Aug. 6, 2013) (footnote omitted) (finding that attorney's professional liability policy did not provide coverage because "a fee dispute does not constitute 'legal services,' and a plaintiff's attempt to cloak [this] run-of-the-mill fee dispute in the trappings some flavor of tort claim cannot change this ultimate conclusion"); *Colony Ins. Co. v. Fladseth*, No. C 12-1157 CW, 2013 WL 1365988, at *2 (N.D. Cal. Apr.

attorney's professional judgment. For example, in *Westport Insurance Corp. v. Wilkes & McHugh, P.A.*, the U.S. District Court for the Western District of Tennessee found that a professional liability insurer owed coverage to an insured attorney over an alleged breach of fiduciary duty for failing to inform his client that the fee agreement they entered into was in violation of state law.²¹ Furthermore, claims against professional billers or debt collectors can be covered where the claim arises out of the insured's efforts to bill on behalf of a client.²²

3, 2013) (holding attorney's professional liability policy did not cover claim by client alleging that insured wrongfully withheld amounts exceeding the statutorily allowable fee), *amended*, No. C 12-1157 CW, 2013 WL 3187938 (N.D. Cal. June 21, 2013); *cf.* *Felice v. St. Paul Fire & Marine Ins. Co.*, 711 P.2d 1066 (Wash. 1985) (holding professional liability policy did not provide coverage for suit seeking to discharge insured attorney as guardian); *Tana v. Pros. Prototype I Ins. Co.*, 55 Cal. Rptr. 2d 160 (Ct. App. 1996) (finding, without addressing whether the claim arose from professional services under a legal malpractice policy, that a billing dispute by a client did not allege "damages").

²¹ *Westport Ins. Corp. v. Wilkes & McHugh, P.A.*, No. 2:07-cv-02522-JPM-dkv, 2009 WL 10665117, at *3 (W.D. Tenn. Feb. 20, 2009); *see also* *Home Ins. Co. v. Bullard*, 850 F.2d 692 (6th Cir. 1988) (holding professional liability policy provided coverage for law firm in suit by former associate for refusal to split legal fees in agreed-upon manner; allegations distinguished from disputes over division of fees because it involved representation of clients through diversion techniques); *Lyons v. Am. Home Assur. Co.*, 354 N.W.2d 892 (Minn. Ct. App. 1984) (holding professional liability policy provided coverage for claim against attorney brought by former partners for recovery of fees under arbitration agreement); *Cont'l Cas. Co. v. Cole*, 809 F.2d 891 (D.C. Cir. 1987) (holding professional liability policy covered claim by law firm against former partner that firm had improperly settled claim and failed to pay partner his share); *Shamoun & Norman, LLP v. Ironshore Indem., Inc.*, 56 F. Supp. 3d 840, 845 (N.D. Tex. 2014) (finding coverage for insured attorney for breach of fiduciary duty claim by client despite noting that "practices such as billing and fee setting are generally not characterized as professional services"); *Edward T. Joyce & Assocs., P.C. v. Pro. Direct Ins. Co.*, No. 13 CV 2475, 2014 WL 4980888, at *7 (N.D. Ill. Sept. 30, 2014) (holding suit against insured attorney by client went beyond a fee dispute where it arose from the attorney's alleged failure to provide a full disclosure about a change in legal representation, a failure to advise clients to seek independent counsel, undue influence in the purported negotiation of a new fee agreement, and a failure by the attorney to comply with its professional obligations by entering into a verbal agreement for a contingent fee), *aff'd on other grounds*, 816 F.3d 928 (7th Cir. 2016); *cf.* *Reliance Nat'l Ins. Co. v. Sears, Roebuck & Co., Inc.*, 792 N.E.2d 145, 148 (Mass. App. Ct. 2003) ("We do not diminish the importance of skillful and thoughtful billing. Indeed, billing may have tax consequences, as in divorce cases or structured settlements in tort actions. When, by arrangement, lawyers bill third parties, they must take care not to reveal lawyer-client confidences. Such billing decisions involve the application of knowledge of the law for the benefit of a client; accordingly, they take on the character of professional services.").

²² *Nat'l Recovery Agency, Inc. v. AIG Tech. Servs., Inc.*, No. 4:05 CV 0033, 2005 WL 2100702, at *10 (M.D. Pa. Aug. 26, 2005).

Consistent with the general rule that billing is not a professional service, courts have typically held that professional liability policies do not provide coverage for *qui tam* claims based upon the False Claims Act because such claims are inherently based upon billing.²³ In this context, courts have consistently rejected the argument that coverage is triggered because the billing was rendered “false” only due to a failure to properly provide the professional services that would justify the bill.

As with billing, claims arising from an insured’s failure to fulfill their payment obligations will typically not be deemed to be a dispute arising out of professional services. For example, in *Illinois Union Insurance Co. v. Brookstreet Security Corp.*, the U.S. District Court for the Central District of California explained that a professional liability policy would not provide coverage for a claim over compensation by a former employee, explaining that payroll administration is a general administrative activity rather than a professional service.²⁴ However, as with claims against professional billers, claims against professional payroll specialists can be deemed to arise out of professional services where the wrongful act occurs in the performance of services for a customer or client.²⁵

B. Advertising and Referrals

As with billing, courts have frequently found that claims arising from a

²³ *Iberiabank Corp. v. Illinois Union Ins. Co.*, No. CV 18-1090, 2019 WL 585288, at *5 (E.D. La. Feb. 13, 2019) (“Every federal circuit faced with the issue has held that coverage under a professional liability insurance policy is not triggered by claims asserted under the False Claims Act because such claims are not predicated on the insured’s professional services that are covered by such a policy.” (collecting cases)); *Gallup, Inc. v. Greenwich Ins. Co.*, No. N14C-02-136FWW, 2015 WL 1201518, at *11-12 (Del. Super. Ct. Feb. 25, 2015) (holding professional services exclusion did not preclude coverage for *qui tam* claim that the insured mischarged the government). *But see* *Hotchalk, Inc. v. Scottsdale Ins. Co.*, 217 F. Supp. 3d 1058, 1066 (N.D. Cal. 2016) (holding professional services exclusion barred coverage for False Claims Act claim involving online degrees).

²⁴ *Ill. Union Ins. Co. v. Brookstreet Sec. Corp.*, No. SACV07-01095-CJC(RNBx), 2009 WL 10675258, at *3 (C.D. Cal. Oct. 15, 2009); *see also* *Bell Lavalin, Inc. v. Simcoe & Erie Gen. Ins. Co.*, 61 F.3d 742, 746 (9th Cir. 1995) (holding professional liability policy did not cover breach of contract claim against engineering and construction firm asserting that the claimant had not been paid for work performed); *cf.* *Gandor v. Torus Nat’l Ins. Co.*, 140 F. Supp. 3d 141, 145-48 (D. Mass. 2015) (holding partner’s conduct in failing to include associate under firm’s policy did not fall within scope of coverage under legal malpractice policy).

²⁵ *Begun v. Scottsdale Ins. Co., Inc.*, No. C-12-03649 EDL, 2013 WL 12077974, at *1 (N.D. Cal. May 16, 2013) (applying professional services exclusion to claim against professional payroll specialists), *aff’d*, 613 F. App’x 643 (9th Cir. 2015).

professional's advertisements and solicitations for business do not arise from the insured's professional services. For example, in *Lira v. Chicago Insurance Co.*, the Ninth Circuit Court of Appeals found that a professional liability policy issued to a vocational rehabilitation business did not provide coverage for a claim in which the claimant/competitor alleged that the insured slandered it in soliciting business.²⁶ The court explained that securing clients and competing in the

²⁶ *Lira v. Chi. Ins. Co.*, 967 F.2d 587 (9th Cir. 1992) (unpublished table opinion); *see also* *Sampathacar v. Sun Ins. Co.*, 25 Phila. 593, 608 (Pa. Ct. C.P. 1992) (holding claim against insured physicians for invasion of privacy for running patient's face in their advertisements did not trigger professional services exclusion because advertising falls within the "business component" of the medical practice rather than the professional component); *Hullverson L. Firm, P.C. v. Liberty Ins. Underwriters, Inc.*, 25 F. Supp. 3d 1185, 1193 (E.D. Mo. 2014) (holding claim against insured law firm arising from advertisements which misleadingly conflated the firm with a more established firm was not covered under professional liability policy); *Westport Ins. Co. v. Jackson Nat'l Life Ins. Co.*, 900 N.E.2d 377, 381 (Ill. App. Ct. 2008) (holding insurance agency's blast fax advertisements did not arise from professional services under professional liability policy, reasoning "mere offer to perform a professional service is not a professional service in its own right"); *Margulis v. BCS Ins. Co.*, 23 N.E.3d 472, 481-86 (Ill. App. Ct. 2014) (holding Telephone Consumer Protection Act claim against insurance broker for making unsolicited advertising calls was not covered by professional liability policy); *Standard Mut. Ins. Co. v. Lay*, 2 N.E.3d 1253, 1259 (Ill. App. Ct. 2014) (holding professional services exclusion did not exclude coverage for damages caused by insured's Telephone Consumer Protection Act violation in sending a blast fax advertising his real estate business); *Assurance Co. of Am. v. St. Paul Fire & Marine Ins. Co.*, No. CV 06-1432, 2008 WL 11510293, at *4 (W.D. Pa. Jan. 10, 2008) (holding professional services exclusion did not apply to commercial aspect of legal practice, including advertising and competition for clients and referrals); *Scottsdale Ins. Co. v. Coapt Sys., Inc.*, No. C-12-1780 MMC, 2013 WL 3146781, at *6 (N.D. Cal. June 18, 2013) (holding professional services exclusion did not apply to claims against medical device manufacturing company for claim arising from "sales and marketing activities"); *Caveo, LLC v. Citizens Ins. Co. of Am., Inc.*, No. 15-CV-6200, 2017 WL 2672297, at *3-5 (N.D. Ill. June 21, 2017) (holding professional services exclusion did not apply to claim against insured consulting company by competitor alleging that the insured used the claimant's confidential information in advertisements); *Lipscomb Ins. Grp. v. Hartford Lloyds Ins. Co.*, No. 3:09-CV-2047-O, 2010 WL 11475236, at *7 (N.D. Tex. Nov. 29, 2010) (holding professional services exclusion did not apply to suit by competitor of insured insurance broker alleging false statements about competitor sent in advertising mailer); *Potomac Ins. Co. of Ill. v. Jayhawk Med. Acceptance Corp.*, 198 F.3d 548, 552 (5th Cir. 2000) (holding professional liability policy did not apply to claims against company that provided financing for elective surgeries as referring a patient to a doctor did not constitute a professional service); *Cent. Dakota Radiologists, P.C. v. Cont'l Cas. Co.*, 769 F. Supp. 323 (D.N.D. 1991) (holding professional liability policy did not provide coverage for insured medical services professional corporation sued for business torts including antitrust violations, tortious

marketplace were not special risks inherent to the practice of the rehabilitation profession, and that malicious slanderous statements made while soliciting business were not part of the rendering of professional rehabilitation services. However, it should be noted that advertising – like billing and payment – can constitute a professional service when performed for a third party rather than for the insured’s own benefit.²⁷

C. Defamation/Slander/Libel/Wrongful Disclosure

Courts generally have little difficulty in finding that claims of slander or libel can arise from professional services. For example, in *Pekin Insurance Co. v. L.J. Shaw & Co.*, the Illinois Court of Appeals held that a professional services exclusion precluded coverage for claims against an insured adjuster who allegedly told a client that a competitor had overstated damages stemming from a fire.²⁸ Similarly, the U.S. District Court for the Southern District of Florida held in *Vogelsang v. Allstate Insurance* that a professional services exclusion precluded coverage for a claim against an attorney for defamation arising out of statement that the claimant was a “crook,” finding that the insured’s conduct was derived solely from his provision of legal services to his client.²⁹

interference, and intentional infliction of emotional distress); *Church Mut. Ins. Co. v. Lake Pointe Assisted Living, Inc.*, 517 F. Supp. 3d 467, 479 (“Marketing decisions are, again, business decisions and not the type of health-care professional service contemplated by the parties when the professional liability health care policy was issued.”). *But see* *Landmark Am. Ins. Co. v. NIP Grp., Inc.*, 962 N.E.2d 562 (Ill. App. Ct. 2011) (concluding that, when read as a whole, insurance policy’s language must provide coverage for claims arising from advertisements without false or misleading statements where policy providing coverage for miscellaneous professional services included coverage for advertising injuries and excluded “intentionally false, misleading, deceptive, fraudulent, or misrepresenting statements in advertising the insured’s own product or service”).

²⁷ *Trialcard Inc. v. Travelers Cas. & Sur. Co. of Am.*, No. 5:19-CV-368-BO, 2020 WL 1609483, at *3 (noting that professional services exclusion would apply to claim arising out of insured’s marketing work for claimant).

²⁸ *Pekin Ins. Co. v. L.J. Shaw & Co.*, 684 N.E.2d 853, 896 (Ill. App. Ct. 1997).

²⁹ *Vogelsang v. Allstate Ins. Co.*, 46 F. Supp. 2d 1319, 1323 (S.D. Fla. 1999); *see also* *Gould & Ratner v. Vigilant Ins. Co.*, 782 N.E.2d 749, 755-57 (Ill. App. Ct. 2002) (holding professional services exclusion barred coverage for claim against insured law firm by former client who alleged that the firm had disseminated unfavorable statements about him in the context of representing another party in a bankruptcy); *Centennial Ins. Co. v. Patterson*, 564 F.3d 46 (1st Cir. 2009) (holding professional liability policy provided coverage for defamation claim that veterinarian had testified that a fellow veterinarian had treated animals without the permission of their owners); *Ministers Life v. St. Paul Fire and Marine Ins. Co.*, 483 N.W.2d 88, 91 (Minn. Ct. App. 1992) (holding professional services

On the other hand, some older decisions found disparaging statements against competitors to be too attenuated to arise from professional services. For example, in *Atlantic Lloyd's Insurance Co. of Texas v. Susman Godfrey, LLP*, the Texas Court of Appeals held that a professional liability policy did not cover a suit against

exclusion in policy issued to insurance company precluded coverage for defamation suit brought by religious group after insured investigated legitimacy of religious group and decided that group contract was void); *U.S. Fid. & Guar. Co. v. Hudson, Everett, Simonson, Mullis & Assocs., Inc.*, No. 3:06-CV-00479-HTW-LRA, 2008 WL 886092, at *7 (S.D. Miss. Mar. 30, 2008) (holding professional services exclusion precluded coverage for defamation claim against engineering firm for failure to recommend engineer on project based on purported problems with them in the past); *Am. Cas. Co. of Reading, Pa. v. Kemper*, No. 07-1149-PHX-EHC, 2008 WL 2783272, at *4-7 (D. Ariz. July 16, 2008) (holding claims that insured clinical/rehabilitation counselor defamed co-worker in attempt to preserve her status with health care providers and preserve license arose from professional services under professional liability policy); *Uhrich v. State Farm Fire & Cas. Co.*, 135 Cal. Rptr. 2d 131 (Ct. App. 2003) (holding professional services exclusion precluded coverage for claim against psychiatrist for conspiring to convince authorities that a former patient had stolen records and for providing false information that led to a search of the patient's home, and finding the fact that actions continued after severance of the professional relationship did not alter the fact that claim arose from providing or failure to provide a professional service); *Allstate Ins. Co. v. Sellers-Bok*, 942 F. Supp. 1428, 1433-34 (M.D. Ala. 1996) (holding professional services exclusion precluded coverage for claims for slander against psychiatrist that published report that patient was molested, thereby leading to prosecution of the patient's father); *Allstate Ins. Co. v. Punturo*, 407 F. Supp. 3d 700, 706 (W.D. Mich. 2019) (holding professional services exclusion applied to defamation suit against insured law firm filed by opposing party in underlying litigation); *Sundaram v. Coverys*, 130 F. Supp. 3d 419, 425 (D. Me. 2015) (holding professional liability policy provided coverage to insured physician for defamation suit by former employee concerning allegedly false statements made to her prospective employer concerning her performance); *Erie Ins. Grp. v. All. Env't, Inc.*, 921 F. Supp. 537, 546 (S.D. Ind. 1996) (holding professional services exclusion applied to defamation suit against insured asbestos remover by competitor over statements the insured made that the competitor had failed to remove all asbestos), *aff'd sub nom. Erie Ins. Grp. v. Sear Corp.*, 102 F.3d 889 (7th Cir. 1996); *Am. Nat'l Fire Ins. Co. v. Borns*, No. 2:06-CV-224, 2007 WL 2743498, at *5 (N.D. Ind. Sept. 18, 2007) (holding legal malpractice insurer is required to defend insured attorney accused of mailing a complaint containing false allegations to customers of the defendant); *Harbison v. Am. Motorists Ins. Co.*, 244 F. App'x 123, 125 (9th Cir. 2007) (holding professional liability policy provided coverage for claim against insured attorney arising out of defamatory statements that the insured allegedly made about co-counsel while providing legal advice to the client); *Westport Ins. Corp. v. Jackson*, No. CIV.A. 3:04-1031, 2005 WL 2300358, at *6 (M.D. Pa. Aug. 19, 2005) (holding legal professional liability policy provided coverage for lawsuit alleging that insured attorney made defamatory statements about the claimant in giving his client a legal opinion as to the plaintiff's honesty and/or competence).

an insured law firm arising from a defamatory letter soliciting new clients.³⁰ Consistent with the reasoning applied to advertising (*Section II.B.*), the court found that the letter was merely a medium to attract clients and, therefore, incidental to any provision of professional services.

Courts typically have held that the wrongful disclosure of information learned in the course of the provision of professional services constitutes a claim arising out of professional services. For example, in *Princeton Insurance Co. v. LaHoda*, the U.S. District Court for the Eastern District of Pennsylvania found coverage under a chiropractor professional liability policy for a claim by a former patient for disclosing that the claimant/patient was pregnant and intended to obtain an abortion.³¹

D. Employment Claims

Generally, courts have found that negligent hiring claims arise from professional services only when the wrongful act alleged was a failure to properly evaluate the employee's professional qualifications. For example, in *National Fire Insurance Co. of Hartford v. Kilfoy*, the Illinois Court of Appeals found that the decision to hire an employee who was professionally incompetent was a professional service under a professional services exclusion because the evaluation

³⁰ *Atl. Lloyd's Ins. Co. of Tex. v. Susman Godfrey, L.L.P.*, 982 S.W.2d 472 (Tex. App. 1998); *see also Warfield-Dorsey Co. v. Travelers Cas. & Sur. Co. of Ill.*, 66 F. Supp. 2d 681, 689-90 (D. Md. 1999) (holding professional services exclusion did not encompass claims against insurance broker regarding defamatory letters sent to clients of business relation); *Lira*, 967 F.2d at 587 ("Securing clients and competing in the marketplace, even unlawfully, are not special risks inherent in the practice of the rehabilitation profession. Malicious slanderous statements made while soliciting business are not part of the rendering of professional rehabilitation services."); *cf. Sentinel Ins. Co., Ltd. v. Cogan*, 202 F. Supp. 3d 831, 834-37 (N.D. Ill. 2016) (holding defamation claim arising out of insured attorney's e-mail to court accusing opposing firm's attorney of ethical and professional misconduct did not trigger professional services exclusion because reporting unethical conduct was a professional obligation rather than a service performed for a client); *Finnie v. LeBlanc*, 856 So. 2d 208, 212 (La. Ct. App. 2003) (holding professional services exclusion did not bar coverage for claim against counselor by patient alleging that therapist had lied about their sexual relationship and falsely accused the patient of stealing records).

³¹ *Princeton Ins. Co. v. LaHoda*, No. CIV. A. 95-5036, 1996 WL 11353, at *3-4 (E.D. Pa. Jan. 4, 1996); *Mellow v. Med. Malpractice Joint Underwriting Ass'n of R.I.*, 567 A.2d 367, 368 (R.I. 1989) (holding professional liability policy covered claim against an emergency room physician for revealing a patient's blood-alcohol level to public without patient's consent). *Contra Del. Ins. Guar. Ass'n v. Birch*, No. CIV.A. 02-C-06-025RFS, 2004 WL 1731139, at *6 (Del. Super. Ct. July 30, 2004) (holding professional liability policy did not cover claim against insured physician for his office's unintentional disclosure of his patient's pregnancy to her mother because the error was ministerial rather than arising out of professional services).

of professional competence was a decision that required the exercise of professional judgment.³² In reaching this conclusion, the court distinguished its prior decision in *American Family Mutual Insurance Co. v. Enright*, in which it ruled that the insured's decision to hire an ultrasound technician who sexually assaulted a patient was not a professional service under a professional liability policy because it had not been an evaluation of professional competence.³³

At the other end of the employment relationship, courts likewise have held that claims arising from wrongful terminations typically do not fall within the coverage of professional liability policies because they are administrative rather than a service performed for another. For example, in *Inglewood Radiology Medical Group, Inc. v. Hospital Shared Services, Inc.*, the California Court of Appeals held that a professional liability policy did not cover a claim by a former employee for wrongful termination because the decision to terminate the employee did not fall within a medical malpractice policy's coverage for injury arising out of the rendering professional services.³⁴ But as with wrongful hiring, a wrongful termination can arise out of professional services where the facts demonstrate that the decision was based on the insured's professional expertise. For example, in *Biborosch v. Transamerica Insurance Co.*, the Pennsylvania Superior Court held that a claim for termination of an employee by the general manager of an insurance agency fell within his professional liability policy because the termination fell within his professional role.³⁵ However, this finding was strongly influenced by the fact that the court found the undefined term "professional services" to be

³² Nat'l Fire Ins. Co. of Hartford v. Kilfoy, 874 N.E.2d 196, 202 (Ill. App. Ct. 2007); see also Premier Med. Mgmt. Sys., Inc. v. Truck Ins. Exch., No. B171402, 2005 WL 15428, at *6 (Cal. Ct. App. Jan. 3, 2005) (holding claim against insured for failing to assess whether a doctor had been properly credentialed fell within the scope of professional services exclusion); cf. N. Am. Specialty Ins. Co. v. Royal Surplus Lines Ins. Co., 541 F.3d 552, 561–62 (5th Cir. 2008) (holding professional liability policy covered claim that insured nursing home was underbudgeted and understaffed because "the only way to know whether a nursing home is properly staffed is by resort to professional standards of care").

³³ *Kilfoy*, 874 N.E.2d at 200-01 (citing *Am. Fam. Mut. Ins. Co. v. Enright*, 781 N.E.2d 394 (Ill. App. Ct. 2002)); see also *Haney v. Cont'l Cas. Co.*, No. CIV.A 308CV482DPJCS, 2010 WL 235025, at *5 (S.D. Miss. Jan. 15, 2010) (holding professional liability policy did not apply to claim against insured insurance agent by former employer for soliciting former co-workers). *Contra Shuler v. Mich. Physicians Mut. Liab. Co.*, 679 N.W.2d 106, 126 (Mich. Ct. App. 2004) (holding professional services exclusion did not apply to claim against insured hospital for failing to supervise doctor and failing to prevent him from sexually assaulting patients).

³⁴ *Inglewood Radiology Med. Grp., Inc. v. Hosp. Shared Servs., Inc.*, 266 Cal. Rptr. 501, 503 (Ct. App. 1989).

³⁵ *Biborosch v. Transamerica Ins. Co.*, 603 A.2d 1050, 1054 (Pa. Super. Ct. 1992).

ambiguous.

Regarding conduct towards employees during the employment relationship, the Florida Court of Appeals ruled that a professional liability policy did not cover a claim against an insured veterinarian for a claim arising from the insured's rules as to when the employee must return to work after sick leave and whether protective gloves would be required.³⁶

E. Sexual Assault

Outside of the medical profession, allegations of sexual assault by the insured rarely are deemed to arise out of professional services. For example, in *Cerrato v. American Home Insurance Co.*, the U.S. District Court for the District of Connecticut had little difficulty finding that an attorney's professional liability policy did not provide coverage with regard to a claim by a client who alleged that the insured sexually assaulted her.³⁷

As to sexual assault claims by medical professionals, decisions vary significantly, and entire articles have already been devoted to this subject.³⁸ Rebecca Haller's *Sexual Abuse Claims Against Nonparticipants* is a valuable resource for researching coverage for sexual abuse claims in which the insured is not the abuser but is alleged to have enabled the abuse or failed to prevent it.³⁹

³⁶ *Block v. Fireman's Fund Ins. Co.*, 609 So. 2d 763, 764 (Fla. App. Ct. 1992).

³⁷ *Cerrato v. Am. Home Ins. Co.*, No. 3:99CV2355(RNC), 2001 WL 1911768 (D. Conn. Apr. 2, 2001); *see also* *Ross v. Home Ins. Co.*, 773 A.2d 654, 657 (N.H. 2001) (holding professional liability policies did not provide coverage for claim by client against attorney for negligent hiring of his son, who sexually assaulted her); *Evanston Ins. Co. v. Gaddis Corp.*, 145 F. Supp. 3d 1140, 1148 (S.D. Fla. 2015) (holding professional services exclusion did not apply to claim against taxicab driver accused of raping passenger); *Sanders v. Phx. Ins. Co.*, No. 14-14039-GAO, 2015 WL 13228002 (D. Mass. Nov. 20, 2015) (holding professional services exclusion did not encompass claim that insured attorney contributed to the death of the claimant's wife by seducing her and failing to prevent her suicide).

³⁸ *E.g.*, Christopher Vaeth, *Coverage of Professional-Liability or Indemnity Policy for Sexual Contact with Patients by Physicians, Surgeons, and Other Healers*, 60 A.L.R. 239 (1998); David M. Lang, *Sexual Malpractice and Professional Liability: Some Things They Don't Teach in Medical School - a Critical Examination of the Formative Case Law*, 6 CONN. INS. L.J. 151, 156 (1999); Vickie I. Simon, *Assault as a Professional Service - to Cover or Not to Cover*, 13 BRIDGEPORT L. REV. 1023 (1993).

³⁹ Rebecca R. Haller, *Is There Coverage? Sexual Abuse Claims Against Nonparticipants*, 55 No. 5 DRI FOR THE DEF., 70, 70 (May 2013).

III. COMMON ISSUES WITHIN DISCRETE PROFESSIONS

The previous section addressed common types of claims generally, whereas this section will address how claims have been addressed in the context of various professions. Specifically, this section has been subdivided by profession to analyze how courts have commonly interpreted the scope of those professions and which type of claims arise out of those professions and which do not. However, this article will not address professional services in the context of architects, engineers, general contractors and/or subcontractors.⁴⁰

A. Attorneys

A claim alleging that an attorney rendered faulty legal advice typically will be deemed to arise out of an attorney's professional services, but courts have found that investment advice given by an attorney can fall outside of that scope. For example, in *Cohen v. Employers Reinsurance Corp.*, the Appellate Division of the New York Supreme Court held that a claim against an insured trustee/attorney for investing trust funds into a speculative investment did not arise out of the insured's services as an attorney.⁴¹ However, courts have found coverage where the insured attorney performs legal services in conjunction with the investment advice. For example, in *Westport Insurance Corp. v. Bayer*, the Fifth Circuit Court of Appeals held that an attorney's malpractice policy encompassed a claim for wrongfully promoting a Ponzi scheme because the attorney's actions in preparing installment notes, transferring money, and representing that he was supervising the investments in his capacity as an attorney could be construed as relating to the

⁴⁰ Coverage claims in the construction context commonly turn on the question of *which* of the parties involved was responsible for the damages alleged based on contractual and commonly understood assignments of the parties' respective responsibilities. *E.g.*, *Wheeler v. Aetna Cas. & Sur. Co.*, 298 N.E.2d 329, 338 (Ill. App. Ct. 1973) (criticizing the Seventh Circuit Court of Appeals for failing to take judicial notice of "what everyone else knows (Ie: [sic] that employees of contractors and subcontractors place and operate hoists and that architects and their employees never do so)"), *vacated*, 311 N.E.2d 134 (Ill. 1974). Accordingly, a detailed survey of decisions in the A&E context would necessarily digress from this article's purposes of when services are "professional" and whether the claim at issue "arises out of" those services.

⁴¹ *Cohen v. Emps. Reinsurance Corp.*, 503 N.Y.S.2d 33, 35 (App. Div. 1986); *see also* *Gen. Accident Ins. Co. v. Namesnik*, 790 F.2d 1397, 1400 (9th Cir. 1986) (holding claim against insured attorney arising from investments he recommended was not covered under malpractice policy); *Bullis v. Minn. Lawyers. Mut. Ins. Co.*, No. 3:06-CV-102, 2007 WL 4353760 (D.N.D. Dec. 10, 2007) (holding legal malpractice policy did not provide coverage to lawyer alleged to have aided in scheme to sell unregistered securities).

practice of law.⁴² Furthermore, courts have found that legal malpractice policies will not respond to claims which arise out of another profession practiced by an insured attorney, such as real estate broker⁴³ or insurance expert.⁴⁴

As discussed in Section II.A., billing disputes typically are not deemed to arise out of professional services, but courts have found coverage for claims against attorneys arising from the mishandling of client funds. For example, in *Regas v. Continental Casualty Co.*, the Illinois Court of Appeals held that an attorney's writing of a check on his overdrawn escrow account to assist in the transfer of client funds for a real estate closing constituted professional services

⁴² *Westport Ins. Corp. v. Bayer*, 284 F.3d 489 (3rd Cir. 2002); *see also Hickman v. Kraft*, No. 84 CA 2, 1985 WL 11160 (Ohio Ct. App. Sept. 26, 1985) (holding professional liability policy covered claims against attorney regarding investment advice where initial discussions took place in attorney's office and subsequent communications were made on attorney's legal stationary); *Jensen v. Snellings*, 841 F.2d 600 (5th Cir. 1988) (holding professional liability policy provided coverage for suit by investors against attorney and law firm alleging violation of federal securities laws and RICO claims relating to investment offering because the attorney offered tax advice in conjunction with promoting the investment); *In re Est. of Corriea*, 719 A.2d 1234 (D.C. 1998) (holding professional liability policy covered claim against attorney for breaching fiduciary duty by failing to disclose conflict of interest and thus profiting off of transaction entered into by client); *Minn. Lawyers Mut. Ins. Co. v. Mazullo*, No. CIV. A. 09-830, 2010 WL 1568465, at *1 (E.D. Pa. Apr. 19, 2010) (finding, where term "professional services" was not defined in policy, it was ambiguous and thus could potentially cover suit naming insured law firm and arising from investment scheme despite the fact that no error or omission was alleged with respect to the work performed by the insured firm).

⁴³ *Rissman, Barrett, Hurt, Donahue & McClain, P.A. v. Westport Ins. Corp.*, No. 11-13827, 2012 WL 1889410 (11th Cir. May 25, 2012) (finding claim that attorney, acting as unlicensed real estate broker, made misrepresentations to real estate purchaser was not covered by professional liability policy); *cf. Cont'l Cas. Co. v. Cuda*, 715 N.E.2d 663, 668-69 (Ill. App. Ct. 1999) (finding suit by a partner in a real estate partnership against insured copartner (who was also claimant's attorney) regarding division of the real estate partnership was covered under professional liability policy because claimant alleged that the insured had breached a professional obligation to disclose any conflicts of interest and to withdraw from representation).

⁴⁴ *E.g.*, *Ill. State Bar Ass'n Mut. Ins. Co. v. Mondo*, 911 N.E.2d 1144, 1151 (Ill. App. Ct. 2009) (holding claim against insured attorney for recommending that client self-insure and hire an administrator that employed the attorney was not covered by professional liability policy); *Gandor v. Torus Nat'l Ins. Co.*, 140 F. Supp. 3d 141, 145-48 (D. Mass. 2015) (holding partner's conduct in failing to include associate under firm's policy did not fall within scope of coverage under legal malpractice policy); *Toms v. Laws. Mut. Liab. Ins. Co.*, 408 S.E.2d 206, 211 (N.C. Ct. App. 1991) (finding issue of material fact existed as to whether professional liability policy provided coverage for claim against insured attorney for failure to procure coverage for airplane).

under a malpractice policy.⁴⁵

Consistent with the idea that professional services must be performed for a client or customer (Section I.C.), legal malpractice policies usually do not apply to suits arising between partners of firms. As explained by the California Court of Appeals, “[b]usiness disputes between members of a firm or between employers and employees are generally not covered under professional liability insurance.”⁴⁶

⁴⁵ *Regas v. Cont'l Cas. Co.*, 487 N.E.2d 105 (Ill. App. Ct. 1985); *see also* *Nardella Chong, P.A. v. Medmarc Cas. Ins. Co.*, 642 F.3d 941 (11th Cir. 2011) (holding professional liability policy provided coverage for claim against law firm for erroneously disbursing funds from client trust account in reliance on forged cashier's check); *Cont'l Cas. Co. v. Burton*, 795 F.2d 1187 (4th Cir. 1986) (holding professional liability policy provided coverage for claim against insured attorney for absconding with client funds because insured acted in his professional capacity as a fiduciary or trustee when he accepted the claimant's funds for investment); *Cominos v. Freedom Specialty Ins. Co.*, No. 18-CV-02070-BLF, 2019 WL 1779577, at *1 (N.D. Cal. Apr. 23, 2019) (rejecting insurer's claim that coverage was not afforded under legal malpractice policy because claim purportedly concerned only the insured law firm's receipt of stolen funds, and finding that the legal advice that the client was entitled to the funds arose from the insured's professional services); *O'Brien & Wolf, LLP v. Liberty Ins. Underwriters, Inc.*, No. 11-3748, 2012 WL 3156802 (D. Minn. Aug. 3, 2012) (holding professional liability policy provided coverage for suit against law firm by client after firm gave away client's funds as a result of a scheme by a third party); *Stark & Knoll Co., L.P.A. v. ProAssurance Cas. Co.*, No. 12 CV 2669, 2013 WL 1411229, at *5 (N.D. Ohio Apr. 8, 2013) (same); *Lombardi, Walsh, Wakeman, Harrison, Amodeo & Davenport, P.C. v. Amer. Guar. & Liab. Ins. Co.*, 924 N.Y.S.2d 201 (N.Y. App. Div. 2011) (same); *Att'ys Liab. Prot. Soc'y, Inc. v. Whittington L. Assocs., PLLC*, 961 F. Supp. 2d 367, 371 (D.N.H. 2013) (same); *cf.* *Bradford & Bradford, P.A. v. Att'ys Liab. Prot. Soc'y, Inc.*, No. 09-cv-2981, 2010 WL 4225907 (D.S.C. Oct. 20, 2010) (holding claim against insured law firm arising from wire transfer was not covered under professional liability policy where claimant did not share attorney-client relationship with insured); *Alps Prop. & Cas. Ins. Co. v. Merdes & Merdes, P.C.*, No. 4:14-CV-00002-SLG, 2014 WL 7399105, at *3 (D. Alaska Dec. 29, 2014) (holding professional liability policy did not cover claim against insured law firm for fraudulently conveying funds to shield them from creditor/client); *Edwards v. Cont'l Cas. Co.*, 841 F.3d 360, 364 (5th Cir. 2016) (holding professional liability policy did not provide coverage for suit naming insured lawyer alleging that lawyer's client committed fraud in inducing a settlement because lawyer's only connection to the case was as an intermediary for conveying settlement funds and claimant did not allege any legal wrongful act by the attorney).

⁴⁶ *State Farm Fire & Cas. Co. v. Wier*, No. A125563, 2012 WL 5279790, at *8 (Cal. Ct. App. Oct. 26, 2012); *see also* *Transamerica Ins. Co. v. Sayble*, 239 Cal. Rptr. 201, 204 (Ct. App. 1987) (holding that an insured law firm's malpractice policy would not cover a claim by a former member of the firm who sued over whether he was an associate or a stakeholder for purposes of compensation (citing *Blumberg v. Guarantee Ins. Co.*, 238 Cal. Rptr. 36 (Ct. App. 1987))); *Roberts v. Fla. Laws. Mut. Ins. Co.*, 839 So. 2d 843 (Fla. Ct. App. 2003) (holding professional liability policy did not cover claim against firm by former law partner about how to divide money received from a lawsuit).

Following this reasoning, courts have typically held that such policies do not provide coverage for disputes regarding fee-splitting and/or referrals.⁴⁷

As addressed in Section I.C., courts have routinely rejected arguments that professional liability policies and exclusions apply only to claims brought by clients of the insured. Based on this, courts have consistently held that malicious prosecution claims, and other claims brought by non-clients, can arise out of the

⁴⁷ *E.g.*, *Garland, Samuel & Loeb, P.C. v. Am. Safety Cas. Ins. Co.*, 651 S.E.2d 177 (Ga. Ct. App. 2007) (holding professional liability policy did not provide coverage for suit against firm for alleged breach of a fee-splitting arrangement); *Gregg & Valby, LLP v. Great Am. Ins. Co.*, 316 F. Supp. 2d 505 (S.D. Tex. 2004) (holding professional liability policy did not provide coverage for insured law firm for claims alleging fee-splitting or kickback arrangements); *Elliott v. Cont'l Cas. Co.*, 949 So. 2d 1247 (La. 2007) (holding professional liability policy did not cover claim by another lawyer accusing insured of wrongfully referring a client without telling the claimant about a prescription barring the client's case); *Assurance Co. of Am. v. St. Paul Fire & Marine Ins. Co.*, No. CV 06-1432, 2008 WL 11510293, at *4 (W.D. Pa. Jan. 10, 2008) (holding professional services exclusion did not apply to commercial aspect of legal practice, including competition for clients and referrals); *Governo v. Allied World Ins. Co.*, 335 F. Supp. 3d 125 (D. Mass. 2018) (holding professional legal liability policy did not cover claim against insured law firm by departing attorneys regarding wages and benefits, but did cover claims regarding the release of client files and property and giving of notice to clients); *cf. Home Ins. Co. v. Bullard*, 850 F.2d 692 (6th Cir. 1988) (holding professional liability policy provided coverage for law firm for suit by former associate for refusal to split legal fees in agreed-upon manner; allegations distinguished from disputes over division of fees because it involved representation of clients through diversion techniques); *Shore Chan Bragalone Depumpo LLP v. Greenwich Ins. Co.*, No. 3:11-CV-0891, 2012 WL 1205159 (N.D. Tex. Apr. 11, 2012) (holding insured law firm's professional liability policy provided coverage for claim because insured performed legal services in settling claims as part of its breach of referral agreement); *Pac. Ins. Co. v. Burnet Title, Inc.*, No. CIV.02-2767(JRT/FLN), 2003 WL 22283355, at *6 (D. Minn. Sept. 24, 2003) (holding realtor's professional liability policy provided coverage for claims that referrals made by insured did not comply with Real Estate Settlement Procedures Act); *Napoli, Kaiser & Bern, LLP v. Westport Ins. Corp.*, 295 F. Supp. 2d 335 (S.D.N.Y. 2003) (holding legal professional liability policy covered claim by law firm from which the insured had been referred clients because insured was not alleged simply to be withholding money owed to referring firms for referrals, but rather to have conducted services to referred clients in such a way as to lower settlements (resulting in lower referral fees)); *Arzadi v. Evanston Ins. Co.*, No. 2:17-CV-5470-SDW-CLW, 2018 WL 747379, at *3 (D.N.J. Feb. 7, 2018) (holding professional liability policy provided coverage with respect to claim alleging that insured attorney referred personal injury clients to certain chiropractic clinics for treatment in exchange for a reciprocal referral for representation in bringing a personal injury claim, finding duty to defend triggered because in the course of the scheme, the insured attorney advised clients as to how to proceed with their claims). *Contra Lyons v. Am. Home Assur. Co.*, 354 N.W.2d 892 (Minn. Ct. App. 1984) (holding professional liability policy provided coverage for claim against attorney brought by former partners for recovery of fees under arbitration agreement).

professional services that the insured attorney performs for a client.⁴⁸ However, that reasoning presumes that the allegedly wrongful prosecution was brought on behalf of a client, and in *Johnson v. First State Insurance Co.*, the California Court of Appeals reasoned that a professional liability policy would not cover a claim arising out of an allegedly malicious lawsuit that the insured attorney filed on his own behalf.⁴⁹

⁴⁸ *E.g.*, *Harad v. Aetna Cas. & Sur. Co.*, 839 F.2d 979 (3d Cir. 1988) (applying professional services exclusion to a malicious prosecution claim against the insured attorney, reversing the lower court's determination that such an exclusion applied only to claims brought by clients of the insured); *Vogelsang v. Allstate Ins. Co.*, 46 F. Supp. 2d 1319 (S.D. Fla. 1999) (applying professional services exclusion to malicious prosecution claim against insured attorney by nonclient); *Hartford Cas. Ins. Co. v. Conrad & Scherer LLP*, No. 15-61360-CIV, 2015 WL 13260391, at *5 (S.D. Fla. Dec. 17, 2015) (holding professional services exclusion barred claim alleging that insured law firm engaged in a media campaign against the nonclient claimant intended to pressure the claimant into a settlement via false allegations); *Murray v. Royal All. Assocs., Inc.*, No. CV 06-617-JJB, 2008 WL 11408432, at *3 (M.D. La. Aug. 29, 2008) (holding attorney's professional liability policy was not limited to claims brought by clients); *Westport Ins. Corp. v. Cotton Schmidt, LLP*, 605 F. Supp. 2d 796 (N.D. Tex. 2009) (holding professional liability policy provided coverage for claim against insured attorney brought by opposing party for wrongfully obtaining a default judgment against the claimant who was not a client of the insured); *Boggs v. Camden-Clark Mem'l Hosp. Corp.*, 693 S.E.2d 53 (W. Va. 2010) (applying professional services exclusion to malicious prosecution claim filed against insured attorney by nonclient); *Allstate Ins. Co. v. Punturo*, 407 F. Supp. 3d 700 (W.D. Mich. 2019) (rejecting argument that professional services exclusion in general liability policy applied only to claims of malpractice by clients of the insured attorney, and applying the exclusion to defamation suit against insured law firm filed by opposing party in underlying litigation); *Am. Nat. Fire Ins. Co. v. Borns*, No. 2:06-CV-224, 2007 WL 2743498, at *5 (N.D. Ind. Sept. 18, 2007) (holding legal malpractice insurer required to defend insured attorney accused of mailing a complaint containing false allegations to customers of the defendant); *Harbison v. Am. Motorists Ins. Co.*, 244 F. App'x 123, 125 (9th Cir. 2007) (holding professional liability policy provided coverage for claim against insured attorney arising out of defamatory statements that the insured allegedly made about co-counsel while providing legal advice to the client); *cf. Sentinel Ins. Co., Ltd. v. Cogan*, 202 F. Supp. 3d 831 (N.D. Ill. 2016) (holding defamation claim arising out of insured attorney's e-mail to court accusing opposing firm's attorney of ethical and professional misconduct did not trigger professional services exclusion because reporting unethical behavior was a professional obligation rather than a service performed for a client).

⁴⁹ *Johnson v. First State Ins. Co.*, 33 Cal. Rptr. 2d 163 (Ct. App. 1994). *Cf. Home Ins. Co. v. Greenfield & Chimicles*, No. 97-7797, 1999 WL 286440, at *8 (E.D. Pa. May 5, 1999) (finding coverage under a professional liability policy for a claim that an insured attorney filed lawsuits purportedly on behalf of parties who had not consented, the court found that the attorney had been rendering a service, albeit on behalf of parties who did not consent to it).

B. Medical Professionals

At the extremes, there are some claims that are clearly outside of the scope of professional medical services, even where the insured is a medical provider. For example, in *Guidry v. Garrett*, the Louisiana Court of Appeals unsurprisingly affirmed a decision that the damages caused by an insured dentist's shooting spree were not covered by his malpractice policy.⁵⁰ However, sometimes the result is less intuitive. For example, in *Woo v. Fireman's Fund Insurance Co.*, an insured dentist sued for coverage under his malpractice policy for a claim made by his former employee over a practical joke.⁵¹ Specifically, the dentist had surgically implanted boar tusks in the mouth of the employee while she was anesthetized and undergoing oral surgery. Reversing the lower courts, an *en banc* panel of the Washington Supreme Court not only found coverage under the malpractice policy, but also awarded bad faith damages to the insured dentist.⁵²

A more common claim is one which arises out of the insured medical provider's prescriptions or recommended courses of treatment, and these claims typically arise out of the insured's professional services. For example, the U.S. District Court for the Middle District of Florida held in *Nationwide Mutual Fire Insurance Co. v. Creations Own Corp.* that a professional services exclusion barred coverage for a claim that the insured medical practice prescribed medically harmful dietary supplements sold by the insured.⁵³ However, even these types of

⁵⁰ *Guidry v. Garrett*, 591 So. 2d 806 (La. Ct. App. 1992) (rejecting insured's argument that his abusive prescription of drugs to himself constituted medical malpractice from which the shooting arose); *see also* *Cent. Dakota Radiologists, P.C. v. Cont'l Cas. Co.*, 769 F. Supp. 323 (D.N.D. 1991) (finding professional liability policy did not provide coverage for insured medical services professional corporation sued for business torts including antitrust violations, tortious interference, and intentional infliction of emotional distress).

⁵¹ *Woo v. Fireman's Fund Ins. Co.*, 164 P.3d 454 (Wash. 2007).

⁵² *Id.* at 469 (J.M. Johnson, J., dissenting) ("Today's majority decision rewards Dr. Woo's obnoxious behavior and allows him to profit handsomely, receiving a total of \$750,000, triple the damages paid to the real victim of his intentional offensive and likely tortious conduct.").

⁵³ *Nationwide Mut. Fire Ins. Co. v. Creations Own Corp.*, No. 611CV1054ORAL28DAB, 2012 WL 12895642 (M.D. Fla. Nov. 5, 2012), *aff'd sub nom.* *Nationwide Mut. Fire Ins. Co. v. Creation's Own Corp.*, 522 F. App'x 589 (11th Cir. 2013); *see also* *Katerndahl v. State Farm Fire & Cas. Co.*, 961 S.W.2d 518 (Tex. App. 1997) (holding professional services exclusion precluded coverage for claims by the insured's wife that the insured had as her physician prescribed addictive drugs); *Pac. Indem. Co. v. Linn*, 766 F.2d 754 (3d Cir. 1985) (holding professional liability policies provided coverage for suits against insured osteopath by claimants who followed diet prescribed in insured's book; ambiguously-worded professional liability exclusions in other policies did

not bar coverage); *Med. Malpractice Joint Underwriting Ass'n v. Lyons*, No. PC 00-5583, 2004 WL 3190049 (R.I. Super. Ct. Dec. 17, 2004) (holding professional liability policy provided coverage for rendering, or failure to render, appropriate treatment for patient's diabetes and infection); *Westfield Ins. Co. v. Orthopedic & Sports Med. Ctr. of N. Ind., Inc.*, 247 F. Supp. 3d 958, 978 (N.D. Ind. 2017) (holding claim for injection of steroid drug which had been contaminated barred by professional services exclusion, rejecting argument that selection of supplier that provided the drug was not a professional service); *Cont'l Cas. Co. v. Physicians Weight Loss Cntr. of Am., Inc.*, 61 F. App'x 841 (4th Cir. 2003) (holding professional liability policy provided coverage for claim against insured weight loss center that overcharged members for weight loss medication and breached fiduciary duties by refusing to write prescriptions to buy same medication for lower costs); *Rosalind Franklin Univ. of Med. & Sci. v. Lexington Ins. Co.*, 8 N.E.3d 20 (Ill. App. Ct. 2014) (holding professional liability policy covered claim against insured hospital arising out of decision to discontinue experimental vaccine program); *Corwin v. State Farm Fire & Cas.*, No. B155114, 2003 WL 178857, at *5 (Cal. Ct. App. Jan. 28, 2003) (holding professional services exclusion precluded coverage for suit against out-patient surgical facility arising from death caused by negligently performed surgery and post-operative care); *Harris Methodist Health Sys. v. Emps. Reinsurance Corp.*, No. 3:96-CV-0054-R, 1997 WL 446459, at *5 (N.D. Tex. July 25, 1997) (holding professional liability policy covered claims by patients of insured hospital who during the course of treatment contracted hepatitis C due to exposure to infected surgical scrub technician); *Mason v. Liberty Mut. Ins. Co.*, 370 F.2d 925, 926 (5th Cir. 1967) (holding professional services exclusion barred coverage for insured hospital for claim by patient who suffered injury as a result of an injection rendered by a student nurse); *Platte River Ins. Co. v. Seminole Health Ctr.*, No. Civ. 09-213, 2010 WL 3834392 (E.D. Okla. Sept. 30, 2010) (holding professional services exclusion precluded coverage for suit against doctor for failing to communicate results of x-ray to patient and recommending CT scan); *Duncanville Diagnostic Ctr., Inc. v. Atl. Lloyd's Ins. Co. of Tex.*, 875 S.W.2d 788 (Tex. App. 1994) (holding professional services exclusion barred coverage for claim against insured medical center by estate of patient who died as a result of overdose of chloral hydrate due to the insured's failure to obtain a proper medical diagnosis); *Ratliff v. Emp'rs Liab. Assur. Corp. Ltd.*, 515 S.W.2d 225 (Ky. Ct. App. 1974) (holding professional services exclusion applied to claim against hospital for failure of nurses to recognize the patient's debilitated condition as a result of alcoholism and administration of drugs by the hospital); *Am. Econ. Ins. Co. v. Jackson*, 476 F.3d 620 (8th Cir. 2007) (holding professional services exclusion precluded coverage for nurse's failure to turn on air conditioning in nursing home at which she worked, which led to the death of a resident; finding that determination of whether to turn on air conditioning drew upon insured's knowledge and experience as a nurse); *Millers Cas. Ins. Co. of Tex. v. Flores*, 876 P.2d 227 (N.M. 1994) (holding professional services exclusion precluded coverage for claim against physician for injection of contraindicated estrogen); *Am. Serv. Ins. Co. v. OnTime Transp., LLC*, No. 5:17-CV-01120-JMC, 2019 WL 3972820, at *10 (D.S.C. Aug. 22, 2019) (holding professional services exclusion applied to allegations that the insured failed to diagnose the claimant's diabetes or to assess symptoms); *Travelers Indem. Co. of Conn. v. Bowling Green Pro. Assocs., PLC*, 440 F. Supp. 2d 652 (W.D. Ky. 2006) (holding professional liability policy provided coverage for claim that insured methadone clinic negligently administered methadone thereby causing

claims can be intertwined with allegations of conduct which does not arise out of professional services. For example, in *Utica National Insurance Co. of Texas v. American Indemnity Co.*, the Texas Supreme Court held that a professional services exclusion did not relieve a CGL insurer of its obligation to defend a lawsuit against an insured physician for injecting the plaintiff with a contaminated drug. The plaintiff had alleged that the drug had been contaminated due to the insured's failure to properly secure the container they were kept in to prevent tampering, and the court held that negligence in securing the drugs did not arise out of professional services.⁵⁴

Another common claim against medical professionals involves slip-and-falls and similar types of accidents which occur during the course of receiving treatment. Courts often have found that such claims arise out of professional services where the accident would not have occurred but for an error in professional judgment. For example, in *State Farm Florida Insurance Co. v.*

the patient's fatal car accident), *vacated and remanded sub nom. Travelers Indem. Co. v. Bowling Green Pro. Assocs., PLC*, 495 F.3d 266 (6th Cir. 2007); *Tankersley v. Ins. Co. of N. Am.*, 216 So. 2d 333 (La. Ct. App. 1968) (holding claim for failure of nurses to observe worsened condition of patient and to call doctor after being notified of patient's condition and after being requested to call the doctor fell within professional services exclusion); *Multnomah Cnty. v. Or. Auto. Ins. Co.*, 470 P.2d 147 (Or. 1970) (applying professional services exclusion to claim by prisoner against county arising from medical technician's failure to provide insulin where technician did not have professional competence to know whether it was required); *Shelter Ins. Cos. v. Hildreth*, 255 F.3d 921 (8th Cir. 2001) (applying professional services exclusion in naprapath's business liability policy to malpractice action brought by patient alleging that insured injured his spine while he was administering massage and manipulation to patient's spine); *Am. Econ. Ins. Co. v. Schoolcraft*, 551 F. Supp. 2d 1235 (D. Colo. 2007) (holding professional services exclusion applied to patients' claims against insured physician for failing to screen for cystic fibrosis during in vitro implantation process); *Jenkins v. CLJ Healthcare, LLC*, 481 F. Supp. 3d 1313, 1325 (holding professional services exclusion applied to wrongful death claim arising from liposuction procedure performed by insured); *cf. Burton v. Choctaw Cnty.*, 730 So. 2d 1 (Miss. 1999) (finding a genuine issue of material fact existed as to whether bathing of resident of nursing home constituted professional services under exclusion).

⁵⁴ *Utica N'tl. Ins. Co. of Tex. v. Am. Indem. Co.*, 141 S.W.3d 198, 202 (Tex. 2004); *see also Sentinel Ins. Co. v. Monarch Med Spa, Inc.*, 105 F. Supp. 3d 464 (E.D. Pa. 2015) (applying professional services exclusion to claim against insured spa made by patients who contracted infections during the course of liposuction; rejecting arguments that misrepresentations regarding safety fell outside the scope of the exclusion); *cf. Perzik v. St. Paul Fire & Marine Ins. Co.*, 279 Cal. Rptr. 498 (Ct. App. 1991) (finding professional liability policy did not provide coverage for criminal charges of illegally dispensing steroids and other drugs, holding "[p]rofessional liability, in common parlance, refers to malpractice liability; it is quite distinct from criminal liability. [The Insured] could not reasonably have understood the phrase to include criminal sanctions.").

Campbell, the Florida Court of Appeals held that a professional liability exclusion applied to a claim by a patient who fell while medical staff were positioning her foot for an x-ray, reasoning that the act of placing the foot was causally connected to the taking of the x-ray.⁵⁵ But where professional judgment is not implicated, courts are less inclined to find that such bodily injury claims arise out of professional services, even if they occur in the context of receiving medical treatment. For example, in *Duke University v. St. Paul Fire & Marine Insurance Co.*, the North Carolina Court of Appeals held that a professional services exclusion did not apply to a claim by a patient who fell from a dialysis chair while receiving treatment because the failure by the insured's employee to secure the casters was a manual act rather than a mental act and did not require special skill or training.⁵⁶ Consistent with this approach, courts often have declined to find that claims arise from professional services where they are based on the claimant being

⁵⁵ *State Farm Fla. Ins. Co. v. Campbell*, 998 So. 2d 1151 (Fla. Ct. App. 2008); *see also Bernthal v. Aetna Cas. & Sur. Co.*, 491 N.W.2d 236, 236 (Mich. Ct. App. 1992) (holding professional services exclusion encompassed a suit against an optometrist for injuries sustained by a patient who fell from examining chair), *ordered not precedential*, 514 N.W.2d 465 (Mich. 1994); *Ohio Sec. Ins. Co. v. Premier Pain Specialists, LLC*, No. 17 C 5937, 2018 WL 3474537 (N.D. Ill. July 19, 2018) (holding professional services exclusion barred coverage for claim that recovery facility failed to prevent claimant's fall in recovery room while claimant was recovering from anesthesia because the creation of a safe recovery space relied on professional judgment); *Antles v. Aetna Cas. & Sur. Co.*, 34 Cal. Rptr. 508 (Ct. App. 1963) (holding professional services exclusion barred coverage for claim against insured chiropractor by patient burned by heat lamp which fell on him during the course of treatment because evidence showed that adjustment of the height of the lamp from the patient and length of time of treatment required plaintiff's supervision in his capacity as a chiropractor); *Am. Rehab. & Physical Therapy, Inc. v. Am. Motorists Ins. Co.*, 829 A.2d 1173 (Pa. Super. Ct. 2003) (holding professional services exclusion barred coverage for claim against insured physical therapy clinic for burns to and scarring of patient's arm from contact with heating pad during physical therapy session), *rev'd*, 849 A.2d 1202 (Pa. 2004).

⁵⁶ *Duke Univ. v. St. Paul Fire & Marine Ins. Co.*, 386 S.E.2d 762 (N.C. 1990); *see also Feszchak v. Pawtucket Mut. Ins. Co.*, 316 Fed. App'x 181 (3d Cir. 2009) (holding professional services exclusion did not apply to claim against medical center arising out of injuries sustained by patient while riding a stationary exercise bicycle at center); *D'Antoni v. Sara Mayo Hosp.*, 144 So. 2d 643, 645 (La. Ct. App. 1962) (finding hospital's failure to install guardrails on bed as ordered by doctor was ministerial and did not arise out of professional services (unlike doctor's order to install the guardrails)); *cf. Russell v. Eye Assocs. of Ne. La.*, 74 So. 3d 230 (La. Ct. App. 2011) (finding genuine issue of material fact existed as to whether professional liability policy provided coverage for injuries sustained by patient in a fall when eye-care provider attempted to have patient move from examination chair to wheelchair); *Am. Cas. Co. v. Hartford Ins. Co.*, 479 So. 2d 577 (La. Ct. App. 1985) (holding professional liability insurer and general liability insurer both were liable for injuries of patient who fell in physician's office).

injured in the course of being transported by medical professionals.⁵⁷

Where claims against medical professionals arise from a clerical error, courts have more frequently found that they arise out of professional services where the error causes bodily harm. For example, in *Northern Insurance Co. v. Superior Court*, the California Court of Appeals held that a professional services exclusion precluded coverage for a claim against a physician and a clerical employee who had confused patient's records and mistakenly performed an abortion on the patient. The court found that the fact that the error had been made by a non-

⁵⁷ *E.g.*, *Am. Med. Response v. N.H. Ins. Co.*, No. CV 950373810, 1997 WL 139452 (Conn. Super. Ct. Mar. 10, 1997) (holding that ambulance service was not a professional service but was "primarily manual" because it did not "require knowledge of an advanced type in a field of learning customarily acquired after a long period of specialized intellectual instruction"); *Nat'l Cas. Co. v. W. World Ins. Co.*, 669 F.3d 608 (5th Cir. 2012) (holding professional services exclusion did not preclude coverage for claim against ambulance company for injuries sustained by patient while being loaded into ambulance); *Gulf Ins. Co. v. Gold Cross Ambulance Servs. Co.*, 327 F. Supp. 149 (W.D. Okla. 1971) (holding professional services exclusion did not apply to suit against insured's employee's failure to transport patient to hospital in an ambulance); *Hartford Fire Ins. Co. v. St. Paul Fire & Marine Ins. Co.*, 606 F. Supp. 2d 602 (E.D.N.C. 2009) (holding professional liability policy did not provide coverage for claim against medical facility for claim arising out of injury to patient injured while riding in vehicle driven by insured's employee); *Laboss Transport. Servs., Inc. v. Glob. Liberty Ins. Co. of N.Y.*, 208 F. Supp. 3d 1268 (S.D. Fla. 2016) (finding driver of non-emergency vehicle transporting disabled passengers was not rendering "professional services" when his driving caused an injury to a passenger); *Jefferson Ins. Co. of N.Y. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 677 N.E.2d 225 (Mass. App. Ct. 1997) (holding professional services exclusion did not bar coverage for claim that insured ambulance company had negligently delayed in responding to an emergency call); *cf.* *W. World Ins. Co. v. Empire Fire & Marine Ins. Co.*, No. 7:06-217, 2006 WL 3337427 (D.S.C. Nov. 18, 2006) (holding claim against ambulance company arising from patient's fall off a stretcher was barred under professional services exclusion because "securing and transporting an individual on a rolling stretcher requires specialized knowledge and so is part of the 'professional services' provided by an ambulance service"); *Md. Cas. Co. v. Fla. Atl. Orthopedics, P.L.*, 771 F. Supp. 2d 1328, 1335 (S.D. Fla. 2011) (holding professional services exclusion barred coverage for a claim that medical facility's elevator was too small to transport a stretcher), *aff'd*, 469 F. App'x 722 (11th Cir. 2012); *Records v. Aetna Life & Cas. Ins.*, 683 A.2d 834 (N.J. Super. Ct. App. Div. 1996) (holding medical malpractice policy provided coverage to insured physician for claim by nurse who suffered injuries as the result of an argument over whether to transfer a patient); *Carnes Funeral Home, Inc. v. Allstate Ins. Co.*, 509 F. Supp. 3d 908, 921 (S.D. Tex. 2020) (finding that ensuring the decedent was properly secured in a specially equipped removal vehicle before the decedent was transported is a professional service under a professional liability policy issued to a funeral home director). *Contra* *Legion Indem. Co. v. Carestate Ambulance, Inc.*, 152 F. Supp. 2d 707 (E.D. Pa. 2001) (holding professional services exclusion barred coverage for claim that ambulance service did not timely respond to emergency).

physician did not relieve the insured doctor of his ultimate professional responsibility.⁵⁸ Courts likewise have been resistant to characterize decisions as administrative rather than professional where a claim arises out of administrative guidelines which determine the care given. For example, in *LCS Corr. Servs., Inc. v. Lexington Ins. Co.*, the Fifth Circuit held that a professional services exclusion applied to a claim against insured prison officials for refusal to provide an inmate with prescribed medications.⁵⁹ The court rejected the insured's contention that the insured's global practice of depriving inmates of particular medical care was administrative rather than professional.

With respect to claims against medical professionals for failure to safeguard their patients from third parties or self-harm, courts have generally found that professional services exclusions do not apply to such claims. For example, in *Buckeye Ranch, Inc. v. Northfield Insurance Co.*, the Ohio Court of Common Pleas held that a professional services exclusion did not apply to a claim against an insured treatment facility for assigning a nine-year old to the same room as an aggressive fifteen-year-old who sexually assaulted him. The court reasoned that room assignment did not arise out of the insured's professional service.⁶⁰ Similarly, the U.S. District Court for the Northern District of West Virginia held in *Johnson v. Acceptance Insurance Co.* that a professional services exclusion did not apply to a claim against an insured group home for failing to supervise the

⁵⁸ *N. Ins. Co. v. Sup. Ct.*, 154 Cal. Rptr. 198 (Ct. App. 1979); *see also* *Alpha Therapeutic Corp. v. St. Paul Fire & Marine Ins. Co.*, 890 F.2d 368 (11th Cir. 1989) (holding professional services exclusion applied to clerical error made by provider of human plasma which resulted in failed testing of plasma); *Est. of Tinervin v. Nationwide Mut. Ins. Co.*, 23 So. 3d 1232, 1234 (Fla. Dist. Ct. App. 2009) (holding professional services exclusion barred coverage for claim for wrongful death arising from insured doctor's failure to see test results due to misfiling by administrative employee); *Evanston Ins. Co. v. Clark Cnty.*, No. C10-5625 RBL, 2011 WL 5563284, at *4 (W.D. Wash. Nov. 14, 2011) (applying professional services exclusion to insured prison's failure to mark box on inmate's medical form indicating that he was suicidal, reasoning "[t]he diagnosis, charting and communicating with personnel who are medical (or non-medical) are all medical services which are vital to the mission of taking care of a patient"). *Contra* *Tyler v. Touro Infirmary*, 223 So. 2d 148 (La. 1969) (holding professional services exclusion did not apply to malpractice claim against hospital by surgery patient for leaving sponges inside, finding error by nurses in counting sponges was an administrative act rather than a professional service), *overruled on other grounds by* *Garlington v. Kingsley*, 289 So. 2d 88 (La. 1974).

⁵⁹ *LCS Corr. Servs., Inc. v. Lexington Ins. Co.*, 800 F.3d 664, 671 (5th Cir. 2015).

⁶⁰ *Buckeye Ranch, Inc. v. Northfield Ins. Co.*, 839 N.E.2d 94 (Ohio Ct. C.P. 2005).

claimant and prevent him from being struck by a car upon leaving the premises.⁶¹

Courts have also frequently held that claims arise out of professional services where they allege improper hiring, training, or supervision of nurses and non-physicians. For example, in *Premier Medical Management Systems, Inc. v. Truck Insurance Exchange*, the California Court of Appeals held that a claim against an insured for failing to assess whether a doctor who was hired had been properly credentialed fell within the scope of a professional services exclusion.⁶² Similarly,

⁶¹ *Johnson v. Acceptance Ins. Co.*, 292 F. Supp. 2d 857 (N.D.W. Va. 2003); *see also* *Guar. Nat'l Ins. Co. v. N. River Ins. Co.*, 909 F.2d 133 (5th Cir. 1990) (holding professional services exclusion did not bar coverage for a claim that a hospital negligently failed to secure windows in a psychiatric unit, allowing patient to commit suicide); *Fire Ins. Exch. v. Miller*, No. 2008-019554, 2011 WL 2507883 (Mich. Ct. App. June 23, 2011) (holding professional services exclusion did not preclude coverage for claim over death of resident in group home; while insured's failure to supervise played a role in the death, court could not say that the death "resulted from" the failure to render professional service); *Rodriguez-Vicente v. Hogar Bella Union, Inc.*, 106 F. Supp. 3d 283 (D.P.R. May 29, 2015) (holding professional services exclusion did not apply to a claim against an assisted living facility for neglect of patients because no professional or specialized knowledge was required to provide the patients with food and water or to seek medical attention for their deteriorating health); *Scottsdale Ins. Co. v. Lock Towns Cmty. Mental Health Ctr., Inc.*, 442 F. Supp. 2d 1287 (S.D. Fla. 2006) (holding professional services exclusion did not apply to claim against mental health center for alleged failure to keep claimant safe from abusive staff); *cf. Granite State Ins. Co. v. Bottoms*, 415 S.E.2d 131 (Va. 1992) (finding professional services exclusion was ambiguous and did not preclude coverage for claim against home for disabled persons that left claimant alone in bathroom causing him to be scalded). *Contra Merchants Mut. Ins. Co. v. City of Concord*, 374 A.2d 945, 949–50 (N.H. 1977) (finding professional services exclusion would apply to wrongful death claim against county by estate of inmate who committed suicide with respect to alleged failure to provide medical and psychiatric care, but would not apply to alleged failure to supervise claimant); *Clark Cnty.*, 2011 WL 5563284, at *4 (applying professional services exclusion applied to insured prison's failure to mark box on inmate's medical form indicating that he was suicidal, reasoning "[t]he diagnosis, charting and communicating with personnel who are medical (or non-medical) are all medical services which are vital to the mission of taking care of a patient").

⁶² *Premier Med. Mgmt. Sys., Inc. v. Truck Ins. Exch.*, No. B171402, 2005 WL 15428, at *6 (Cal. Ct. App. Jan. 3, 2005); *see also Md. Cas. Co.*, 771 F. Supp. 2d at 1335 (holding professional services exclusion applied to claim against insured orthopedics clinic for negligent hiring because "[h]iring medical staff . . . is an intricate part of the provision of medical services"); *Assurance Co. of Am. v. Am. Registry of Radiologic Technologists*, 64 F. Supp. 3d 1289 (D. Minn. 2014) (applying professional services exclusion to claim against insured for negligent certification of a cardiovascular technician whose misconduct resulted in multiple patients contracting Hepatitis C); *Gray v. Arch Specialty Ins. Co.*, 149 So. 3d 503 (Miss. 2014) (holding professional services exclusion precluded coverage for claim against insured paramedics company for negligent hiring and training of its

in *Colony Insurance Co. v. Suncoast Medical Clinic, LLC*, the Middle District of Florida held that a professional services exclusion applied to a claim where a medical clinic failed to place adequate policies, procedures, staff, and assistive technology to ensure performance of diagnostic tests.⁶³

employees); *Rayborn v. State Farm Fire & Cas. Co.*, No. CV-05-05479RLB, 2006 WL 162646 (W.D. Wash. Jan. 20, 2006) (holding professional services exclusion barred claim against insured physical therapy clinic which assigned claimant to someone fraudulently pretending to be a doctor licensed in psychology); *Am. Rehab. & Physical Therapy, Inc. v. Am. Motorists Ins. Co.*, 829 A.2d 1173 (Pa. Super. Ct. 2003) (applying professional services exclusion to alleged liability for training, supervising, and monitoring employees of insured physical therapy clinic), *rev'd*, 849 A.2d 1202 (Pa. 2004); *cf. Visiting Nurse Ass'n of Greater Philadelphia v. St. Paul Fire & Marine Ins. Co.*, 65 F.3d 1097, 1104 (3d Cir. 1995) (holding professional liability policy did not provide coverage for insured medical services provider for anti-trust claim alleging that insured paid the salaries of hospitals' discharge planners, who held themselves out as employees of their respective hospitals, causing the hospitals to refer virtually all of their home care patients to the insured).

⁶³ *Colony Ins. Co. v. Suncoast Med. Clinic, LLC*, 726 F. Supp. 2d 1369 (M.D. Fla. 2010); *see also Atl. Mut. Ins. Co. v. Gula*, 926 A.2d 449 (Pa. Super. Ct. 2007) (holding professional services exclusion precluded coverage for claim against insured workers' compensation claims manager alleging delayed approval of diagnostic test and failure to properly supervise physician who recommended against surgery; insured's services required training and not merely administrative functions); *Millers Cas. Ins. Co. of Tex. v. Flores*, 876 P.2d 227 (N.M. 1994) (holding professional services exclusion precluded coverage for claim against physician for injection of contraindicated estrogen given by assistant; claim deemed to arise from physicians failure to properly supervise or train the assistant); *N. Am. Specialty Ins. Co. v. Royal Surplus Lines Ins. Co.*, 541 F.3d 552, 561–62 (5th Cir. 2008) (holding professional liability policy covered claim that insured nursing home was underbudgeted and understaffed because “the only way to know whether a nursing home is properly staffed is by resort to professional standards of care”); *Md. Cas. Co.*, 771 F. Supp. 2d at 1335 (applying professional services exclusion to claim against insured orthopedics clinic for failure to implement appropriate emergency procedures because “implementing appropriate emergency procedures is an intricate part of the provision of medical services”); *Alayon Del Valle v. Kenyon*, No. CIV. 06-2105CCC, 2009 WL 3299373, at *1 (D.P.R. Oct. 9, 2009) (holding professional services exclusion precluded coverage for claim against medical director for failure to establish adequate protocols for screening patients for LASIK); *cf. Allstate Ins. Co. v. Disability Servs. of the Sw. Inc.*, 400 F.3d 260 (5th Cir. 2005) (applying professional services exclusion to claim against insured provider of home care services for failure to provide adequate communication device to quadriplegic patient, leading to patient's death); *Am. Serv. Ins. Co. v. OnTime Transp., LLC*, No. 5:17-CV-01120-JMC, 2019 WL 3972820, at *11 (D.S.C. Aug. 22, 2019) (holding professional services exclusion did not encompass allegations that insured failed to train, educate and/or supervise its employees on how to “render proper non-medical care”). *Contra Clark Cnty.*, 2011 WL 5563284, at *5 (holding professional services exclusion did not apply to allegations in wrongful death claim that

As with legal malpractice claims, the claim does not need to be brought by a client/patient for a professional services policy to constitute “professional services.” For example, in *St. Paul Fire & Marine Insurance Co. v. Medical Protective Co. of Fort Wayne, Indiana*, a technologist working for an insured physician sued when the technologist injured his back while helping to lift a patient who had fallen off the table during surgery. The Eleventh Circuit Court of Appeals held that the suit was covered by the insured’s professional liability policy because, despite the fact that the technologist was not a patient, the claim nonetheless arose from the insured’s services to the actual patient.⁶⁴

However, while claims by employees and other third parties can be deemed to arise from professional services where the claim arises in the course of treating a patient, disputes between insured medical professionals and co-workers

insured medical services provider failed to develop and maintain an administrative and operational policy manual because such policies were administrative in nature).

⁶⁴ *St. Paul Fire & Marine Ins. Co. v. Med. Protective Co. of Fort Wayne, Ind.*, No. 2:04CV0391-FTM, 2006 WL 3544817, at *2 (M.D. Fla. Dec. 8, 2006), *aff’d*, 257 F. App’x 232 (11th Cir. 2007); *see also* *Royal Ins. Co. of Am. v. Med. Eval. Specs.*, No. 95-75412, 1996 WL 33406032 (E.D. Mich. Oct. 10, 1996) (applying professional services exclusion to a claim against the insured medical evaluation specialists, holding that it made no difference that the independent medical examination was performed at the request of someone other than patient); *Administaff, Inc. v. Am. Int’l Specialty Lines Ins. Co.*, 75 F. App’x 239 (5th Cir. 2003) (holding professional liability policy provided coverage to insured company providing human resources and personnel management for misrepresentations made to health insurer, finding claim did not have to be made by customers of insured); *Cincinnati Ins. Co. v. Quorum Mgmt. Corp.*, 186 F. Supp. 3d 1307, 1321 (M.D. Fla. 2016) (rejecting argument that professional services exclusion did not apply to claims against pharmacist for malpractice in treating a horse as opposed to a human); *Records v. Aetna Life & Cas. Ins.*, 683 A.2d 834 (N.J. Super. Ct. App. Div. 1996) (holding medical malpractice policy provided coverage to insured physician for claim by nurse who suffered injuries as the result of an argument over whether to transfer a patient); *cf. Com. Ins. Co. v. Mass. Med. Pro. Ins. Assoc.*, No. 945462F, 1995 WL 809990 (Mass. Super. Ct. July 26, 1995) (holding professional services exclusion did not preclude coverage for suit against surgeon for cutting the hand of a nurse during surgery because the exclusion contemplated a suit brought by a patient; professional services policy did not provide coverage); *Travelers Indem. Co. of Conn. v. Bowling Green Pro. Assocs., PLC*, 440 F. Supp. 2d 652 (W.D. Ky. 2006) (holding professional liability policy did not provide coverage to insured methadone clinic for claim by estate of motorist killed in car accident allegedly caused by the insured’s negligent administration of methadone to other driver, finding policy explicitly covered only claims by patients of the insured), *vacated*, 495 F.3d 266 (6th Cir. 2007); *Brooks v. St. Tammany Hosp. Found.*, No. 2009 CA 0859, 2009 WL 4983808 (La. Ct. App. Dec. 23, 2009) (holding professional services exclusion did not encompass claim against hospital by prospective employee for injury sustained during pre-employment examination because examination could have been performed by an unskilled or untrained person).

otherwise will not typically be deemed to arise out of professional services. For example, in *McCarthy v. State Farm Fire & Cas. Co.*, No. CV-10-334, 2010 WL 3938294 (D. Or. Oct. 5, 2010) the District of Oregon held that a professional liability policy did not cover a claim against the insured veterinarian that he disparaged staff, verbally threatened them, and made unreasonable demands of them.⁶⁵

Lastly, the claims described above involved insureds who were some type of medical professional. Courts have frequently found that claims for failure to provide medical care do not arise from professional services where the insured is not a medical professional. For example, in *Employers Reinsurance Corp. v. Newcap Insurance Co.*, the District of Kansas held that a professional healthcare services policy did not cover a security guard's decision to call 911 rather than providing healthcare services to claimant because the guards were not trained to provide healthcare services.⁶⁶

⁶⁵ *McCarthy v. State Farm Fire & Cas. Co.*, No. CV-10-334-ST, 2010 WL 3938294 (D. Or. Oct. 5, 2010); *see also* *Block v. Fireman's Fund Ins. Co.*, 609 So. 2d 763 (Fla. Ct. App. 1992) (holding professional liability policy did not cover claim against veterinarian by employee for decision as to when employee must return to work after sick leave and whether protective gloves should be provided); *Hartford Cas. Ins. Co. v. Shehata*, 427 F. Supp. 336 (N.D. Ill. 1977) (holding professional liability policy did not provide coverage for claim against insured radiologist by nurse who was struck by cart being pulled by insured because the pulling of the cart was not a service performed in his profession as a physician), *rev'd and remanded*, 577 F.2d 746 (7th Cir. 1978). *Contra* *Med. Protective Co. v. Nieto*, No. CV 96-1623-MV/ACT, 2004 WL 7337892, at *4 (D.N.M. June 30, 2004) (holding professional liability policy covered claims by employees of insured physician alleging racial and gender bias towards them); *Lincoln Cnty. Ambulance Dist. v. Pac. Emps. Ins. Co.*, 15 S.W.3d 739, 744 (Mo. Ct. App. 1998) (holding professional liability policy provided coverage to suit against insured ambulance company by employees arising from wage agreement that excluded meal and sleep time in calculating overtime compensation).

⁶⁶ *Emps. Reinsurance Corp. v. Newcap Ins. Co.*, 209 F. Supp. 2d 1184 (D. Kan. 2002); *see also* *Imperial Cas. & Indem. Co. v. Home Ins. Co. of Manchester, N.H.*, 727 F. Supp. 917, 919 (M.D. Pa. 1990) (holding professional services exclusion did not apply to inmates claim against prison for failing to provide necessary medical assistance because the inmate's complaint could be read as alleging a failure on the part of the prison officials to convey information to appropriate medical authorities), *aff'd*, 909 F.2d 1476 (3d Cir. 1990) (table opinions); *Gen. Ins. Co. v. Rodriguez*, No. HHBCV085007513, 2009 WL 4069922 (Conn. Super. Ct. Nov. 3, 2009) (holding professional services exclusion did not apply to failure of insured's employee to promptly call 911 upon seeing heart attack of claimant that employee had been supposed to transport for weekly dialysis treatment); *Cornucopia v. St. Paul Fire & Marine Ins. Co.*, No. 89-35321, 1990 WL 127563 (9th Cir. Sept. 4, 1990) (holding professional services exclusion did not apply to claim against

C. Banking and Investment

While at least one decision has held that banking does not constitute a profession,⁶⁷ the vast majority of courts have found to the contrary in evaluating coverage for claims arising from the handling of loans, mortgages, and/or bonds. For example, in *First California Bank v. Federal Insurance Co.*, the Ninth Circuit Court of Appeals held that a professional services exclusion encompassed claims against an insured bank for wrongful foreclosure.⁶⁸ Perhaps because clerical work

church for failure to perform first aid to claimant); *Jacob v. Grant Life Choices*, No. 94APE10-1436, 1995 WL 390810, at *2 (Ohio Ct. App. June 29, 1995) (holding professional services exclusion did not apply to claim against insured gym for fitness director's failure to call for medical assistance after insured collapsed in the gym).

⁶⁷ *Cincinnati Ins. Co. v. Canton Fin.*, No. 2003CA00150, 2003 WL 23416084 (Ohio Ct. App. Dec. 16, 2003) (holding professional services exclusion did not apply to claim against bank for running credit report on individual who had not applied for a loan, finding that banking was not a profession); *see also* *First Newton Nat'l Bank v. Gen. Cas. Co. of Wis.*, 426 N.W.2d 618 (Iowa 1988) (finding the language ambiguous, holding that professional services exclusion did not encompass claims of negligence in insured bank's handling of foreclosure proceedings).

⁶⁸ *First Cal. Bank v. Fed. Ins. Co.*, 983 F.2d 1076 (9th Cir. 1992); *see also* *State St. Bank & Tr. Co. of Quincy, Ill. v. INA Ins. Co. of Ill.*, 567 N.E.2d 42 (Ill. App. Ct. 1991) (applying professional services exclusion to claim against insured bank alleging that bank had taken advantage of debtor's hospital stay to accelerate debts and seize assets); *First Cmty. Bancshares v. St. Paul Mercury Ins. Co.*, 593 F. App'x 286, 290 (5th Cir. 2014) (noting insurer conceded that claims against insured bank for charging excessive fees fell within insuring agreement of professional liability policy); *Bank of Cal., N.A. v. Opie*, 663 F.2d 977 (9th Cir. 1981) (holding professional liability policy provided coverage to insured mortgage banker for claim for mismanagement of loan proceeds in his role as mortgage banker and broker); *Franklin Loan Corp. v. Certain Underwriters at Lloyd's, London*, No. EDCV1100215VAPDTBX, 2011 WL 13224854, at *5 (C.D. Cal. Apr. 5, 2011) (holding claims against insured mortgage banker for sales of loans were covered under professional liability policy because both origination of the loan and sale of same arose from professional services); *Cincinnati Ins. Co. v. Stonebridge Fin. Corp.*, 797 F. Supp. 2d 534, 541 (E.D. Pa. 2011) (holding professional liability policy provided coverage to insured bank for allegedly wrongful failure to extend credit), *vacated*, No. 10-CV-4131, 2011 WL 10977963 (E.D. Pa. Nov. 17, 2011); *W.R. Starkey Mortg., LLP v. Chartis Specialty Ins. Co.*, No. 4:12-CV-219, 2013 WL 12138896, at *9 (E.D. Tex. June 27, 2013) (holding professional services exclusion encompassed claim against insured mortgage lender alleging a scheme in which insured would approve loans to consumers who could not afford them without first verifying their financial information, applied discount points to loans at no benefit to the consumer, made material misrepresentations, and added false information to loan applications to improve the consumers' financial history); *Aetna Cas. & Sur. Co. v. Dannenfeldt*, 778 F. Supp. 484, 497 (D. Ariz. 1991) (holding professional liability policy issued to insured bank provided coverage for claims arising from sale of bonds, reasoning "[t]he bond representatives were part of the natural progression from

is so close to the heart of banking work, courts in this context have been reluctant to accept arguments that claims do not arise from professional services because they arise from ministerial actions. For example, in *Neighborhood Housing Services of America, Inc. v. Turner-Ridley*, the U.S. District Court for the Northern District of Indiana held that a professional services exclusion applied to a claim against an insured mortgage servicer, rejecting an argument that the duties allegedly breached by the insured – collecting payments, segregating funds, maintaining accurate records, and making accurate reports – were ministerial rather than requiring professional judgment.⁶⁹

Similarly, courts typically have found that the work of investment advisors and/or life agent broker/dealers can arise from professional services. For example, in *David Lerner Assocs., Inc. v. Philadelphia Indemnity Insurance Co.*, the U.S. District Court for the Eastern District of New York held that for purposes of a

conception of the bonds to sale in the outlets. They themselves may have been ill-trained, or untrained, but this doesn't make the sale of bonds from Lincoln branches any less a professional service.”); *cf. Prosper Marketplace, Inc. v. Greenwich Ins. Co.*, No. A132967, 2012 WL 2878121, at *9 (Cal. Ct. App. July 16, 2012) (finding the language of the professional services exclusion ambiguous, finding coverage for claim against insured online lending platform arising from sale of loan notes); *Terre Haute First Nat'l Bank v. Pac. Emps. Ins. Co.*, 634 N.E.2d 1336 (Ind. Ct. App. 1994) (applying professional services exclusion to action against bank for alleged negligence in acting as guardian); *Impac Mortg. Holdings Inc. v. Houston Cas. Co.*, No. SACV 11-1845-JST JCG, 2013 WL 792790, at *7 (C.D. Cal. Feb. 26, 2013) (rejecting the insurer's argument that the insured's buying/selling of mortgages for its own account did not constitute services, finding that a professional liability policy provided coverage because the underlying risk was nonetheless inherent to the insured's profession).

⁶⁹ *Neighborhood Hous. Servs. of Am., Inc. v. Turner-Ridley*, 742 F. Supp. 2d 964, 971 (N.D. Ind. 2010); *see also* *Goldberg v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA.*, 143 F. Supp. 3d 1283, 1300 (S.D. Fla. 2015) (rejecting argument of insured bank that some of the wrongful acts alleged in connection with claim for complicity with a Ponzi scheme were “purely internal management and regulatory” and thus not barred by professional services exclusion), *aff'd sub nom. Stettin v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA.*, 861 F.3d 1335 (11th Cir. 2017); *Piper Jaffray Cos., Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 967 F. Supp. 1148 (D. Minn. 1997) (rejecting argument of insured investment manager that professional services exclusion did not apply to claim of mismanaging investments because claim arose from ministerial accounting procedures); *Certain Underwriters at Lloyd's, London v. Amwest Fin., Inc.*, No. CIV. H-04-4024, 2005 WL 1994290, at *7 (S.D. Tex. Aug. 17, 2005) (holding professional services exclusion barred claims against insured lender alleging that it arranged mortgage loans in excess of the reasonable value of the collateral property, in some instances falsifying or misrepresenting information on the forms, reasoning “[a]ll these steps were necessary in order for the loan to close. These acts were all ‘professional services’ performed by [insured], since they were not merely those of a scribe filling out forms at the direction of someone else, but instead constituted the core functions of [insured's] business.”).

policy's professional services exclusion, a purported failure of the insured broker-dealer to conduct due diligence on real estate investment trusts (REITs) in connection with providing investment advice to customers in the sale of shares of REITs constituted professional services.⁷⁰ However, investment advisors should be wary because at least one court has held that professional liability policies issued to them may not cover so-called “selling away” claims, *i.e.*, claims against an investment advisor for selling securities which are not registered with the SEC nor sold through a registered dealer.⁷¹

D. Insurance Agents/Brokers

Claims against insurance agents and brokers typically fall within the ambit of providing professional services where they arise from the sale of policies or claims,

⁷⁰ David Lerner Assocs., v. Philadelphia Indem. Ins. Co., 934 F. Supp. 2d 533 (E.D.N.Y.), *aff'd*, 542 F. App'x 89 (2d Cir. 2013); *see also* Rupracht v. Certain Underwriters at Lloyd's of London Subscribing to Policy No. B0146LDUSA0701030, No. 3:11-CV-00654-LRH, 2012 WL 4472158, at *5 (D. Nev. Sept. 25, 2012) (applying professional services exclusion contained in financial advisor's D&O policy to claim by customer for recommending a life insurance policy that declined in value due to insured's mismanagement); Or. Mut. Ins. Co. v. Inv. Tax Mgmt., Inc., 983 F.2d 1077 (9th Cir. 1992) (applying professional service exclusion to claim against insured investment advisor for investment advice given to clients); Bolton Partners Inv. Consulting Grp. v. Travelers Indem. Co. of Am., No. CIV.A. RDB-05-2724, 2007 WL 776675, at *9 (D. Md. Mar. 15, 2007) (holding professional liability policy provided coverage for insured investment advisor for lawsuit brought by seller of an annuity that the insured had recommended against purchasing); Beazley Ins. Co., Inc. v. ACE Am. Ins. Co., 197 F. Supp. 3d 616, 621 (S.D.N.Y. 2016) (applying professional services exclusion to claim against insured stock exchange for mishandling IPO), *aff'd*, 880 F.3d 64 (2d Cir. 2018).

⁷¹ Smith v. Cont'l Cas. Co., No. 07-CV-1214, 2008 WL 4462120 (M.D. Pa. Sept. 30, 2008); *see also* D'Amato v. Endurance Am. Specialty Ins. Co., No. CV H-12-84, 2012 WL 12872722, at *7 (S.D. Tex. Oct. 5, 2012) (holding professional liability policy did not provide coverage for claim against insured broker/dealer for claim of intentionally fraudulent transfer of securities because such fraudulent behavior did not arise out of professional services); Am. Auto. Inc. Co. v. Mayfield, 287 F. Supp. 2d 661, 665 (N.D. Tex. 2003) (holding sale of securities by life insurance agent were not professional services under his professional liability policy); *cf.* DeMarco v. Everest Indem. Ins. Co., No. SACV0722DOCRNBX, 2008 WL 11336494, at *4-5 (C.D. Cal. Aug. 18, 2008) (holding professional liability policy did not cover claim against insured alarm company for fraudulent sale of company's own stock). *But see* Saoud v. Everest Indem. Ins. Co., No. 19-12389, 2021 WL 3186736 (E.D. Mich. July 28, 2021) (finding offers to sell unregistered securities constitute “wrongful acts in the rendering of professional services”).

monitoring, or adjusting.⁷² On the other hand, courts have been less likely to find that claims arise from professional services where the claims do not arise from tasks performed for a client but instead are deemed to be more in the nature of competitive business disputes. For example, in *Massamont Insurance Agency, Inc. v. Utica Mutual Insurance Co.*, the First Circuit Court of Appeals held that a professional liability policy did not cover a claim against an insurance agent for

⁷² *E.g.*, *Country Life Ins. Co. v. St. Paul Surplus Lines Ins. Co.*, 422 F. Supp. 2d 977 (C.D. Ill. 2006) (rejecting insurer's argument that, by selling policies through contractor agents, an insured broker had acted as an insurer rather than as a broker and thus any wrongful acts committed by agents were not covered under brokers' professional liability policy, finding that coverage existed because policy provided coverage for suits arising from professional services "rendered by or on behalf of the Insured"); *Utica Mut. Ins. Co. v. Miller*, 746 A.2d 935 (Md. Ct. App. 2000) (holding professional liability policy provided coverage for claims regarding agent's monitoring of business operations, maintaining records, and accounting to insurance company for premiums); *Bayer v. Emps. Reins. Corp.*, 383 N.W.2d 858 (S.D. 1986) (finding errors and omissions policy provided coverage for claim against insured insurance agency re mortgage financing client leading to fraud); *Am. Fellowship Mut. Ins. Co. v. Ins. Co. of N. Am.*, 282 N.W.2d 425 (Mich. Ct. App. 1979) (holding professional services exclusion encompassed claim arising out of adjusting services performed by insurance company); *James Gorman Ins., Inc. v. Graphic Arts Mut. Ins. Co.*, No. CV 13-11263-RWZ, 2015 WL 12781189, at *2 (D. Mass. Aug. 28, 2015) ("If failure to properly segregate and maintain client premiums in escrow does not implicate a 'professional service' [for coverage under a professional liability policy] for a surety bond producer, one of whose essential functions is to serve as a clearinghouse for those premiums, it becomes difficult to imagine what a professional service by a surety bond producer consists of."); *Titan Indem. Co. v. Travelers Prop. & Cas. Co. of Am.*, 181 P.3d 303 (Colo. Ct. App. 2008) (holding professional services exclusion precluded coverage for claims against insured medical cost management services provider for failure to provide independent medical examination to its customer's policyholder); *UTICA Mut. Ins. Co. v. Herbert H. Landy Ins. Agency*, No. 15-1220, 2014 WL 5475038 (D. Mass. Oct. 29, 2014) (holding professional liability policy provided coverage for claim against insurance agency by competitor alleging that insured had been selling surplus line policies to customers who did not require them); *Am. Auto. Ins. Co. v. Grimes*, No. CIV.A.5:02-CV-066-C, 2004 WL 246989, at *9 (N.D. Tex. Feb. 10, 2004) ("Advice on when and under what circumstances one should get out of a particular insurance or investment product, no matter the reason suggested for doing so, is within the scope of coverage anticipated by [professional liability policy issued to insurance agent]."); *PMI Mortg. Ins. Co. v. Am. Int'l Specialty Lines Ins. Co.*, 394 F.3d 761 (9th Cir. 2005) (holding claims against mortgage insurer for alleged violations of Real Estate Settlement Procedure Act's anti-kickback provisions were covered by professional liability policy); *Burgess v. Am. Family Mut. Ins. Co.*, No. 05-3275, 2007 WL 1452512 (W.D. Mo. May 15, 2007) (holding professional services exclusion precluded coverage for claim against insurance agency for negligent provision of false information); *Am. Motorists Ins. Co. v. S. Sec. Life Ins. Co.*, 80 F. Supp. 2d 1285 (M.D. Ala. 2000) (holding professional services exclusion barred coverage for claim alleging that insured insurance agents made misrepresentations relative to the purchase and payment schedules of whole life insurance policies).

the breach of a promise to represent one insurer exclusively for certain lines of insurance.⁷³ Similarly, professional liability policies issued to insurance professionals are unlikely to provide coverage to claims that arise from conduct which exceeds that role. For example, the New Jersey Superior court held in *North Jersey Public Adjusters, Inc. v. Philadelphia Insurance Co.*, that a professional liability policy did not provide coverage for a claim against an insured adjuster for assuming the role of “project manager” in the reconstruction of a fire damaged home and carrying out the role negligently.⁷⁴

Furthermore, coverage for insurance professionals may turn on the type of product being sold. For example, in *Patriot Group, Inc. v. Columbia Casualty Co.*, the U.S. District Court for the Eastern District of Pennsylvania held that an insurance agency’s professional liability policy applied to a claim alleging that the insured participated in fraudulent living trust and annuities schemes.⁷⁵ However, the Third Circuit Court of Appeals held in *Mallalieu-Golder Insurance Agency, Inc. v. Executive Risk Indemnity, Inc.*, that a professional liability policy issued to

⁷³ *Massamont Ins. Agency, Inc. v. Utica Mut. Ins. Co.*, 489 F.3d 71 (1st Cir. 2007); *see also* *Albert J. Schiff Assocs., Inc. v. Flack*, 417 N.E.2d 84 (N.Y. 1980) (holding professional liability policy did not provide coverage for claim against insured life insurance agents for willfully and maliciously usurping trade secret of a competitor); *GemCap Lending, LLC v. Scottsdale Indem. Co.*, No. 215CV09942CASFFMX, 2017 WL 1042059, at *6 (C.D. Cal. Mar. 17, 2017) (finding no coverage under professional liability policy issued to an insurance agent because the insured was accused of “erroneous disclosures during a business and administrative decision unconnected to the provision of insurance services”); *Mut. Asur. Admin, Inc. v. U.S. Risk Underwriters, Inc.*, 993 P.2d 795 (Okla. Ct. App. 1999) (holding professional liability policy did not provide coverage for suit against third-party administrator of group health plans because solicitation and retention of clients did not constitute a “professional service”); *Agilis Benefit Servs., LLC v. Travelers Cas. & Sur. Co. of Am.*, No. 5:08CV213, 2010 WL 11595321, at *2 (E.D. Tex. Feb. 24) (refusing to apply professional services exclusion to subpoena against insured insurance agency because subpoena was broad enough that court could not say it would have been issued in the absence of professional services), *report and recommendation adopted*, No. 5:08-CV-213, 2010 WL 8573372 (E.D. Tex. Apr. 30, 2010); *Haney v. Cont’l Cas. Co.*, No. CIV.A 308CV482DPJCS, 2010 WL 235025, at *5 (S.D. Miss. Jan. 15, 2010) (holding professional liability policy did not apply to claim against insured insurance agent by former employer for soliciting former co-workers); *cf.* *Administaff, Inc. v. Am. Int’l Specialty Lines Ins. Co.*, 75 F. App’x 239 (5th Cir. 2003) (holding professional liability policy provided coverage to insured company providing human resources and personnel management for misrepresentations made to health insurer; finding claim did not have to be made by consumers).

⁷⁴ *N. Jersey Pub. Adjusters, Inc. v. Philadelphia Ins. Co.*, No. A-5835-11T2, 2013 WL 10822201, at *1 (N.J. Super. Ct. App. Div. July 9, 2015).

⁷⁵ *Patriot Grp., Inc. v. Columbia Cas. Co.*, No. CIV.A.04-5814, 2005 WL 2039047, at *6 (E.D. Pa. Aug. 23, 2005).

an insurance agency did not cover a claim arising out of the issuance of promissory notes to those who invested in the notes for the purpose of obtaining a return rather than to finance premiums.⁷⁶

E. Accountants

Courts have unsurprisingly found that claims against accountants arise from professional services where the claim arises from accounting work.⁷⁷ However, claims are less likely to be deemed to arise from professional services where they arise from investment advice or sales. For example, in *Navigators Insurance Co. v. Hamlin*, the U.S. District Court for the District of Oregon held that a professional liability policy did not cover a claim against an insured accountant for selling clients investment products in the form of promissory notes.⁷⁸

F. Real Estate and Property Management

Courts have had little difficulty in finding that claims against realtors, mortgage brokers, and home inspectors can arise out of professional services. However, as in so many of these types of disputes, the question often boils down to what types of actions fall within the ambit of the professional services being

⁷⁶ *Mallalieu-Golder Ins. Agency, Inc. v. Exec. Risk Indem., Inc.*, 255 F. App'x 673, 675 (3d Cir. 2007); *cf. Endurance Am. Specialty Ins. Co. v. Brown, Miclette & Britt, Inc.*, No. CIV.A. H-09-2307, 2010 WL 55988, at *1 (S.D. Tex. Jan. 4, 2010) (holding professional liability policy provided coverage for insured insurance agent for claim arising out of Ponzi scam because insured provided customer with inaccurate information regarding insurance coverage for the underlying investments).

⁷⁷ *E.g., N. River Ins. Co. v. Endicott*, 391 N.W.2d 454 (Mich. Ct. App. 1986) (holding professional services exclusion precluded coverage for suit against trustee for failure to perform professional accounting services); *N. River Ins. Co. v. M.M. Winkler & Assocs.*, No. Civ.A.1:92CV366-D-D, 1994 WL 1890812 (N.D. Miss. Oct. 12, 1994) (holding professional liability policy did not provide coverage for claim that accountant embezzled funds but would cover damages for claims arising from erroneous financial statements); *see also Mastrom, Inc. v. Cont'l Cas. Co.*, 337 S.E.2d 162, 165 (N.C. 1985) (holding professional liability policy did not cover claim related to sale of securities to clients unrelated to taxes); *cf. Philadelphia Indem. Ins. Co. v. Hamic*, No. 8:12-CV-829-T-26EAJ, 2012 WL 3835088, at *5 (M.D. Fla. Sept. 4) (holding professional liability policy provided coverage for claim against insured accountant who performed professional accounting services in the review and analysis of financial documents obtained through subpoenas, allegedly causing a malicious prosecution of the claimant), *reconsidered*, No. 8:12-CV-829-T-26EAJ, 2012 WL 5055558 (M.D. Fla. Oct. 18, 2012); *Doeren Mayhew & Co. v. CPA Mut. Ins. Co. of Am. Risk Retention Grp.*, 633 F. Supp. 2d 434 (E.D. Mich. 2007) (holding professional liability policy provided coverage for SEC proceeding against accounting firm); *Piper Jaffray Cos., Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 967 F. Supp. 1148 (D. Minn. 1997) (“Accountancy, by definition, is a profession.”).

⁷⁸ *Navigators Ins. Co. v. Hamlin*, 96 F. Supp. 3d 1181, 1187 (D. Or. 2015).

provided. For example, in *Eddy v. B.S.T.V., Inc.*, the Wisconsin Court of Appeals held that a professional services exclusion applied to a claim against an insured real estate broker for their failure to disclose mold prior to the sale of a home.⁷⁹ Claims against such professionals can sometimes be deemed to arise out of professional services even when the insured allegedly engaged in more outlandish conduct. For example, in *Safeco Insurance Co. of Illinois v. Skar*, the U.S. District Court for the District of Minnesota held that a professional services exclusion applied to a claim against an insured real estate agent for failing to sell a home so that he could instead use it for sexual purposes.⁸⁰ Still, some claims will still be deemed to be too attenuated from the provision of professional services. Such was the case in *St. Paul Fire & Marine Insurance Co. v. Wedgewood Realty, Inc.*, in which the Missouri Court of Appeals held that an errors and omissions policy did not provide coverage for a claim against an insured real estate broker for refusing to purchase a house because the purchase was never intended to be performed for a client.⁸¹

⁷⁹ *Eddy v. B.S.T.V., Inc.*, 696 N.W.2d 265 (Wis. Ct. App. 2005); *see also* 3303-05 Marina Road, LLC v. Zennett Props., LLC, 724 N.W.2d 273 (Wis. Ct. App. 2006) (holding professional services exclusion precluded coverage for claims against insured real estate agents arising out of sale of property that had long-term water leaks and toxic mold); *Auto-Owners Ins. Co. v. E.N.D. Servs., Inc.*, No. 8:10-CV-2387-T-30EAJ, 2011 WL 6319189, at *1 (M.D. Fla. Dec. 15, 2011) (applying professional services exclusion to claim against insured home inspector for failing to discover various defects, and rejecting argument that home inspection is not a profession), *aff'd*, 506 F. App'x 920 (11th Cir. 2013); *Me. Mut. Fire Ins. Co. v. Tinker*, 872 A.2d 360 (Vt. 2005) (holding professional services exclusion precluded coverage for surveyor's negligence in surveying a property boundary line); *Transcon. Ins. Co. v. Caliber One Indem. Co.*, 367 F. Supp. 2d 994 (E.D. Va. 2005) (finding claim arising from insured's failure to inspect and properly maintain a fire suppression system arose from professional services under both professional liability policy and professional services exclusion in CGL policy).

⁸⁰ *Safeco Ins. Co. of Ill. v. Skar*, No. 10-CV-4789, 2011 WL 3163332 (D. Minn. July 27, 2011); *see also* *Corp. Realty, Inc. v. Gulf Ins. Co.*, No. CIV.A. 04-2933, 2005 WL 236182, at *2 (E.D. La. Jan. 31, 2005) (applying professional services exclusion to allegations that insured mortgage broker attempted to extort landlord by threatening to have tenant terminate its lease). *But see* *Crum & Forster Managers Corp. v. Resol. Tr. Corp.*, 620 N.E.2d 1073 (1993) (holding intentional torts and unfair business practices committed by insured real estate agents did not arise out of rendering of professional services because professional liability policy covered only risks "inherent in the practice of the real estate profession" and risk of conducting one's business in an unfair and tortious manner was not inherent to real estate profession).

⁸¹ *St. Paul Fire & Marine Ins. Co. v. Wedgewood Realty, Inc.*, 639 S.W.2d 233, 235 (Mo. Ct. App. 1982) (holding errors and omissions policy covering professional services did not cover claim arising out of insured real estate broker's refusal to purchase house

Claims against real estate professionals seem more likely to be deemed to arise out of professional services where they are framed as a failure to comply with the Real Estate Settlement Procedures Act (RESPA). For example, in *Pacific Insurance Co. v. Burnet Title, Inc.*, the U.S. District Court for the District of Minnesota held that a professional services policy provided coverage for referrals that violated RESPA, contrary to how courts have typically viewed claims for improper referrals in other contexts (see Section II.B.).⁸²

With respect to claims against property managers for failing to conduct adequate repairs and maintenance, courts have typically declined to find that they are excluded by professional services exclusions. For example, in *Pennsylvania National Mutual Casualty Insurance Co. v. Roberts Bros., Inc.*, the U.S. District Court for the Southern District of Alabama held that a professional services exclusion did not bar coverage for a suit against an insured property manager for failure to fix a door, thereby enabling an assailant to enter the claimant's home. The court further held that the failure was an administrative oversight rather than the use of professional judgment.⁸³ That being said, courts may be inclined to find

because it was not performed for another); *see also* *St. Paul Fire & Marine Ins. Co. v. ERA Oxford Realty Co.*, 572 F.3d 893, 901 (11th Cir. 2009) (holding professional liability policy issued to real estate brokers did not cover claim that insured induced claimant real estate brokers to enter into a merger and breached terms); *Hiscox Dedicated Corp. Member Ltd. v. Partners Com. Realty, L.P.*, No. CIV A H-08-3411, 2009 WL 1794997, at *9 (S.D. Tex. June 23, 2009) (holding professional liability policy issued to insured real estate broker/agent did not cover claims arising from sale of securities); *Am. Nat'l Prop. & Cas. Co. v. Select Mgmt. Grp., LLC*, 528 F. Supp. 3d 1188, 1199 (holding professional services exclusion did not apply to claim against insured realtor for failure to warn plaintiff of the presence of a dog during a showing of a home).

⁸² *Pac. Ins. Co. v. Burnet Title, Inc.*, No. CIV.02-2767(JRT/FLN), 2003 WL 22283355, at *6 (D. Minn. Sept. 24, 2003); *see also* *PMI Mortg. Ins. Co. v. Am. Int'l Specialty Lines Ins. Co.*, 394 F.3d 761 (9th Cir. 2005) (holding claims against mortgage insurer for alleged violations of Real Estate Settlement Procedure Act's anti-kickback provisions were covered by professional liability policy).

⁸³ *Pa. Nat'l Mut. Cas. Ins. Co. v. Roberts Bros., Inc.*, 550 F. Supp. 2d 1295 (S.D. Ala. 2008); *see also* *Bonnie Owen Realty, Inc. v. Cincinnati Ins. Co.*, 670 N.E.2d 1182 (Ill. App. Ct. 1996) (holding professional services exclusion did not preclude coverage for allegations of simple negligence in maintaining apartment building); *Scottsdale Ins. Co. v. Byrne*, No. CV 16-11435-FDS, 2018 WL 1122360, at *5 (D. Mass. Mar. 1, 2018), *reconsidered*, No. CV 16-11435-FDS, 2018 WL 2056153 (D. Mass. May 2, 2018), and *aff'd*, 913 F.3d 221 (1st Cir. 2019); *Penn Star Ins. v. Real Estate Consulting Specialists, Inc.*, 1 F. Supp. 3d 1168 (D. Mont. 2014) (holding professional services exclusion did not bar coverage for claim against property manager whose failure to perform routine maintenance caused claimant to be scalded in the shower); *Great Am. Ins. Co. v. Sequoia Ins. Co.*, No. SA CV 15-1161-DOC (Ex), 2016 WL 844819 (C.D. Cal. Mar. 1, 2016)

coverage under a professional liability policy issued to cover such a risk. For example, in *Shelly v. Moir*, the Wisconsin Court of Appeals held that a professional liability policy covered a claim against the insured property management corporation for failing to properly maintain a stairwell.⁸⁴

G. Technology Professionals

Some of the most difficult professions to apply this type of analysis to are those that deal with software and other emerging technology. While all of the professions described above have existed for generations (giving the courts ample context with which to evaluate which activities are inherent to the respective profession), professions dealing with technology are often comparatively new, making it more difficult for courts to determine which activities draw on the skill inherent to the profession, and which are incidental. Nonetheless, courts faced with coverage questions in this area have drawn such distinctions. For example, the U.S. District Court in the Southern District of New York applied a professional services exclusion to a claim against a social networking website for failure to remove offensive material because the maintenance of the site was “intellectual and mental – rather than physical or manual.”⁸⁵ Similarly, the U.S. District Court for the Eastern District of New York held in *Strategic Forecasting, Inc. v. Scottsdale*

(holding that despite “murky” allegations regarding the property manager’s breach of duty, court could not conclude that all of them fell within the scope of a professional services exclusion); *Atain Specialty Ins. Co. v. Sierra Pac. Mgmt. Co.*, No. 2:14-CV-00609-TLN-DB, 2016 WL 6568678, at *8 (E.D. Cal. Nov. 3, 2016) (holding professional services exclusion did not apply to negligence claim against property management due to language in endorsement indicating that parties agreed to insure such risk), *aff’d*, 725 F. App’x 557 (9th Cir. 2018); *Chapman ex rel. Chapman v. Mut. Serv. Cas. Ins. Co.*, 35 F. Supp. 2d 693 (E.D. Wis. 1999) (holding professional services exclusion did not exclude coverage for suit alleging that insured property manager negligently selected housepainter and failed to supervise his work). *Contra Golden Eagle Ins. Corp. v. Lemoore Real Est. & Prop. Mgmt., Inc.*, No. F061735, 2012 WL 1670475 (Cal. Ct. App. 2012) (holding professional services exclusion barred coverage for claim against property management company for failure to ensure that its employee inspected smoke detectors).

⁸⁴ *Shelly v. Moir*, 405 N.W.2d 737 (Wis. Ct. App. 1987); *see also Discover Specialty Ins. Co. v. Certain Underwriters at Lloyd’s London*, No. B205333, 2008 WL 4225885, at *10 (Cal. Ct. App. Sept. 17, 2008) (“Construction management and property management are both professional services that would come under [professional services] exclusion.”).

⁸⁵ *Tagged, Inc. v. Scottsdale Ins. Co.*, No. CIV. JFM-11-127, 2011 WL 2748682, at *1 (S.D.N.Y. May 27, 2011); *see also Navigators Specialty Ins. Co. v. Double Down Interactive, LLC*, No. 2:18-CV-01514-BJR, 2019 WL 3387458, at *5 (W.D. Wash. July 26, 2019) (“While designing and coding online games might be considered a professional service, simply playing the game is not because it only requires the computer to execute a function that it was programmed to do.”).

Indemnity Co., that a professional services exclusion applied to a claim that the insured had failed to warn customers that their data had been compromised following a hack of the insured's website.⁸⁶

As with other professions, courts have found that claims against technology professionals do not arise out of professional services where they involve more traditional business disputes rather than errors involving the underlying technology. For example, the U.S. District Court for the District of Minnesota held in *Firepond Liquidating Trust v. Vigilant Insurance Co.* that a professional liability policy did not provide coverage for a claim against an insured for premature termination of a contract. The court found that while the contract had been to provide information technology services, that the claim for premature termination "did not flow from the performance of those services."⁸⁷

CONCLUSION

The practice of law is in large part about applying the rulings in disputes from the past to new but similar fact patterns. To that end, it is hoped that this article will aid the reader in finding past fact patterns which are similar to the disputes they are grappling with.

Readers seeking more information on this topic should refer to the Defense Research Institute's Compendium of Professional Liability (John Zulkey authored the Illinois and Missouri chapters of this state-by-state survey of professional liability law). Those researching whether claims are related or interrelated for coverage purposes are encouraged to read John Zulkey's *Related Acts Provisions: Patterns Amidst the Chaos*, 50 VALPARAISO UNIV. L. REV. 3 (2016).

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⁸⁶ *Strategic Forecasting, Inc. v. Scottsdale Indem. Co.*, No. 12-CV-5389JMAARL, 2015 WL 9694796, at *2 (E.D.N.Y. Sept. 30, 2015).

⁸⁷ *Firepond Liquidating Tr. v. Vigilant Ins. Co.*, No. CIV. No. 06-3050 DWFAJB, 2007 WL 2695642 (D. Minn. Sept. 11, 2007); *see also* *Specific Impulse, Inc. v. Hartford Cas. Ins. Co.*, No. 5:02-CV-02849-JW, 2002 WL 32052699, at *5 (N.D. Cal. Sept. 17, 2002) (holding professional services exclusion did not apply to claim against insured web design and development company for theft of proprietary information).