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Federal Courts Help Define the Borders of “Professional Services”

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Underwriting professional risks can be tricky—especially if the nature of those risks is uncertain. In July 2014, two federal courts addressed this problem and offered some promising clarity. Wisznia Company is an architectural firm that designed a performing arts center for Jefferson Parish, Louisiana. The parish sued the firm, alleging that it produced a "defective set of plans and specifications," failed to coordinate effectively with its consultants and also committed "**[a]ny and all negligent acts … to be proven at trial**." Wisznia tendered the suit to its general liability insurer, which declined coverage on the basis of a policy exclusion for claims arising out of "**professional services**." In the ensuing coverage action, Wisznia argued that the parish asserted claims "for **both** professional liability **and** ordinary negligence." In *Wisznia Company v. General Star Indemnity Co.*, the U.S. Court of Appeals for the Fifth Circuit disagreed. Applying Louisiana law, the court acknowledged that the "eight corners rule" required it to read both the underlying petition and Wisznia’s policy in a "liberal" fashion favoring the insured. But the court found that the factual allegations in the parish’s petition established only "that it hired Wisznia to use its professional skills to design a building and coordinate its construction, and the building … did not pass muster." Most importantly, the court found that the parish’s factual allegations **did not** give rise to "an **ordinary** claim for negligence"—such as one that Wisznia had created an unreasonably dangerous condition. Absent allegations that the defendant breached the "**general duty of reasonable care**," the court held, the claims implicate **only** "professional services." The following day, in *John M O’Quinn P.C. v. National Union Fire Ins. Co. of Pittsburgh*, the U.S. District Court for the Southern District of Texas addressed this issue from the opposite perspective. The plaintiff in that case, a law firm, was insured under a lawyer’s professional liability policy, which offered coverage for claims arising out of "**professional legal services**." The firm sought coverage for two class actions alleging it had improperly withheld certain settlement proceeds as a deduction for "general expenses." In awarding summary judgment to the insurers, the court cited several earlier cases to the effect that "**billing and/or fee-setting practices do not constitute ‘professional services.’**" In this case, however, the attorneys argued that their billing

practice overlapped with their **fiduciary responsibilities**. In the early 1990s, the law firm represented plaintiffs in suits against breast-implant manufacturers. Because of the large number of implant cases in Texas, the local courts consolidated many of them for pretrial matters, directing that certain witnesses be deposed only once, for use in all cases. The law firm therefore had to find a way to allocate expenses common to all its clients. Rather than seek the court's assistance, it unilaterally imposed a 1.5 percent deduction from each client's settlement, which it referred to as "BI General Expenses." The district court was unmoved. It held that the distinction between billing and professional services is clear-cut: "**There are elements of experience and judgment in billing for legal services, but the same goes for pricing shoes**." As in *Wisznia*, the court simply refused to blur the distinction between professional and non-professional claims.

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