Commentary

Forty Years Later And No States Are Grouchy About Marx v. Hartford

The Most Influential Insurance Coverage Decision Of All Time And The Secret Word In Professional Liability Claims

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Some of the most entertaining sports talk-radio is when listeners are asked to weigh-in with their choice for the best of something, such as left-handed pitchers (Steve Carlton) or sports movies (Field of Dreams) (sorry, Rudy fans). Since talk radio thrives on controversy, and because people are passionate about things that they believe are the best of something, it is not surprising that a lively and entertaining debate can be counted on when peoples' strongly held beliefs are challenged.

So if such a thing as an insurance coverage talk-radio show existed (work with us here), surely there would be a night where the host invites listeners to call in with their vote for the most important judicial decision to address this or that coverage issue.

Give us a call and tell us what you think is the most important decision ever to address the pollution exclusion. Let's go to the phones and talk to Jeff from Sacramento. "Hey guys, first-time caller, long-time listener." ["Jeff — Turn down your radio."] "When it comes to the pollution exclusion, I'd have to say that the most important decision is *Pipefitters v. Westchester Fire Ins.* from the Seventh Circuit in 1992. It was this court's observation that, without some so-called limiting principle, the absolute pollution exclusion would lead to some absurd results, such as excluding coverage for bodily injury suffered by a person who slips and falls on the spilled contents of a bottle of Drano. The Drano example has been the darling of courts that are seeking to limit the pollution exclusion to traditional environmental pollution."

Amy from Voorhees in the Garden State is on the line. She must know a thing or two about pollution.

Go ahead, you're live on *Coverage Call-In*. "Thanks for taking my call. Love your show. I've gotta disagree. You have to go back to when it all began. I think that *Lansco v. DEP* is the most important pollution exclusion decision. Sure, it's a 1975 New Jersey trial court decision, but that's just the point. It was the first to address the meaning of "sudden" in the "sudden and accidental" exception to the pollution exclusion. *Lansco* concluded that sudden means unexpected or unforeseen. And defining sudden as something other than temporally abrupt is what opened the door for insureds to seek coverage for gradual discharges of pollution. And we all know how contentious and significant that issue was in the large environmental coverage cases in the 1980s and 90s. And don't forget that it was the litigation over the sudden and accidental exclusion that led to the adoption of the absolute and total pollution exclusions — which brought another 20-plus years of hotly contested coverage litigation. You could say it all goes back to *Lansco*."

While a best-of list can be created for any particular insurance coverage issue, what about those decisions that are of great importance but not limited to a narrow issue. Which decisions transcend individual issues and have fundamentally influenced coverage for numerous types of claims? Which decisions have achieved iconic status and are the granddaddies of them all — the Ruths, Gerhrigs, Dimaggios of insurance coverage? In other words, what are the most influential insurance coverage decisions of all time? Any list of such decisions would surely include the following:

Keene Corp. v. Ins. Co. of N. America, 667 F.2d 1034 (D.C. Cir. 1981) — The seminal case to adopt the continuous trigger — which led to billions of dollars of additional exposure for insurers in asbestos claims, followed by a fundamental change in thinking about coverage for several other types of claims.

Northwestern National Cas. Co. v. McNulty, 307 F.2d 432 (5th Cir. 1962) (applying Florida law) and *Lazenby v. Universal Underwriters Insurance Co.*, 383 S.W.2d 1 (Tenn. 1964) — Hands down the most commonly cited cases — and almost always in a point — counter-point fashion — on the insurability of punitive damages.

San Diego Navy Federal Credit Union v. Cumis Insurance Soc'y, 208 Cal. Rptr. 494 (Cal. Ct. App. 1984) — While certainly not the first case to address an insured's right to independent counsel when being defended under a reservation of rights, it is the most frequently examined by other courts considering the issue.

Weedo v. Stone-E-Brick, Inc., 405 A.2d 788 (N.J. 1979) — Possibly the most frequently cited decision — and not without its critics — explaining the scope of coverage for claims for an insured's faulty workmanship (especially construction defect).

True to form for any best-of list, no doubt some readers are making faces over these selections and can't imagine how their own choice could have possibly been omitted as one of the most influential of all time, even from such a small list of examples.

Marx v. Hartford Accident & Indemnity Co. — The Pied Piper Of Insurance Coverage

Our vote for the most influential insurance coverage decision of all time is *Marx v. Hartford Accident & Indemnity Co.*, 157 N.W.2d 870 (Neb. 1968), in which the Supreme Court of Nebraska, in the context of determining coverage under a medical malpractice policy, was required to define the term "professional services."

In *Marx*, an employee technician of the insured, seemingly a medical practice of some type, mistakenly poured benzene instead of water into a sterilization container. A fire started, resulting in extensive damage to the building. No patients were present or being treated at the time. *Marx*, 157 N.W.2d at 871.

A Hartford policy issued to the insured provided coverage for "damages because of injury arising out of: (a) malpractice, error or mistake of the insured, or of a person for whose acts or omissions the insured is legally responsible . . . [i]n rendering or failing to render professional services." *Id.*

While acknowledging that the insured was liable for the negligent act of its employee during the course of employment, the court recognized that, in fact, the precise task before it was to determine whether

the damage arose out of the rendering or failure to render professional services. *Id.* The Supreme Court of Nebraska laid down the following definition of "professional services":

> 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.

Id. at 871-72 (internal citations omitted).

Applying this definition, the *Marx* Court concluded that no coverage was owed under the Hartford policy because the negligent act performed required no special training or professional skill, and, hence, did not constitute the rendering of or failure to render professional services. *Id.* at 872. The *Marx* Court saw it this way:

> The boiling of water for sterilization purposes alone was not an act requiring any professional knowledge or training. It was a routine equipment cleaning act which any unskilled person could perform. The act was not a part of any patient's treatment per se any more than any other routine cleaning or arranging procedure incidental to the proper general operations of the plaintiffs' offices. It was no more of a 'professional service' than the routine activity of a housewife engaged in sterilizing baby bottles or canning jars.

Id. at 872.

The definition of "professional services" has a far-reaching impact in insurance coverage as it is the touchstone of the entire body of professional liability claims — regardless of the nature of the profession being insured. The meaning of the term also arises with frequency in the context of determining whether a certain act of the insured is excluded from coverage by a "professional services" exclusion in a commercial general liability policy.

While the definition of "professional services" clearly has a long reach, *Marx* may seem, on its face, a curious choice for the most influential insurance coverage decision of all time. Even soaking wet the opinion is just over one-page in length and the court provided virtually no explanation for its conclusion. The court's decision was supported by nothing more than a string cite of seven out-of-state decisions — without so much as even a parenthetical after any of them — and a citation to "Words and Phrases." *Id.*

Marx is also an old decision. But then again, so are *Keene*, *Weedo*, *McNulty*, *Lazenby* and *Cumis*. Indeed, by definition, any decision that achieves iconic status must be long in the tooth. But *Marx* isn't old simply because it was decided 40 years ago. In addition to its chronological age, the court's comparison of the act in question, to the "routine activity of a housewife engaged in sterilizing baby bottles or canning jars," gives the decision a feel that it is from a bygone era.

But despite all this, there is something unique about *Marx* that entitles it to claim the mantle of most influential insurance coverage decision of all time — virtually every state in the country that has addressed the definition of "professional services" has followed it. You just can't say that about *Keene*, *Weedo* and those others. While they are decisions that have unquestionably influenced many courts, they have also been rejected — sometimes by just as many.

But *Marx* is the Pied Piper of insurance coverage, with its definition of "professional services" being "the most widely used definition used by courts throughout the country." *Zurich Am. Ins. Co. v. O'Hara Reg'l Ctr. for Rehab.*, 529 F.3d 916, 922 (10th Cir. 2008); *see St. Paul Fire & Marine Ins. Co. v. ERA Oxford Realty Co. Greystone*, No. 08-13374, 2009

WL 1757162, at *6 (11th Cir. June 23, 2009) (applying **Alabama** law) (citing *Marx* for the definition of "professional services"); *W. Corrections Group, Inc. v. Tierny*, 96 P.3d 1070, 1075, 1075 n.2 (**Ariz. Ct. App.** 2004) (same); *Shelter Ins. Cos. v. Hildreth*, 255 F.3d 921, 925 (8th Cir. 2001) (applying **Arkansas** law) (same); *Amdahl Corp. v. County of Santa Clara*, 10 Cal. Rptr. 3d 486, 498-99 (**Cal. Ct. App.** 2004) (same); *Titan Indem. Co. v. Travelers Prop. Cas. Co. of Am.*, 181 P.3d 303, 307-08 (**Colo. App.** 2007) (same); *St. Paul Fire & Marine Ins. Co. v. Shernow*, 610 A.2d 1281, 1284 (**Conn.** 1992) (same); *Lindheimer v. St. Paul Fire & Marine Ins. Co.*, 643 So.2d 636, 638 (**Fla. Dist. Ct. App.** 1994) (same); *St. Paul Fire & Marine Ins. Co. v. Alderman*, 455 S.E.2d 852, 853 (**Ga. Ct. App.** 1995) (same); *Chicago Ins. Co. v. Griffin*, 817 F.Supp. 861, 866 (D. Haw. 1993) (applying **Hawaii** law) (same); *Hirst v. St. Paul Fire & Marine Ins. Co.*, 683 P.2d 440, 444 (**Idaho Ct. App.** 1984) (same); *Hartford Cas. Ins. Co. v. Shehata*, 427 F.Supp. 336, 337 (N.D. Ill. 1977) (applying **Illinois** law) (same), *rev'd on other grounds*, 577 F.2d 746 (7th Cir. 1978); *Nat'l Ben Franklin Ins. Co. of Ill. v. Calumet Testing Servs., Inc.*, No. 98-3934, 1999 WL 594926, at *7 (7th Cir. Aug. 6, 1999) (applying **Indiana** law) (same); *Curtis Ambulance of Florida, Inc. v. Bd. of County Comm'rs of Shawnee*, 811 F.2d 1371, 1379 (10th Cir. 1987) (applying **Kansas** law) (same); *Ratliff v. Employers' Liab. Assurance Corp.*, 515 S.W.2d 225, 230 (**Ky.** 1974) (same); *Centennial Ins. Co. v. Patterson*, 564 F.3d 46, 53 (1st Cir. 2009) (applying **Maine** law) (same); *Utica Mut. Ins. Co. v. Miller*, 746 A.2d 935, 943 (**Md. Ct. Spec. App.** 2000) (same); *Roe v. Fed. Ins. Co.*, 587 N.E.2d 214, 217 (**Mass.** 1992) (same); *St. Paul Fire & Marine Ins. Co. v. Quintana*, 419 N.W.2d 60, 62 (**Mich. Ct. App.** 1988) (same); *St. Paul Fire & Marine Ins. Co. v. Mori*, 486 N.W.2d 803, 807-08 (**Minn. Ct. App.** 1992) (same); *Titan Indem. Co. v. Williams*, 743 So.2d 1020, 1026 (**Miss. Ct. App.** 1999) (same); *Jerome Group, Inc. v. Cincinnati Ins. Co.*, 257 F. Supp. 2d 1217, 1223-24 (E.D. Mo. 2003) (applying **Missouri** law) (same); *Niedzielski v. St. Paul Fire & Marine Ins. Co.*, 589 A.2d 130, 131 (**N.H.** 1991) (same); *Princeton Ins. Co. v. Chunmuang*, 698 A.2d 9, 13 (**N.J.** 1997) (same); *New Mexico Physicians Mut. Liability Co. v. LaMure***,** 860 P.2d 734, 738 (**N.M.** 1993) (same); *Ins. Co. of N. Am. v. Milberg Weiss Bershad Specthrie & Lerach*, No. 95 Civ. 3722, 1996 WL 520902, at *5 (S.D.N.Y. 1996) (applying **New York** law) (same); *Taylor v. Vencor, Inc.*, 525 S.E.2d 201, 203 (**N.C. Ct. App.** 2000) (same); *St. Paul Fire & Marine Ins. Co. v. Three D Sales, Inc.,* 518 F. Supp. 305, 310 (D.C.N.D. 1981) (applying **North Dakota** law) (same); *Jacob v. Grant Life Choices*, No. 94APE10-1436, 1995 WL 390810, at *2 (**Ohio Ct. App.** June 29, 1995) (same); *Mut. Assurance Adm'rs, Inc. v. U.S. Risk Underwriters, Inc.*, 993 P.2d 795, 797-98 (**Okla. Civ. App.** 1999) (same); *McLean v. Buck Med. Servs., Inc.*, 45 P.3d 120, 132-33 (**Or.** 2002) (same); *Strine v. Commonwealth*, 894 A.2d 733, 739 (**Pa.** 2006) (same); *Sanzi v. Shetty*, 864 A.2d 614, 618 (**R.I.** 2005) (same); *S.C. Med. Malpractice Liab. Ins. Joint Underwriting Ass'n v. Ferry*, 354 S.E.2d 378, 380 (**S.C.** 1987) (same); *St. Paul Fire & Marine Ins. Co. v. Engelmann*, 639 N.W.2d 192, 197 (**S.D.** 2002) (same); *St. Paul Fire & Marine Ins. Co. v. Torpoco*, 1993 WL 6298, at *3 (**Tenn. Ct. App.** 1993) (same), *aff'd in part, rev'd in part* 879 S.W.2d 831 (Tenn. 1994); *Atl. Lloyd's Ins. Co. of Tex. v. Susman Godfrey, L.L.P.*, 982 S.W.2d 472, 476 (**Tex. App.** 1998) (same); *St. Paul Fire & Marine Ins. Co. v. Jacobson*, 826 F. Supp. 155, 160-61 (**E.D. Va.** 1993) (same); *Bank of Cal. v. W.H. Opie & Co.*, 663 F.2d 977, 980-81 (9th Cir. 1981) (applying **Washington** law) (same); *Steven G. v. Herget*, 505 N.W.2d 422, 427-28 (**Wis. Ct. App.** 1993) (same); *see also Rivera v. Nev. Med. Liab. Ins. Co.*, 814 P.2d 71, 73 (**Nev.** 1991) (using a definition of "professional services" akin to that articulated in *Marx*); *Am. Motorists Ins. Co. v. Republic Ins. Co.*, 830 P.2d 785, 787 (**Alaska** 1992) (same); *Hartford Cas. Ins. Co. v. Benchmark, Inc.*, No. C 98-0021 MJM, 1999 WL 33656863, at *3 (N.D. Iowa 1999) (applying **Iowa** law) (same); *Sommers v. State Farm Fire & Cas. Co.*, 764 So.2d 87, 91 (**La. Ct. App.** 2000) (same); *Johnson v. Acceptance Ins. Co.*, 292 F. Supp. 2d 857, 866 (**N.D.W.Va.** 2003) (same); *T.M. v. Executive Risk Indem. Inc.*, 59 P.3d 721, 727 (**Wyo.** 2002) (same). No instructive authority for Delaware, Montana, Utah and Vermont.

The extent to which *Marx* has been followed is remarkable, especially when you consider that insurance coverage is so frequently fractured — with two or three diverse schools of thought on how to address an issue being routine. Think late notice (prejudice or no prejudice required); pollution exclusion (limited to traditional environmental pollution or applies to all hazardous substances); allocation ("all sums" or

pro-rata); trigger of coverage (continuous or some other method), and on and on.

Applying Marx v. Hartford — Not Always Duck Soup

Marx is frequently at the center of coverage disputes that involve acts by professionals, but that may not specifically involve "professional services," because the particular conduct causing the injury or loss may not have arisen out of the professional's application of specialized knowledge or skill. "[N]ot every action a professional takes in the course of providing professional services will be a professional service for insurance purposes." *Nat'l Ben Franklin Ins. Co. v. Calumet Testing Servs., Inc.*, No. 98-3934, 1999 U.S. App. LEXIS 18862 (7th Cir. Aug. 6, 1999) (applying Indiana law) (quoting *Erie Ins. Group v. Alliance Envt., Inc.*, 921 F. Supp. 537, 546 (S.D. Ind. 1996)); *Atl. Lloyd's Ins. Co. of Tex. v. Susman Godfrey, LLP*, 982 S.W.2d 472, 477 (Tex. App. 1998) ("We do not deem an act a professional service merely because it is performed by a professional. Rather, it must be necessary for the professional to use his specialized knowledge or training.").

Whether the particular act in question falls into the category of "professional" or "non-professional" is no easy task. It turns out that the *Marx* definition of "professional services" is much simpler to say than apply. First, disputes in this area are frequently fact intensive and usually involve conduct still undertaken by the insured, in one way or another, in the course of his or her profession. In other words, any insurer attempting to prove that certain conduct was non-professional will likely have to overcome the fact that the doctor was wearing a white jacket, or the lawyer was in his or her office, when it was committed.

In addition, the *Marx* definition of "professional services" is expressed in less than scientific terms that leave a fair amount of room for subjectivity in their application. *See Med. Records Assocs., Inc. v. Am. Empire Surplus Lines Ins. Co.*, 142 F.3d 512, 515 (1st Cir. 1998) (applying Massachusetts law) ("These [*Marx*] cases do not paint an unwavering line of demarcation between 'professional' and 'nonprofessional' activities.").

There are also a significant number of decisions nationally that courts can look to for guidance in determining whether an act qualifies as a professional service. Shepardizing *Marx* at the time of publication resulted in 325 total citing references, with 113 to other judicial decisions.

One of the reasons *Marx* has achieved such a large number of citing references is because its definition of "professional services" is also cited in cases that do not involve the availability of insurance. For example, *Marx* is sometimes cited in medical malpractice cases where there is a need to determine for some reason whether certain actions of medical personnel qualified as "professional." *See Taylor v. Vencor, Inc.*, 525 S.E.2d 201, 202 (N.C. Ct. App. 2000) (citing *Marx* and addressing whether the failure to prevent a nursing home resident from dropping a match or lighted cigarette upon herself, while in a designated smoking room, qualified as medical malpractice under a North Carolina pleading statute that requires an assertion that an expert is willing to testify that the medical care did not comply with the applicable standard of care). Notwithstanding that the issue arises in different contexts, courts in *Marx* insurance-cases sometimes cite decisions from non-insurance-cases, and vice-versa. With so many factually intensive cases to choose from, decisions can often be found to support any parties' position whether the definition of "professional services" has been satisfied.

As a result of this confluence of circumstances — a less than precise definition of "professional services;" that the conduct at issue was still likely performed in the professional setting; and numerous factually diverse decisions to draw upon — it can be difficult to predict the outcome of "*Marx* litigation." And because insurers choose their battles selectively, it may be easy for some to conclude that, since it looks, swims and quacks like a duck — or at least close to it — they'll take a pass on attempting to draw the distinction between the "professional" and "non-professional" aspects of the insured's business.

Marx v. Hartford — The Secret Word In Professional Liability Claims

But despite all the perceived challenges, insurers that are willing to litigate the distinction between the "professional" and "non-professional" aspects of an insured's business are not infrequently rewarded for their efforts. The secret word in professional liability claims is that courts are not afraid to engage in pars-

ing — sometimes fine-point — between these two aspects of an insured's business and conclude that injury or loss is not covered because it was not caused by acts involving specialized knowledge or training. *See Burton v. Choctaw County*, 730 So. 2d 1, 7 (Miss. 1999) ("Inevitably, every service performed, or every activity engaged in, by a physician, dentist, nurse, or lawyer is not a 'professional' service.").

Moreover, some courts even go one step further and conclude that, notwithstanding that the insured was performing an activity that required specialized knowledge or training, the act in question nonetheless did not qualify as a "professional service," because it involved the commercial, and not the professional, aspect of the insured's business. For example, in *Visiting Nurses Ass'n v. St. Paul Fire & Marine Ins. Co.*, 65 F.3d 1097 (3rd Cir. 1995), the court accepted that discharge planning may involve professional services, but observed that the suit against the insured involved conspiring with hospitals to monopolize referrals, engaged in a pattern of racketeering activity, and interfere with prospective contractual relations with patients. *Visiting Nurses Ass'n.*, 65 F.3d at 1102. "Similar allegations could be made against any business competing for referrals or customers. These allegations stem from VNA's effort to operate its business, not from any professional services that were or should have been provided by the discharge planners, and thus do not even potentially fall within the policy's coverage." *Id.*

Consider the following examples, in no particular order, in which the court agreed with the insurer that, just because the claim arose out of the act of a professional, in some way related to his or her profession, it did not qualify as a "professional service" for insurance purposes. [Given that the point being sought to be made in this Commentary is that insurers need not eschew pursuing a narrow interpretation of "professionals services," only decisions in which the act was found to be "non-professional" are discussed. This is in no way an attempt to suggest that insurers are never on the losing end of this issue. They certainly are.]

In *Massamont Insurance Agency, Inc. v. Utica Mutual Insurance Co.*, 489 F.3d 71 (1st Cir. 2007), the court, applying Massachusetts law, held that breach of promise by an insurance agent, to represent one insurer exclusively for certain lines of insurance, was not a wrongful act committed in the conduct of the insured's business in rendering or failing to render professional services as an insurance agent. *Massamont*, 489 F.3d at 74. The court concluded that "the decision to divert business may have been caused by friction over insurance matters but it was a distinct business decision by Massamont as to whether to maintain a relationship with a particular insurer — like leasing a building, buying supplies or charging for services. Such a decision is not the provision of professional services — the target of an E & O or malpractice policy." *Id.*

In *Hartford Fire Ins. Co. v. St. Paul Fire & Marine Ins. Co.*, 606 F. Supp. 2d 602 (E.D.N.C. 2009), the court held that a health care facility medical professional liability policy did not provide coverage for an automobile accident involving a health care worker who was driving a patient to or from a park or library — activities that were not disputed to be within the scope of treatment. *St. Paul*, 606 F. Supp. 2d at 613. The driver was a high risk intervention worker ("HRI") — a position requiring a four year degree in human services or in a non-related field with two-years of post-graduate experience in the field. *Id.* at 605.

The policy provided coverage for "medical professional injury that results from health care professional services" and included a comprehensive definition of such term. *Id.* at 608. The court concluded that the definition of "health care professional services" unambiguously did not include the driving services at issue. *Id.*

But the court went further and also examined whether the driving services provided by the health care worker qualified as "professional services" under the *Marx* definition. The court concluded that it was not even a "close question." *Id.* at 610, n.10. "[T]he driving services provided by [the health care worker] required no type of specialized health care or other specialized skills and could have been performed by any person licensed to drive a passenger car or truck, including [the patient's] mother had she been available to do so on the day in question. Regardless of whether [the health care worker] was providing other mental heath services to [the patient] as an HRI, it is the 'act itself' that must be considered and not [the

health care worker's] 'title or character.'" *Id.* at 611 (*quoting Marx* , 157 N.W.2d at 872).

In *Reliance Nat'l Ins. Co. v. Sears, Roebuck & Co.,* 792 N.E.2d 145 (Mass. App. Ct. 2003), the court held that improper billing by a lawyer for collection cases did not qualify as "professional services for others in the insured's capacity as a lawyer." *Reliance Nat'l*, 792 N.E.2d at 147. The court reasoned that "the billing function of a lawyer is not a professional service [except in exceptional circumstances, such as tax consequences in some situations and the need not to reveal client confidences when billing a third-party]. Billing for legal services does not draw on special learning acquired through rigorous intellectual training. We are not aware that courses in billing clients appear in law school curricula. The billing function is largely ministerial. There are elements of experience and judgment in billing for legal services, but the same goes for pricing shoes." *Id.* at 148.

In *St. Paul Fire & Marine Insurance Co. v. ERA Oxford Realty Greystone, LLC*, 572 F.3d 893 (11th Cir. 2009), the court held that the term "professional services," as used in an insurance policy providing professional liability protection to a real estate company, did not include the insured's conduct in connection with potential mergers with other real estate agencies. *ERA Oxford Realty*, 572 F.3d at 901.

The insurer argued that the alleged conduct did not involve "professional real estate services," because it did not arise from services "unique to real estate agents," but, instead, "from common business transactions which any professional might perform." *Id.* at 898.

The court agreed and held that "the Policy obligate[d] St. Paul to provide a defense only for losses resulting from the ERA Parties' errors or omissions while acting as real estate agents or mortgage brokers, that is: while they are engaged in the sale, exchange, purchase, or lease of real estate, including any negotiations concerning the mortgage, or involved in the prospects of sale, or otherwise using their specialized expertise as real estate agents or brokers." *Id.* at 900. The various wrongful acts committed during the course of merger negotiations did not result from actions "dependent upon the ERA Parties' use of expertise as real estate agents in the sale, exchange, purchase, or rental of real estate. The risk of committing a tort or breaching an agreement in the course of merging one business with another is certainly not one specific to the practice of the real estate profession." *ERA Oxford Realty*, 572 F.3d at 900-01. The Eighth Circuit further reasoned that:

> Although certain allegations refer to real estate matters such as the licensing of agents and the earning of commissions, these allegations go to the injury done to the [u]nderlying [p]laintiffs which resulted from . . . ERA's . . . allegedly tortious conduct in the aborted mergers. . . . None of the Underlying Plaintiffs' claims are premised upon the ERA Parties' faulty performance of real estate services . . . [and a]ll of these alleged losses could have occurred regardless of whether the ERA Parties ever provided any services to others in their capacities as real estate agents or brokers.

Id. at 901.

In *American Automobile Insurance Co. v. CBL Insurance Services, Inc.*, No. G039051, 2009 Cal. App. Unpub. LEXIS 5375 (Cal. Ct. App. June 30, 2009), the court held that a professional liability policy did not provide coverage to a life insurance agency that allegedly mismanaged funds provided as part of this investment program to finance policy premiums. *CBL Insurance*, 2009 Cal. App. Unpub. LEXIS 5375, at *24. The court concluded that "CBL was a life insurance agency" and this "was the sole business activity American agreed to insure. Simply because CBL chose to conduct another business venture either as its sole activity *or as an adjunct to selling and servicing insurance* [did] not mean American's policy applied to all of CBL's enterprises." *Id.* (emphasis added).

In *Zurich American Insurance Co. v. O'Hara Regional Center for Rehabilitation*, 529 F.3d 916 (10th Cir. 2008), the court held that, notwithstanding that "processing Medicare and Medicaid claims may be difficult and time consuming, the activity does not characterize a 'professional service.'" *O'Hara,* 529 F.3d at 924-25. Therefore, a health care facility's failure to file accurate reimbursement claims with the government was not covered under its professional liability policy. *Id.* at 925.

In *Duke University v. St. Paul Fire & Marine Insurance Co.*, 386 S.E.2d 762 (N.C. Ct. App. 1990), the court held that coverage for bodily injury sustained by a dialysis patient, who was injured while attempting to get out of a dialysis chair that slid out from under her, because its castors were not locked, was not precluded by a "professional services" exclusion contained in a hospital's policy. *Duke Univ.*, 386 S.E.2d at 766.

The court acknowledged that dialysis treatment is clearly a professional service. *Id.* at 764. The court also acknowledged that the dialysis chair was a specialized piece of equipment. *Id.* at 766. Nonetheless, the court concluded that the claim did not arise from the furnishing or failure to furnish professional services. *Id.* The court reasoned as follows:

> [I]f [the hospital's] employees were negligent, their negligence consisted of (i) failing to lock the casters on the dialysis chair, (ii) failing to stabilize the chair by other means, or (iii) failing to adequately support the decedent as she rose. The performance of these acts would not require any special skills or training. Although the dialysis chair was a specialized piece of equipment, the injury was not related to any special function of the chair but merely resulted from the presence of casters on the chair which enable it to be easily moved. The injury may have been avoided by simply locking the casters or holding the chair. These tasks are purely manual and no special training is required for a person to know that a chair with casters may move when someone attempts to rise from it.

Id.

In *Feszchak v. Pawtucket Mutual Insurance Co.*, 316 F. App'x. 181 (3rd Cir. 2009) (applying New Jersey law), the court held that injuries sustained by a person on account of a health care facility's failure to maintain a stationary exercise bicycle was not excluded by a "professional services" exclusion. *Feszchak,* 316 F. App'x. at 183. "As the District Court noted, this failure was 'manual' or 'physical' and 'no different than that caused by loose carpeting or a visitor's chair with a broken leg.'" *Id.*

Conclusion

When it comes to the question whether injury or damage caused by a professional insured was done so while performing non-professional services, the secret word is that, despite all the perceived challenges, insurers that are willing to litigate this issue are oftentimes rewarded for their efforts (and by much more than $100). The fact is that some acts by "professionals" are "non-professional," but they put on silly glasses, big eyebrows and nose and a moustache in an attempt to convince a court otherwise. ■