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INSURANCE LAW—New Mexico Recognizes the Administrative/Medical Services Distinction: *Millers Casualty Insurance Co. of Texas v. Flores*

I. INTRODUCTION

In *Millers Casualty Insurance Co. of Texas v. Flores*[1] the New Mexico Supreme Court attempted to clarify the term "professional services" as it is used in businessowners insurance policy exclusions. The court liberally construed the term, holding that the professional services exclusion[2] waived the insurance carrier's liability when an untrained doctor's assistant negligently administered an injection.[3] The court based its interpretation of "professional services" on the distinction between administrative and medical services.[4] In doing so, the court drew a distinction that is at best marginally effective and at worst arbitrary.

This Note will provide an overview of analogous case law from other jurisdictions, examine the rationale of the *Millers* decision, and explore the potential ramifications of *Millers* in New Mexico.

II. STATEMENT OF THE CASE[5]

Estefana Flores suffered a stroke after receiving a contraindicated injection[6] from Florence Curtis, an assistant[7] to Flores' physician, Dr.

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1. 117 N.M. 712, 876 P.2d 227 (1994).

2. The "Deluxe Businessowners Policy" of Millers Casualty Insurance Company of Texas at issue stated:

> [T]his policy does not apply . . . to bodily injury or property damage due to [the] rendering of or [the] failure to render any professional service, including but not limited to: (a) legal, accounting, advertising, engineering, drafting, architectural, and (b) medical, dental, pharmacological, cosmetic, hearing aid, optical, or ear piercing services . . . .

Id. at 714, 876 P.2d at 229.

3. Liability stemmed from actions that were not professional in nature. If the actions were professional, then the exclusion waived the carrier's liability. *See id.*

4. Losses related to medical services were excluded under the professional services clause of the businessowners policy; losses related to administrative services, closely related to operating a business, were covered. *See id.* at 715-16, 876 P.2d at 230-31.

5. All references within this section are found at 117 N.M. at 713, 876 P.2d at 228, unless otherwise cited.

6. Flores received injections of estrogen-type drugs to alleviate symptoms related to menopause. *See* Appellant's Brief in Chief at 1, *Millers*, 117 N.M. 712, 876 P.,2d 227 (1994) (No. 20190). Her medical file stated that estrogen should never be administered to her as she had a history of thrombophlebitis and treatment with estrogen or estrogen-based drugs was unsafe for her. *Id.*

7. Ms. Curtis' position as assistant is central to this case but her designated duties as assistant are unclear. Appellant referred to Curtis as an unsupervised and untrained assistant. *Id.* at 2. In an amicus curiae brief, the Trial Lawyers Association concurred. Brief for the New Mexico Trial Lawyers Association at 1, *Millers*, 117 N.M. 712, 876 P.2d 227 (1994) (No. 20190). Appellee classified Ms. Curtis as a physician's medical assistant, Appellee's Brief in Chief at 1, *Millers*, 117 N.M. 712, 876 P.2d 227 (1994), but Flores conceded that Curtis' actions were medical in nature. *Millers*, 117 N.M. at 714, 876 P.2d at 229. Ms. Curtis had no training as a nurse or medical assistant. She was trained as a phlebotomist but her experience was mainly in retail and clerical work. *Id.* at 714 n.1, 876 P.2d at 229 n.1.

Harry Winkworth. Dr. Winkworth did not supervise Curtis nor did he sufficiently train her to administer the injection. Flores brought suit against Dr. Winkworth and his professional corporation for medical malpractice, negligent employee hiring, training, and supervision. Flores subsequently settled the malpractice claim but sought damages under the remaining theories.[8]

Prior to the incident, Millers Casualty Insurance Company of Texas ("Millers") sold Dr. Winkworth a "Deluxe Businessowners Policy" which provided him and his business with comprehensive general liability coverage. This policy was in effect at the time of Flores' injury. It excluded coverage for losses related to professional services.[9]

After Millers was named in the suit, it filed a declaratory judgment action against Flores, Curtis, Dr. Winkworth, and his professional corporation claiming that the policy exclusion exempted it from any duty to defend or indemnify Dr. Winkworth or his corporation. In response to Millers' action, Flores moved for summary judgment, asserting that the exclusion clause did not exculpate Millers from its duty to defend or indemnify. Millers then filed a cross-motion for summary judgment, asserting that Dr. Winkworth's policy, "unambiguously excluded liability for injury arising out of 'professional services.'"[10] The trial court granted Millers' motion for summary judgment, ruling that Curtis' actions were "professional services" and Millers' policy excluded coverage for loss resulting from such services. Flores appealed to the New Mexico Supreme Court, which affirmed the summary judgment in favor of Millers.

III. CONTEXTUAL BACKGROUND

A businessowners insurance policy provides liability coverage for loss stemming from premises liability and administrative aspects of a business.[11] It generally excludes losses relating to professional services such as medical, legal, engineering, and architectural malpractice.[12] Therefore, comprehensive liability insurance carriers exclude coverage for certain claims related to the rendering of professional services to limit their liability and reduce costs for policy holders.[13] In this way, comprehensive liability insurers keep policy costs low for all policy holders. The exclusions must be unambiguous to be valid and enforceable.[14]

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8. Flores settled the malpractice claim by stipulating to a $500,000 settlement that the district court declared "fair and equitable." Appellee's Brief in Chief at 1, *Millers*, 117 N.M. 712, 876 P.2d 227 (1994) (No. 20190).

9. *See supra* note 2.

10. *Millers*, 117 N.M. at 713, 876 P.2d at 228.

11. *Id.* at 714, 876 P.2d at 229.

12. Carrying professional insurance is a recommended and generally required practice in many professions. 7A JOHN ALAN APPLEMAN, INSURANCE LAW AND PRACTICE WITH FORMS § 4505, at 324 (Walter F. Berdal ed. 1979).

13. *See id.* at 325. By excluding an area of potentially expensive liability, such as all liability resulting from the rendering of medical services, the general liability insurance carrier is able to offer coverage at a more reasonable price.

14. *See* Williams v. Herrera, 83 N.M. 680, 684, 496 P.2d 740, 744 (Ct. App. 1972)(holding that the court would construe any ambiguity in policy coverage wording against the insurer).

The essential issue in construing the professional services exclusion at issue is its scope. Determining whether an untrained medical assistant's acts are included in the professional service exclusion, or whether they are administrative services for which the insurer is liable, is difficult. Although a court may hold an exclusion is unambiguous, the policy itself is often unhelpful because the exclusion wording is non-exhaustive and only provides examples of excluded services.[15]

A. Other Jurisdictions Have Attempted to Formulate Working Distinctions Between Medical and Administrative Actions

Courts are split over how to determine whether an action is administrative or medical in nature. Although the distinction seems to be one of common sense, courts have focused on different characteristics in determining an action's classification. Courts generally look at one of four areas in distinguishing between professional and administrative actions: (1) the timing of the action, (2) the nature of the action, (3) whether the action falls within a theory of non-delegable duty for the professional, or (4) the chain of events leading up to the incident.

1. Timing of the Action

A number of courts have found the crucial factor to be the timing of the action causing the injury. If the action occurred during medical treatment, it is a professional service and the loss is therefore excluded. In *Antles v. Aetna Casualty & Surety Co.*,[16] the plaintiff, a chiropractor, sought to recover from his general liability insurer when a heat lamp fell from its mounting and injured a patient.[17] The California appellate court ruled that a professional services exclusion in the chiropractor's general liability insurance policy exempted the insurance carrier from covering the injury because it had occurred during chiropractic treatment.[18] Even though the doctor's actions did not cause the injury,[19] the court found that the timing of the incident brought the act under the exclusion's control.

In *Alpha Therapeutic Corp. v. St. Paul Fire & Marine Insurance Co.*,[20] the Eleventh Circuit Court of Appeals held that a professional services exclusion effectively waived the insurer's liability for an injury resulting from the negligence of a medical technician.[21] In *Alpha Therapeutic*, a medical technician improperly transcribed hepatitis test results, causing

15. *See* Ocean Accident & Guarantee Corp. v. Herzber's, Inc., 100 F.2d 171, 173 (8th Cir. 1938) (holding that the definition of "professional services" is not clear), *cert. denied*, 306 U.S. 645 (1939).

16. 34 Cal. Rptr. 508 (Dist. Ct. App. 1963).

17. *Id.* at 510.

18. *Id.* at 511.

19. Testimony at trial showed that improper installation of the heat lamp caused the injury. The plaintiff had not installed the heat lamp; it was installed by the previous tenant of the office, another chiropractor. *Id.* at 510.

20. 890 F.2d 368 (11th Cir. 1989).

21. *Id.* at 370.

the shipment of tainted blood to be sent to Alpha Therapeutic Corporation ("Alpha").[22] Alpha brought suit against the Hunter Blood Center ("Hunter") for the resulting damages.[23] Hunter's general liability insurance policy included a professional services exclusion.[24] Hunter argued that "a medical technician does not have the requisite training to qualify as a professional and that the technician's job of transposing test results is not a professional service."[25] Nevertheless, the court held that the transposing of test results and figures was part of the professional services Hunter provided; therefore, the exclusion waived the insurance carrier's liability.[26]

One drawback to this type of analysis is that it does not take into consideration the title of the actor or the actor's occupational training. A second flaw is that this approach does not analyze the timing of the ultimate cause of the injury.[27]

2. The Nature of the Action Most Proximately Causing the Injury

In *Mason v. Liberty Mutual Insurance Co.*,[28] a Louisiana court held that the nature of the injurious action should control rather than the timing of the action or the title of the negligent actor.[29] In *Mason*, a student nurse administered an injection that injured the plaintiff.[30] The trial court granted summary judgment for Liberty Mutual Insurance Company based on a professional services exclusion included in the policy it issued to the infirmary. On appeal, the Fifth Circuit Court of Appeals upheld the trial court's ruling, reasoning that "we should look not to the title or the character of the party performing the act but to the act itself."[31] Because the student nurse administered the injection as part of a certified medical program, the court found that the injection itself constituted professional services and was therefore excluded from coverage under the policy.[32]

This type of approach analyzes the nature of the action causing the injury but limits the scope of analysis to the action that most proximately caused the injury. It does not extend to the underlying causes of the

22. *Id.* at 369.
23. *Id.*
24. *Id.*
25. *Id.* at 369-70.
26. *Id.*
27. For example, in *Antles* the ultimate cause of the injury was not the rendering of medical services but the improper installation of equipment by someone other than the insured. *See Antles*, 34 Cal. Rptr. at 510.
28. 370 F.2d 925 (5th Cir. 1967).
29. *Id.* at 926.
30. *Id.* The student nurse administered the injection in the presence of a surgeon and the student's supervisor. As a result of the injection, plaintiff suffered nerve degeneration and loss of control of his right foot. *Id.*
31. *Id.* (quoting D'Antoni v. Sara May Hosp., 144 So. 2d 643, 646 (La. Ct. App. 1962)); *see also* Multnomah County v. Oregon Auto. Ins. Co., 470 P.2d 147, 150 (Or. 1970) (holding that the court must examine the action taken and not the title of the actor when determining the scope of professional services exclusions).
32. *See Mason*, 370 F.2d at 926.

injury. For instance, in *Mason* the court did not examine the administrative component of the decision to let a student nurse administer the injection.[33]

3. The Non-Delegable Duty of a Professional

Some courts have focused on the professional's non-delegable duty to provide adequate services to deny coverage under an exclusion provision. In *Northern Insurance Co. of New York v. Superior Court of California*,[34] a California appellate court held that the non-professional status of a physician's assistant did not "alter the professional nature of . . . [the Doctor's] nondelegable duty."[35] In *Northern Insurance*, a clerical employee of a doctor of obstetrics mistook one patient for another and directed the doctor to perform an abortion on the wrong patient.[36] The court focused on the physician's exclusive and ever-present duty to operate on the right patient. The court found that even when a "physician utilizes the assistance of a nonphysician in the performance" of his or her duties it does not "alter the professional nature of that nondelegable duty."[37]

At first glance, this approach appears to require little analysis to determine a distinction between administrative and medical services. If the action is related to the performance of medical services, then it is medical rather than administrative. However, the distinction drawn by this approach is potentially arbitrary because, to some extent, all services performed by a doctor's staff are related to the performance of medical services.

4. An Expansive Causation Analysis

Still other courts have focused on the series of events that contributed to the injury. *Guaranty National Insurance Co. v. North River Insurance Co.*[38] involved a psychiatric patient who killed herself by jumping from the fourth floor window of a hospital.[39] The patient was admitted "with directions that she be placed in the hospital's 'closed' unit"; because the closed unit was full, the hospital placed the patient in a less secure area.[40] The patient jumped to her death after she opened the window in her hospital room.[41]

After a jury awarded the decedent's estate damages for the hospital's negligence, the hospital's general liability carrier sought to avoid liability for the judgment through a professional services exclusion in the hospital's policy.[42]

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33. It is arguable whether the decision to let a student nurse administer injections on patients rather than limiting the student's education to artificial models is an administrative one.

34. 154 Cal. Rptr. 198 (Ct. App. 1979).

35. *Id.* at 200.

36. *Id.* at 199.

37. *Id.* at 200.

38. 909 F.2d 133 (5th Cir. 1990).

39. *Id.* at 134.

40. *Id.* While the window screens in the "closed" unit were attached to the windows so that patients could not escape, the windows in the less secure area lacked this precaution. *See id.* at 134, n.1.

41. *Id.* at 134.

42. *Id.* at 135.

The Fifth Circuit held that the hospital's decision to prevent psychiatric patients from escaping by screwing the hospital windows shut rather than installing protective screens over the windows was administrative in nature, not medical.[43] Therefore, the court determined that the policy required the general liability carrier to cover the liability of the hospital.[44]

In an analogous case, *Keepes v. Doctors Convalescent Center, Inc.*,[45] an Illinois court ruled that the negligent actions of a nonprofessional employee that resulted in injury to a retarded child were not professional services.[46] The child suffered severe burns when his aide left him unattended near a radiator while preparing his bath.[47] The court concluded that the injury resulted from the aide's negligence, but did not focus on her job title: "[w]hile . . . [the employee] was called a nurses' aid, she was working as a maid."[48] Reasoning that the aide's services were connected with "normal living," the court found that the negligence resulted from an administrative rather than a professional decision.[49] Accordingly, the carrier was not exempted from liability.

This approach focuses on the underlying causes of the injury. It examines the entire chain of events leading to the injury; it is not limited to the action most proximate to the injury. This approach is sufficiently detailed to analyze complicated chains of events leading to an injury but requires a thorough analysis of each decision and action leading to that injury.

In sum, few jurisdictions have squarely addressed the distinction between administrative and medical services. Of those jurisdictions which have ruled on the subject, the majority have upheld professional services policy exclusions and barred recovery for the negligence of medical aides and assistants. Courts have employed varied methods of distinguishing between administrative and medical services.[50] The lack of case law and meaningful analysis on the subject leaves this area of the law open to speculation, argument, and opportunity.

IV. RATIONALE AND IMPLICATIONS OF *MILLERS*

A. *Rationale of the Millers Court*

The New Mexico Supreme Court held that Curtis' action in administering an injection was a medical service included in the professional

43. *Id.* at 136.
44. *Id.*
45. 231 N.E.2d 274 (Ill. App. Ct. 1967).
46. *Id.* at 276.
47. *Id.* at 275.
48. *Id.* at 276.
49. *Id.*
50. In fact, some jurisdictions have not limited their analysis to applying only one method of distinction. For example, the Fifth Circuit has adopted a distinction based on a thorough analysis of the cause of the injury in Guaranty National Ins. v. North River Ins. Co., 909 F.2d 133, 135-37 (5th Cir. 1990), a distinction based on the nondelegable duty of a professional in D'Antoni v. Sara May Hosp., 144 So. 2d 643, 646-47 (La. Ct. App. 1962), and a distinction based on the nature of the action most proximately causing the injury in Mason v. Liberty Mutual Ins. Co., 370 F.2d 925, 926 (5th Cir. 1967).

services exclusion, waiving the insurer's liability for Flores' loss.[51] In reaching its decision, the court began by examining Flores' argument that the professional services exclusion did not prevent coverage of her claims.[52] Flores argued that the policy exclusion did not extend to her claims that Dr. Winkworth negligently hired, supervised, and failed to train Curtis.[53] Flores contended that those actions were the result of business or administrative, not medical decisions: "Dr. Winkworth's decision[s] . . . were administrative decisions rather than the rendition of medical services, and . . . these decisions were removed in time from Curtis's act of failing to render adequate medical care."[54] Therefore, Flores argued that the medical service exclusion did not preclude recovery of her claims.

The court disagreed, discounting Flores' argument that Dr. Winkworth's decisions relating to Curtis' hiring, training, and supervision were administrative in nature.[55] Instead, the New Mexico Supreme Court grounded its logic in precedent from other jurisdictions,[56] particularly *Mason v. Liberty Mutual Insurance Co.*[57] Relying on *Mason*, the court recognized a distinction between professional and administrative actions based on the nature of the action.[58] But the New Mexico court ultimately based its ruling on *Northern Insurance Co. of New York v. Superior Court of California*.[59]

In *Northern Insurance*, a California appellate court held that the non-professional status of a physician's assistant did not "alter the professional nature of . . . [the Doctor's] nondelegable duty [to administer the proper medical services to patients]."[60] The *Millers* court found that hiring and training assistants were included in Dr. Winkworth's medical services and was not a business-related activity.[61] Therefore, Dr. Winkworth failed to render adequate medical services when he hired an unqualified assistant

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51. Millers argued that Curtis' actions constituted professional services and were therefore excluded from Millers' coverage. *Millers*, 117 N.M. at 713, 876 P.2d at 228.

52. *Id.* at 714, 876 P.2d at 229. Flores conceded that the primary purpose of the insurance policy was "to cover against liability arising from premises liability" and that Curtis' act of administering the contraindicated injection was a medical service. *Id.*

53. *Id.*

54. *Id.*

55. *Id.* In doing so, the court distinguished *Guaranty National Insurance Co. v. North River Insurance Co.*, 909 F.2d 133 (5th Cir. 1990), on which Flores relied, because Curtis' actions involved professional judgment whereas the hospital's failure to secure the windows did not. *Millers*, 117 N.M. at 716, 876 P.2d at 231. *See supra* notes 38-44 and accompanying text.

56. *Id.* at 714, 876 P.2d at 229.

57. 370 F.2d 925 (5th Cir. 1967). *See supra* notes 28-33 and accompanying text.

58. *Millers*, 117 N.M. at 714-15, 876 P.2d at 229-30. The court also cited Alpha Therapeutic Corp. v. St. Paul Fire & Marine Ins. Co., 890 F.2d 368 (11th Cir. 1989), *see supra* notes 20-27 and accompanying text, thereby adopting a distinction based on the timing of the injury. The court did not explain its reliance on *Alpha Therapeutic* as precedent, and therefore the rationale behind it is unclear.

59. *Millers*, 117 N.M. at 715, 876 P.2d at 230, (citing Northern Ins. Co. of New York v. Superior Court of California, 154 Cal. Rptr. 198 (Ct. App. 1979)); *see supra* notes 34-37 and accompanying text.

60. *Northern Ins.*, 154 Cal. Rptr. at 200.

61. *Millers*, 117 N.M. at 715, 876 P.2d at 230.

and failed to adequately train and supervise her.[62] The court stated that the non-professional employee's acts were professional/medical services because the physician ultimately bore the responsibility for actions taken by the employee.[63] By relying on the rationale of *Northern Insurance*, the court implicitly adopted the non-delegable duty analysis as a way of defining professional services in New Mexico.[64]

The court touched briefly on the distinction between ordinary negligence and medical malpractice in response to plaintiff's argument that Dr. Winkworth's negligent hiring, training, and supervising of Curtis constituted ordinary negligence.[65] Because it determined that Dr. Winkworth's actions in hiring, supervising, and training Curtis were medical in nature, the court ruled that his actions constituted medical malpractice, not ordinary negligence.[66] Therefore, the resulting liability was professional in nature and was excluded from the policy Millers issued to Dr. Winkworth.

Finally, the court examined the wording of the exclusion itself and concluded that it was sufficiently unambiguous to act as a valid and enforceable prohibition of coverage.[67] The court found that the exclusion in the Millers policy was sufficiently clear to exclude coverage because it included an itemized list of professional services.[68] The specificity with which the exclusion was drafted removed any ambiguity.[69]

B. Implications: The Distinction Between Administrative and Professional Activities

1. *Millers* as Precedent for Future Cases

Millers cannot effectively act as precedent for future New Mexico decisions. This is because the *Millers* court relied on cases that contradict each other in analysis method. By doing so, the court implicitly adopted multiple methods of differentiating between administrative and professional services. The *Millers* court also failed to explore the connection

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62. *Id.* The court cited Bell v. Sharp Cabrillo Hosp., 260 Cal. Rptr. 886 (Ct. App. 1989) for the proposition that physicians have a professional responsibility to "insure the competence of its medical staff", and failure to do so is "professional negligence." *Id.*

63. *Millers*, 117 N.M. at 715, 876 P.2d at 230.

64. The court also likened the present case to Fire Ins. Exch. v. Alsop, 709 P.2d 389 (Utah 1985). *Millers*, 117 N.M. at 715, 876 P.2d at 230. *See supra* notes 34-37 and accompanying text.

65. The court stated that it did not intend to draw a clear distinction between the two theories of recovery. *Millers*, 117 N.M. at 716, 876 P.2d at 231.

66. *Id.*

67. *Id.*

68. *See supra* note 2 for the precise wording of the exclusion. The court cited Vihstadt v. Travelers Ins. Co., 103 N.M. 465, 709 P.2d 187 (1985) and Security Mut. Cas. Co. v. O'Brien, 99 N.M. 638, 662 P.2d 639 (1983) as analogous precedent for its ruling. *Millers*, 117 N.M. at 716-17, 876 P.2d at 231-32. The claim that a policy's terms are ambiguous is one potential argument in an insurance case. *See* Williams v. Herrera, 83 N.M. 680, 496 P.2d 740, (Ct. App. 1972)(holding that ambiguity in policy terms is construed against the insurer).

69. *Millers*, 117 N.M. at 716, 876 P.2d at 231.

between an employee's negligent actions and an administrator or doctor's negligent hiring and training practices.

a. Adoption of Multiple Methods of Distinction

The *Millers* court recognized a method of distinction based on the timing of the action[70] and a method of distinction based on the theory of non-delegable duty[71] in determining whether the cause of Flores' injury was medical or administrative. The court, however, did not thoroughly develop either method of distinction. As a result, it remains unclear which test will be used to make a legal determination of medical or administrative classification in the future. Consequently, insurance carriers, doctors, and lawyers cannot know what the controlling factors of analysis are in a "professional services" case.

b. Where Does Medical Judgment End and Business Sense Begin?

The *Millers* court also failed to explore the connection between an employee's negligent actions and an administrator's or doctor's negligent hiring and training practices. The court examined Dr. Winkworth's actions as one continuous exercise of professional judgment. The court said the hiring, training, and supervising of his assistant constituted the rendering of "professional services" because he bore the ultimate responsibility for his assistant's actions.[72] But common sense dictates that there must be some point at which Dr. Winkworth's decisions required administrative, not medical, judgment. Future personal injury negligence cases will require further clarification of what is required for an action to be categorized as medical or administrative.[73]

C. *A Potential Problem Not Addressed in Millers: The Changing Composition of Personnel in the Medical Profession*

Although the differentiation between administrative and medical actions may seem like a matter of common sense, a thorough examination of today's medical services industry illustrates that it is not. Indeed, the difference between administrative and professional medical decisions may have lost its meaning.[74] With significant advances in medicine and the

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70. *See supra* notes 16-27 and accompanying text.

71. *See supra* notes 34-37, 59-64 and accompanying text.

72. *Millers*, 117 N.M. at 716, 876 P.2d at 231.

73. It is likely that the court could not use *Millers* to fashion a practical distinction between administrative and medical decisions because Flores conceded that Curtis' actions were medical in nature and that coverage of those services was not the primary purpose of the policy. *Id.* If future plaintiffs do not concede that the injurious actions were administrative or medical, the presiding court will be forced to determine the true nature of the service rendered. The court that does so will greatly clarify the scope of administrative and medical services exclusions in New Mexico.

74. The cases cited for the premise that there is a definable common law distinction between administrative and medical decisions date predominantly from the late 1960's and early 1970's when there was a smaller patient/physician ratio and not as many medical para-professionals. *See* Mason v. Liberty Mutual Ins. Co., 370 F.2d 925 (5th Cir. 1967); Antles v. Aetna Cas. & Sur. Co., 34 Cal. Rptr. 508 (Dist. Ct. App. 1963).

rapid growth of the medical industry in the last twenty years, the composition of the medical profession's personnel has changed dramatically. The ranks of highly trained personnel have been joined by aides, assistants, and technicians who generally receive less training than physicians but often participate in rendering medical services.[75] These individuals perform activities that were previously the duties of nurses and doctors (such as medical record maintenance, treatment preparation, and patient hygiene). As a result, the line between administrative and medical actions is increasingly unclear.

Specialist physicians hire, train, and supervise assistants and staff of all types, yet not all of those employees are integrally related to the rendering of "professional services." For instance, a pediatrician's receptionist is not integrally related to the doctor's treatment of a child's pneumonia, yet the receptionist's actions may be considered part of the medical service under *Millers*. Nevertheless, the amount of interaction these employees have with files, patients, and the patients' environment create a great risk of harm if performed negligently. The process of hiring, training, and supervising assistants requires physicians to exercise administrative and managerial, rather than medical judgment. It would be absurd to exclude claims for all actions related to the operation of a business, but if that business is the rendering of medical services, there is nothing to prevent it under *Millers*.

The court must clarify what methodology will control the classification of an action as medical or administrative. *Millers* does not sufficiently explain the determinative factors for analysis. By recognizing more than one method of distinction the court has left this area of law ambiguous. It is unclear whether the timing of the action is controlling or the presence of a non-delegable duty related to that action is the essential factor. There are shortcomings in each method of distinction[76] and the court may clarify the distinction by formulating its own method. An approach involving a thorough analysis of the cause of the injury could sufficiently treat even the most complicated of cases but may not be necessary for more rudimentary cases.[77] Regardless of which distinction method the court adopts, it must be sufficiently clear to be of use to insurers, insureds, and the attorneys handling personal injury cases, sufficiently thorough to handle complicated chains of events leading to injury, and sufficiently adept to scrutinize cases in the framework of the changing composition of personnel in the medical profession.

V. CONCLUSION

In *Millers Casualty Insurance Co. v. Flores*, the New Mexico Supreme Court held that the professional services exclusion in a businessowners

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75. The requisite training for these positions depends on the employer. Some require training courses from accredited medical training institutions while others require no formal specialized training.

76. *See supra* notes 16-50 and accompanying text.

77. Nevertheless, establishing the thorough analysis method of distinction would not bar cursory treatment of cases in which the classification of an action or actions is indisputable.

policy waived the insurance carrier's liability when an untrained doctor's assistant negligently administered an injection.[78] However, the court failed to provide a sufficiently clear distinction between administrative and medical services. The holding demonstrates that the traditional distinction between administrative and professional services is ineffective. In highly specialized areas of medicine which work in tandem with important administrative support, there is a great risk that individuals sustaining injuries may slip through the cracks of both medical malpractice and general liability insurance coverage. *Millers* recognizes multiple ways of drawing the distinction between administrative and medical decisions for the purpose of insurance policy exclusions but does not clearly adopt a test for doing so. *Millers* does not clarify the distinction between medical and administrative services; it manifests the need for more clarification.

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78. 117 N.M. 712, 876 P.2d 227 (1994).