

Sexual Misconduct Exclusion Bars Coverage for Sexual Harassment by Chiropractor

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In an unpublished opinion, the United States Court of Appeals for the Tenth Circuit has held that a sexual misconduct exclusion in a professional liability policy issued to a chiropractor barred coverage under the policy for sexual harassment. *Nat'l Chiropractic Mut. Ins. Co. v. Kancilia*, 2003 WL 22273338 (10th Cir. Oct. 3, 2003).

The insurer issued a professional liability policy to a chiropractor. The policy provided coverage for amounts that "the insured shall become legally obligated to pay as damages because of injury caused by accident arising out of the rendering of or failure to render to a patient" those professional services "usually and customarily furnished by Chiropractors." The policy excluded coverage for "injury resulting in whole or in part from...sexual impropriety; sexual intimacy, or assault." The policy also excluded coverage for "punitive or exemplary damages, fines, penalties imposed by law, or matters uninsurable under law pursuant to which this policy is construed."

Two former patients of the chiropractor, one of whom was also an employee, filed suit against the chiropractor alleging sexual misconduct on his part. After a jury trial, the court in the underlying action found the chiropractor liable for the torts of negligence, invasion of privacy and outrageous conduct. The court awarded economic damages, non-economic damages and punitive damages. After the chiropractor sought coverage under the insurance policy for damages awarded at trial, the insurer filed a declaratory judgment action, contending that coverage for the judgment was excluded under the policy.

The Tenth Circuit agreed with the insurer. The court initially noted that the only potential coverage issue was with respect to economic damages because the policy "expressly exclude[s] coverage for any of the non-economic or punitive damages awarded in the underlying action." The court held that no coverage was available for economic damages because the policy provided coverage only for "accidents," and the allegations against the chiropractor were based on intentional conduct. The court also noted that the policy explicitly excluded coverage for sexual assault or impropriety. The court rejected the assertion that coverage was available because the underlying plaintiffs had also alleged that the chiropractor failed to diagnose or treat them properly, reasoning that the state trial court case had focused exclusively on the chiropractor's inappropriate sexual conduct.

The Tenth Circuit also rejected the argument by the underlying claimants that they were entitled to a separate evidentiary hearing in the coverage action to afford them the right to present additional evidence to establish coverage. The court held that the availability of coverage could appropriately be determined based on "the language of the policies at issue and the evidence presented in the underlying trial."

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