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NEWSLETTER

Other Decisions of Note

October 2006

Sexual Assault Is an "Error or Omission" in Supervising, Teaching, Proctoring Others

The U.S. District Court for the Eastern District of Pennsylvania, applying Pennsylvania law, has ruled that a health care liability policy afforded coverage for damages arising out of a sexual attack by a teacher in a residential treatment program. *Lexington Ins. Co. v. Kidspeace Corp.*, 2006 WL 2456468 (E.D. Pa. Aug. 22, 2006).

The health care professional liability policy at issue provided coverage for a medical incident arising out of professional services, unless the incident involved sexual misconduct that the insured knew (or should have known) that the individual responsible for the sexual misconduct at issue had a prior history of such misconduct.

In its decision, the court noted that the policy defined "medical incident" to include "an act, error or omission" in providing professional services. The court explained that, in this case, the teacher committed the act at issue while supervising a resident of the facility. The court explained that "[i]t may be a broad definition of a medical incident, but it is the one [the insurer] chose."

Notice-Prejudice Rule Not Applicable Under District of Columbia Law

The U.S. District Court for the District of Columbia has held that, under District of Columbia law, coverage was not available to an insured railroad under an excess policy as a result of the railroad's failure to provide timely notice of a claim to its insurers, regardless of whether the insurer suffered prejudice as a result of the delay. *Nat'l R.R. Passenger Corp. v. Lexington Ins. Co.*, 2006 WL 2468062 (D.D.C. Aug. 25, 2006).

The insurer issued a claims-made, excess policy to the railroad. The policy required the railroad to provide "immediate" notice of "Claims," defined as "that part of any written demand received by the [railroad] for damages covered by [the policies]," "whenever [it] ha[d] information from which [it] should [have] reasonably conclude[d] that a Claim . . . equals or exceeds the agreements' threshold amounts."

In January 1999, the railroad received a letter demanding a $6.5 million settlement for a suit stemming from a collision between a vehicle and a train. In September 1999, a verdict was entered against the railroad for more than $20 million. Following the verdict, the railroad notified its excess insurers of the suit and the verdict; the insurer denied coverage based on untimely notice. The court concluded that "immediate" notice of the claim was required under the policy because "the railroad was obligated to assume that it was liable for the

entirety of the demand in determining whether the amount of the claim exceeded the notification thresholds applicable under each of the policies."

Recognizing that, under District of Columbia law, an insurer is not required to show prejudice before denying coverage based on late notice, the court rejected the railroad's assertion that the District of Columbia Court of Appeals would require the insurer to demonstrate prejudice in the case at hand since it involved an excess, rather than a primary, policy and since the majority of jurisdictions have abandoned the "no prejudice" rule. The court, in rejecting the railroad's argument, concluded that "[t]he District's 'no prejudice' rule . . . has not had time to atrophy, having been restated by the Court of Appeals as recently as 2001."

Printing Error Not Covered By Subsequently Obtained Printer's E&O Provision

The U.S. Court of Appeals for the Seventh Circuit, applying Illinois law, has held that an insurer does not have a duty to defend or indemnify a policyholder who purchased printer's E&O coverage several months after a printer error despite the fact that the insurer mistakenly produced a copy of the policy showing the provision was in effect at the time of the printer error. *Grey Direct, Inc v. Erie Ins. Exchange*, 2006 WL 2391293 (7th Cir. Aug. 21, 2006).

The policyholder obtained standard business owner's coverage, but added printer's E&O coverage after a costly printer error. In the course of the litigation, the insurer produced, by means of computer generation, a copy of the policy that failed to indicate that the printer's E&O coverage was obtained after the inception of the policy. The court held that "the fact the insurance company inadvertently provided flawed evidence of the policy in the form of the computer generated copy does not change the terms of the contract itself." The court held that even if the terms of the policy were affected by the insurer's mistake, the known loss doctrine precluded coverage because there was no evidence that the insurer intended to accept a known loss of nearly $1 million in exchange for a $50 premium. According to the court, a contrary holding would be "unconscionable."

Pennsylvania Trial Court Rules That Reinsurance Information Is Discoverable

The Court of Common Pleas of Pennsylvania has ruled that reinsurance information is discoverable in a coverage dispute.*Executive Risk Indemnity, Inc. v. Cigna Corp.*, 2006 WL 2439733 (Pa. Com. Pl. Aug. 18, 2006). An excess insurer brought a coverage action against a policyholder to determine the coverage rights applicable to claims arising out of class action lawsuits. The policyholder counterclaimed for breach of contract and bad faith.

In discovery, the policyholder sought information regarding reinsurance and communications between the insurer and its reinsurer. The court first determined that the policyholder was entitled to discovery of the existence and terms of any potentially applicable reinsurance because such discovery is no different than discovery of insurance coverage in a "routine automobile accident case."

Additionally, the court ruled that communications between the insurer and reinsurer are discoverable because they "may lead to evidence concerning the true reasonable basis for denying coverage," which was at issue because of the policyholder's bad-faith counterclaim. The court also ruled that reserve information was not

discoverable, that communications between the insurer and co-insurers were subject to a joint defense privilege until the insurers' interests diverged during mediation, that certain documents drafted by a claims handler were not discoverable to the extent they summarized communications with counsel, and that the insurer who did not participate in mediation could not invoke the mediation privilege to prevent depositions of the parties who did participate in mediation.