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NEWSLETTER

Indemnification Not Available for Allegations of Misrepresentations as to Physician's Credentials, But Insurer May Be Estopped from Denying a Defense

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A state trial court in Connecticut has held that there is no indemnification coverage available under a medical professional liability policy for a suit arising out of allegations that the named insured hired a physician who he knew was not licensed to practice medicine. *ProSelect Ins. Co. v. Fica*, 2009 WL 5698128 (Conn. Super. Dec. 22, 2009). The court also concluded, however, that the insurer may be equitably estopped from asserting that it has no duty to defend the insured based on the appointment of insurer's counsel who may have been negligent.

The insured sought coverage for a lawsuit filed on June 29, 2005 by a former patient of the insured's medical practice. The patient alleged that the insured knowingly hired a physician who had failed to pass the necessary licensing requirements to practice medicine in the United States and that the patient allowed that physician to treat him based on representations by the insured that the physician was properly credentialed. The patient also alleged that the insured committed medical malpractice by allowing the unlicensed physician to treat him and that the consent provided by the patient for treatment was uninformed and improperly obtained. According to the complaint, the insured as well as the unlicensed physician "violated the laws and regulations for practicing medicine."

The insurer appointed defense counsel for the insured under a reservation of rights and brought a declaratory judgment action. The insurer subsequently moved for summary judgment as to its defense and indemnification obligations. Addressing the latter first, the court found that several exclusions precluded indemnification. For starters, the court held that the exclusion for claims "[a]rising from the willful, knowing, deliberate or intentional violation of any statute, ordinance or regulation" applied. In this regard, the court noted that while the claimant may have pleaded causes of action for malpractice, all of the supporting allegations were "inextricably tied" to the named insured's and unlicensed physician's purported knowing and intentional violation of Section 20-9 of the Connecticut General Statutes, which prohibits the practice of medicine without a license. These facts, according to the court, also triggered the exclusion in the policy for claims "[a]rising from any Incident in the performance of Professional Services . . . [w]hich takes place while Your professional

license is . . . not in effect." And, pointing to the guilty pleas of the insured and unlicensed physician to federal charges of health care fraud, the court found that the policy's dishonesty exclusion applied.

Despite its conclusion that indemnification under the policy was not available, the court determined that factual questions remained as to the insurer's defense obligation that precluded summary judgment on this point. Specifically, the court noted that there was evidence in the record to suggest that counsel appointed by the insurer may have been negligent. According to the court, this evidence raised the issue of whether the insured relied to his detriment on the insurer's action in appointing counsel (and therefore refrained from retaining other counsel) and, as a result, whether the insurer should be equitably estopped from asserting it has no duty to defend.