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Texas Federal Court Clarifies Broad Scope of Professional Liability Policies for Lawyers

Article By:

Shawn Ledingham

Lawyers may be surprised to learn that lawsuits brought by clients challenging something other than purely legal advice or advocacy—such as billing—**may not be covered by their professional liability policies**. Interpreting the phrases "professional services" and "legal services" in such policies narrowly, courts in some jurisdictions—including Texas—have historically limited professional liability coverage to claims based on the provision of legal advice or advocacy, not from more administrative tasks like billing and fee setting. However, a new trend seems to be developing in Texas, where courts are increasingly recognizing that, even if non-legal services rendered by a law firm are arguably not "professional services" themselves, they are sufficiently related to professional services to be covered by professional liability policies.

A professional liability policy typically provides coverage for claims "arising out of" the provision of "professional services." In a 2012 case, Shore Chan Bragalone Depumpo LLP v. Greenwich Ins. Co., the Northern District of Texas adhered to the narrow interpretation of "professional services" that has long been applied in Texas, limiting coverage to claims relating to services consisting of legal advice or advocacy. But the court did not end its analysis there, as is often the case. It next examined the phrase "arising out of," observing that it was a broad term, requiring only a causal relationship between a claim and a "professional service" to trigger coverage. The underlying dispute in Shore Chan centered on an agreement between the underlying plaintiffs and the policyholder, a law firm, to share fees generated by referrals provided to the law firm by the underlying plaintiffs. Because the fee dispute would not have arisen but for the policyholder's provision of legal services, the court concluded that the insurer had a duty to defend its insured against the claim.

Two weeks ago, in what may signal a trend, the Northern District of Texas applied the same analysis and again found coverage under the more expansive interpretation of a professional liability policy in Shamoun & Norman, LLP v. Ironshore Indem., Inc. In the underlying action, the policyholder, the Shamoun Norman law firm, sued a former client for allegedly failing to pay the law firm certain performance bonuses. The former client then brought claims against the law firm, alleging that the bonus arrangement violated the firm's fiduciary duty to its client.

Although the Shamoun court found that the term "professional services" does not include the practice of billing clients, it observed that determining whether conduct is a "professional service" is

only half of the analysis required in determining whether there is coverage. A court must also determine whether a claim "arises out of" professional services. In interpreting that phrase, the Shamoun court looked to Texas Supreme Court precedent which holds that the "arise out of" means that there is a causal connection or relation, often referred to as "but for" causation, not necessarily direct or proximate causation. Applying the "but-for" standard, the court held that were it not for the law firm's attorney-client relationship with its former client, there would not have been a claim alleging breach of fiduciary duty, and therefore, the claim "arose out of" the firm's provision of professional services, triggering the insurer's duty to defend against the claim.

This is the right result. Strictly limiting coverage only to claims that allege error or negligence in legal advocacy or advice, as the Shamoun court points out, misinterprets policy language in one of two ways. It either ascribes no meaning to the phrase "arising out of," which would violate the rule that an interpretation of a contract that renders certain language surplusage is disfavored, or it assigns an overly restrictive interpretation of the phrase which demands a more direct connection between the underlying claim and provision of "professional services" more akin to proximate, rather than but-for, causation. In Shore Chan and Shamoun, the Northern District of Texas has taken significant steps in bringing the scope of coverage under professional liability policies back in line with policyholders' expectations.

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