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NEWSLETTER

Other Decisions of Note

August 2004

Per Claim Limitation Applies to Medical Malpractice Suit

In an unpublished decision, the United States Court of Appeals for the Sixth Circuit, applying Kentucky law, has held that a medical malpractice policy did not afford coverage to a doctor for a loss of consortium lawsuit filed by a deceased patient's husband because the suit against the deceased wife's doctor was part of the same claim as the malpractice lawsuit by the wife's estate that had previously settled for the policy's "per claim" limit. *Nat'l Cas. Co. v. Hajjar*, 2004 WL 1491634 (6th Cir. June 22, 2004). The court provided no substantive discussion, explaining that the district court's reasoning in support of the same result sufficiently articulated the basis for the ruling.

Insurer Not Liable for Prejudgment Interest in Excess of Policy Limits

The Supreme Court of Oklahoma has held that an insurer is not liable in a garnishment action for a prejudgment interest award in excess of its policy limits in a case in which the policy required the insurer to obtain the policyholder's consent to settle third-party claims and the policyholder twice withheld his consent. *Parish v. Henry*, 2004 WL 1542213 (Okla. July 6, 2004). The insurer issued a professional liability policy to a doctor. The policy conditioned the insurer's right to settle third-party claims against the doctor on the doctor's consent to any settlement. During litigation against the doctor, the doctor twice rejected offers to settle within, or for, the limits of the policy. Under such circumstances, the court held that the doctor should be held liable for any prejudgment interest in excess of policy limits. The court further reasoned that cases holding an insurer liable for prejudgment interest in excess of policy limits where the insurer "has complete control of litigation" were inapplicable.

Insurer May Be Estopped from Withdrawing Defense

A Florida appellate court, relying on the decision of the Florida Supreme Court in *Doe v. Allstate Insurance Co.*, 653 So. 2d 371, 374 (Fla. 1995), has held that where an insurer initially assumed the defense of a policyholder, it may be estopped from denying coverage for an otherwise appropriate reason if "the insurer's assumption of the insured's defense prejudiced the insured." *Family Care Ctr. v. Truck Ins. Exch.*, 2004 WL 1335724 (Fla. Dist. Ct. App. June 16, 2004). The policy in question provided medical malpractice coverage to a physician and named his employer as an additional insured "but only as respects professional services rendered" by the physician. Suit was brought against a second physician and the employer. The employer sought coverage under the policy, and the insurer initially provided a defense to the employer during statutorily required pre-suit proceedings. Following completion of the pre-suit proceedings, the insurer denied

coverage and withdrew its defense as to the employer. The court agreed that the employer was not covered under the policy; however, it remanded the case for further proceedings to allow the employer to litigate its claim that the insurer made decisions when initially defending the employer that prejudiced the employer's defense after the denial of coverage.

Third Circuit Holds Insurer Did Not Waive Coverage Defense By Not Specifically Reserving Its Rights
In an unpublished decision, the United States Court of Appeals for the Third Circuit, applying Pennsylvania law, has held that a professional liability insurer did not waive its right to deny coverage based on a breach of the cooperation clause, even though it had not specifically reserved its rights under that provision of the policy, because it had generally reserved its right to raise other terms and conditions of the policy. *Pizzini v. Am. Int'l Specialty Lines Ins. Co.*, 2004 WL 1543274 (3d Cir. July 12, 2004). The professional liability insurer defended the policyholder pursuant to a reservation of rights letter. The policyholder refused to testify, which undermined the defense counsel's ability to provide an effective defense. Thereafter, without consent of the insurer, the insured settled with the underlying plaintiffs, who then brought suit against the insurer seeking indemnity for the settlement. The court rejected the plaintiffs' argument that the insurer waived its right to deny coverage based on the breach of the cooperation clause by not specifically reserving its rights under that provision of the policy. The court noted that in reserving its rights, the insurer delineated specific defenses and also generally reserved the right to deny coverage based on any other defenses that might affect coverage.

For more information, please contact us at 202.719.7130.