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NEWSLETTER

Other Decisions of Note

September 2004

Potential Coverage Based on One Complaint Triggers Duty to Defend Other Complaints

In an unreported decision, the U.S. District Court for the Northern District of Illinois, applying Illinois law, has held that an insurer has a duty to defend a partnership in connection with demand letters, arbitration notices and class action complaints concerning the partnership's refusal to disburse retired partners' benefits in lump sum payments. *Federal Ins. Co. v. Arthur Anderson*, L.L.P., No. 03 C 1174 (N.D. Ill. May 18, 2004). In reaching this decision, the court rejected the insurer's argument that it did not have to defend those complaints lacking allegations that would implicate coverage. The court stated in *United States Fidelity and Guaranty Co. v. Wilkin Insulation Co.*, 550 N.E. 2d 1032 (Ill. App. 1990) that an insurer "must defend if it has knowledge of true but unpleaded facts which when taken together with the allegations in the complaint indicate that the claim is potentially covered by the policy." The court explained that at least one of the lawsuits alleged wrongful acts that were potentially covered and that "the allegations in any single complaint can be inferred in the other complaints."

Sexual Assault Does Not Constitute "Professional Liability" under State Medical Loss Fund

A Pennsylvania trial court has held that a hospital's alleged negligent supervision of one of its technicians, who sexually assaulted female patients, did not constitute "professional liability" under Pennsylvania's Health Care Services Malpractice Act for purposes of excess coverage under a state sponsored insurance fund. *St. Joseph Med. Ctr. v. The Med. Prof'l Liab. Catastrophe Loss Fund*, 2004 WL 1661032 (Pa. Commw. Ct. July 27, 2004). The applicable state statute does not defend "professional liability;" however, it defines "professional liability insurance" as "[I]nsurance against liability on the part of a health care provider arising out of any tort or breach...resulting from the furnishing of medical services." The court therefore inferred from this definition that professional liability under the act arises from the provision of medical services. Relying on the Pennsylvania Supreme Court's decision in *Physicians Ins. Co. v. Pistone*, 726 A.2d 339 (1999), the court found that professional liability policies do not provide coverage for health care practitioners who sexually assault their patients because those acts do not involve "any medical skill associated with specialized training."

Texas Statute Mandates Separate Notice of a Claim for Health Care Providers

The Texas Court of Appeals has held that, under applicable Texas statutory law, a notice of claim letter sent to a doctor did not constitute notice of a claim to the clinic that employed the doctor. *Texas Med. Liab. Trust v. Transp. Ins. Co.*, 2004 WL 1637890 (Tex. App. July 23, 2004). The insurer issued separate claims-made policies to both a doctor and the clinic that employed the doctor. A patient sent a letter providing notice of a potential

claim against the doctor for malpractice by the doctor, but the letter, which the clinic and insurer were aware of, did not mention any claim against the clinic. Three years later, the patient made a claim against the doctor and the clinic for the same matter. At the time the claim was made against the clinic, the insurer no longer provided coverage. The court held that the insurer properly denied the clinic coverage since the prior letter had not threatened a claim. The court observed that its holding was consistent with Section 74.051 of the Texas Civil Practice and Remedies Code, which provides that "a person asserting a health care liability claim must give notice to *each* physician or health care provider against whom the claimant asserts liability."

Ambiguity in Pollution Exclusion Prevents Broad Application under Iowa Law

The U.S. Court of Appeals for the Eighth Circuit, applying Iowa law, has held that a pollution exclusion in a professional liability policy does not bar coverage for claims arising from a realtor's alleged negligent misrepresentation to prospective property owners that property was not formally used as a solid waste disposal site. *First Realty, Ltd. v. Frontier Ins. Co.*, 2004 WL 1752584 (8th Cir. Aug. 6, 2004). In doing so, the court determined that, while the policy's pollution exclusion applied to claims based on "the presence of hazardous materials...or other material, irritant, [or] contaminant," Iowa law had previously construed the terms "other material," "irritant" and "contaminant" to be ambiguous, and thus to be construed in favor of the insured. Thus, while claims regarding the presence of "hazardous materials" would be subject to the exclusion, claims based on the presence of non-hazardous solid waste would not be. Since Iowa law did not restrict the definition of solid waste disposal sites to only those sites having hazardous wastes, allegations of failure to disclose the existence of a solid waste disposal site did not necessarily trigger the exclusion, and thus were subject to coverage.

Assault and Battery Exclusion Inapplicable to Claims for Sexual Harassment Including Sexual Assault

The U.S. District Court for the Northern District of California, applying California law, has concluded that an exclusion for assault and battery in a directors and officers liability policy did not apply to claims of sexual harassment that included sexual assault. *AXA Rosenberg Group v. Gulf Underwriters*, 2004 WL 1844846 (N.D. Cal. Aug. 16, 2004). The coverage grant of the policy at issue provided coverage for losses arising from wrongful acts, which was defined to include, *inter alia*, "sexual or workplace harassment of any kind." The policy also contained an exclusion that provided that the insurer would not be liable "for Loss in connection with any Claim...for...assault [or] battery." The insurer denied coverage, contending that the coverage grant and the exclusion taken together provided that coverage was available for "all-types of non-physical sexual harassment" but not claims based on physical contact. The court rejected that position, determining that the words "of any kind" in the coverage grant would be rendered meaningless if the exclusion were enforced to apply to sexual assault. Accordingly, the court limited the exclusion's application to claims of assault and battery that were not made in connection with allegations of sexual harassment.

For more information, please contact us at 202.719.7130.