

# Coverage Available under Medical Liability Policy in Texas for Punitive Damages

---

July/August 2003

A Texas appellate court has held that, in the absence of guidance from the state legislature or the Texas Supreme Court, insurance policies may provide coverage for punitive damages. *Westchester Fire Ins. Co. v. Admiral Ins. Co.*, 2003 WL 21475423 (Tex. App. June 26, 2003).

A nursing home purchased an occurrence-based primary policy of professional medical liability insurance with a limit of \$1 million per occurrence and an excess policy with a limit of \$10 million per occurrence. The primary policy defined occurrence as "an accident...which results in bodily injury...neither expected nor intended from the standpoint of the Insured."

The nursing home was sued by a patient and found to have been grossly negligent in its treatment of the patient. The underlying court held that the patient was entitled to compensatory damages, plus prejudgment interest; mental anguish damages; and treble damages, attorney's fees, and prejudgment interest under the Texas Deceptive Trade Practices Act (DTPA). The amount of compensatory damages exceeded the primary carrier's policy limits. Before the court could hold a hearing on punitive damages, the case settled with the primary carrier tendering its limits and the excess carrier contributing the remainder. The excess carrier then brought an equitable subrogation claim against the primary carrier, alleging that the primary carrier failed to settle the underlying insurance claim within its policy limits.

The excess carrier argued that the primary carrier improperly settled for punitive damages, which it contended are uninsurable as a matter of law. The appellate court disagreed. It noted that neither the Texas legislature nor the Texas Supreme Court have addressed the public policy implications of permitting insurance for punitive damages. In the absence of such direction, the court declined to hold that insurance coverage for punitive damages was void as against public policy.

The excess carrier also argued that the punitive damage component of the settlement was not covered under the language of the policy because the underlying court had found the nursing home to have been grossly negligent, and, thus, the injuries were "expected" or "intended." The court rejected that argument, reasoning "it is possible for a person to know that an act or omission is likely to cause serious harm, but not to anticipate it or to consider it probable that harm will likely occur." The court further noted that the policy did not contain an exclusion for grossly negligent behavior.

The court did hold, however, that damages based on the DTPA were not covered under the policy because the underlying trial court had based DTPA liability on a finding that the nursing home "intentionally" deceived the patient and its acts and omissions were "knowing." Since knowing is defined under the DTPA as "actual awareness," the court concluded that the DTPA violations were based on "expected" or "intended" acts or omissions.

*For more information, please contact us at 202.719.7130.*