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ALERT

District Court Narrowly Interprets Bodily Injury Exclusion

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The United States District Court for the Southern District of West Virginia has narrowly construed a bodily injury exclusion in a professional liability insurance policy in connection with determining that coverage existed for negligent supervision claims against the insured related to allegations of patient molestation by the insured's employee. *Charleston Area Med. Ctr. v. Nat. Union Fire Ins.,* 2011 WL 2161534 (S.D. W.Va. June 1, 2011). The court also determined that coverage was not excluded by the medical and professional services exclusion in the policy.

The insurer issued a professional liability policy to the insured that included directors and officers, not-for-profit organization liability, and employment practices liability coverage sections. The insured medical center faced two claims by female patients alleging negligence in the supervision of an employee who allegedly molested the patients. The insured provided timely notice of the claims to the insurer, and the insurer denied coverage. The insurer determined that no coverage existed under the policy because the claims did not allege a "wrongful act" and would be barred by the bodily injury and medical and professional services exclusions in the policy in any event. During the discussion over whether coverage was available under the policy, the insured settled the claims with the insurer's consent. Shortly thereafter, the insured filed an action against the insurer for breach of contract and violations of the West Virginia Unfair Trade Practices Act. Both parties moved for summary judgment.

The court first determined that the patients' complaint alleged a "wrongful act," triggering the directors and officers coverage section of the policy. The directors and officers coverage section defined

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"wrongful act" as loss resulting from "any breach of duty, neglect, error, misstatement, misleading statement, omission or act by or on behalf of the Organization." The insurer contended that directors and officers policies are not designed to provide general liability coverage for claims such as claims for negligent supervision. In rejecting the insurer's contention, the court held that the claimants adequately pled a case for negligent supervision under West Virginia law, and the negligent supervision claims fell within the policy's definition of "wrongful act."

Next, the court held that coverage for the claims was not excluded by the bodily injury exclusion in the policy. The policy excluded coverage for claims "alleging, arising out of, based upon, attributable to, or in any way involving, directly or indirectly, Bodily Injury," defining "Bodily Injury" as "physical injury, sickness or disease (other than emotional distress or mental anguish), including death resulting therefrom." The insurer contended that both claims alleged bodily injuries, noting that both complaints claimed "injury in mind and body," and one claimant referenced a specific physical manifestation of the alleged molestation. According to the court, West Virginia has rejected the premise that an allegation of physical contact in the underlying complaint is sufficient to trigger the bodily injury exclusion. Instead, the court determined that the inquiry must focus upon "the nature of the injuries rather than on the act that resulted in such injuries." Accordingly, after determining that the claims at issue "consist largely of alleged emotional injury," the court concluded that the insurer had failed to present sufficient evidence of bodily injury to trigger the exclusion.

The court also determined that coverage was not barred by the medical and professional services exclusion. The policy excluded coverage for claims "alleging, arising out of, based upon or attributable to the Insureds [sic] performance or rendering of or failure to perform or render medical or other professional services or treatments for others." The insurer contended that the claims were excluded because the alleged molestation occurred while the employee was performing medical and professional services. The court rejected the insurer's argument, concluding that claims resulted from "the employee's intentional and offensive acts, independent of any treatment or medical service that he may have been providing."

Finally, the court rejected the insurer's motion for summary judgment on the insured's claims pursuant to the West Virginia Unfair Trade Practices Act. In so holding, the court noted that the determination of an insurer's compliance with the statute is typically left to a jury, and issues of fact were presented by discovery that were not appropriate for resolution on summary judgment.