

Physician's Excessive Charges for Prescription Drugs to Patients Constitute "Professional Services"

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In an unpublished opinion, the U.S. Court of Appeals for the Fourth Circuit, applying North Carolina law, has held that a weight-loss center that was sued for overcharging patients for prescription drugs was entitled to a defense by its professional liability insurer because the allegations involved "professional services." *Continental Cas. Co. v. Physicians Weight Loss Centers of Am., et al.*, 2003 WL 1689530 (4th Cir. Mar. 31, 2003). The court also held that the exclusion for the "return of fees" did not bar coverage because the damages sought were based on inflated prices for goods, not services.

The insurer issued a professional liability policy to a weight-loss center. The policy provided "coverage against professional liability claims brought against [the insured] resulting from professional services provided by [the insured]." The policy further defined "professional services" as "those health care or medical services [the insured] normally provide[s] as a [weight loss program center]." The policy also contained an exclusion barring coverage for "fines, penalties, the return or withdrawal of fees or governmental payments."

A patient who had been treated at the weight-loss center filed a class-action lawsuit against the center. The complaint alleged that the weight-loss center required the patient to purchase drugs from the center at more than twice the price for which they were sold at a pharmacy, and that the treating physician, employed by the weight-loss center, refused to give her a prescription to fill at the pharmacy because he was barred from doing so by the center. The complaint alleged various state statutory violations, intentional interference with fiduciary duty and fraud.

The Fourth Circuit held that the acts alleged in the underlying claim constituted "professional services." In doing so, the court stated that the insurer mischaracterized the claim as a "mere dispute over pricing." Instead, the court determined that the underlying complaint involved the dispensation of a prescription and the breach of the physician's fiduciary duties, which were indisputably "professional services."

The court also rejected the insurer's argument that the exclusion for "fines, penalties, the return or withdrawal of fees or governmental payments" precluded coverage. The court first reasoned that the term "return of fees" applied to charges for professional services, rather than to payments for goods. Because the underlying

claims sought "damages based on the inflated purchase price of a good, not a service," the court held that the exclusion was inapplicable. In addition, the court noted that the "context" of the exclusion suggested that it applies only to fees paid to the government.

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