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NEWSLETTER

Other Decisions of Note

November 2005

Bruising and Groping Not Within Scope of Teacher's Employment

In an unpublished decision, the Wisconsin Court of Appeals, applying Wisconsin law, has held that a teacher did not engage in "activities . . . performed pursuant to the express or implied terms of his . . . employment" when he allegedly touched students inappropriately. *Employers Mut. Cas. Co. v. Horace Mann Ins. Co.*, 2005 WL 2035963 (Wis. Ct. App. Aug. 25, 2005). The insurer in this case issued a policy providing coverage for "loss . . . sustained by the insured by reason of liability . . . caused by an occurrence in the courts of the Insured's educational employment activities." The insured was named in a lawsuit alleging sexual battery of minor students, and the insurer declined to provide a defense to the lawsuit. The insurer argued that the teacher had acted outside the scope of his employment and was thus not covered by the policy. The court agreed, explaining that while student interactions were within the terms of the teacher's employment, "[g]roping and bruising cannot be said to be within the terms of the [teacher's] employment."

Securities Exclusion Does Not Apply to Claims Involving Securities of Third Parties

In an unpublished decision, the United States District Court for the District of Minnesota has held that the securities exclusion in a D&O policy issued to a securities underwriter/broker-dealer does not preclude coverage in connection with claims resulting from the default of approximately $140 million dollars worth of bonds issued by a third party and underwritten by the policyholder. *Leonard v. Exec. Risk Indem. Inc.*, 2005 WL 2240352 (D. Minn. Sept. 13, 2005). The court reasoned that the securities exclusion should be interpreted to apply only to the sale of the policyholder's own securities and not to the sale of securities of third parties. The court also held that the E&O exclusion would not apply to some of the underlying claims because the exclusion contained a management carve-back applicable to claims brought against the directors and officers "solely based on their position within the company."

Pleading "A Possibility of Coverage" Satisfies Rule 12(b)(6)

The U.S. District Court for the Middle District of North Carolina has denied without prejudice an insurer's 12(b)(6) motion, concluding that the insured's complaint alleged "a possibility of coverage" sufficient to state a claim under South Carolina law. *Clifford v. Am. Int'l Specialty Lines Ins. Co.*, 2005 WL 2313907 (M.D.N.C. Sept. 21, 2005). The defendant insurer alleged that certain policy exclusions, which precluded coverage for fraudulent or knowing wrongful acts, relieved it of any duty to defend the insured in the underlying action. The insured argued that, even if some of the underlying claims involved allegations of fraud or knowing wrongful acts, others were "derivative in nature or did not involve allegations of intentional bad acts" by the insured.

After reviewing the allegations, the court concluded that, at least in the early stages of litigation before full discovery, the complaint sufficiently stated a claim "to the extent that there was at least a possibility of coverage of at least some claims under the Policy that would have required [the insurer] to provide a defense" for the insured. The court thus rejected the insured's policy exclusion argument, explaining that such a determination would have required fact-finding and a review of materials beyond those properly considered on a motion to dismiss.

No Coverage for Complaint Alleging Physicians Violated Statutes and Discriminated Against Hearing Impaired

In an unreported decision, a federal court in New Jersey, applying New Jersey law, has held that a professional liability insurer had no duty to defend or indemnify a physician against allegations that the physician failed to provide a hearing-impaired patient with a sign language interpreter during office visits, in violation of state and federal statutes. *Evanston Ins. Co. v. Bulkley*, 2005 WL 2347100 (D.N.J. Sept. 23, 2005). The patient alleged that the physician's repeated failure to provide an interpreter during office visits violated the Americans With Disabilities Act, the Rehabilitation Act of 1973 and the New Jersey Law Against Discrimination. The court concluded that coverage was barred under exclusions for claims arising out of: (1) "any act committed in violation of any law or ordinance," (2) "any . . . deliberate, or intentional acts and" (3) "discrimination by the Insured on the basis of . . . physical handicap." The court further held that because the patient's claim for intentional infliction of emotional distress was "inextricably bound up with" the alleged statutory violations and intentional acts, the exclusions applied to that claim as well.

Court Finds No Standing for Former Employee of Policyholder to Bring Direct Action Against Insurer Under ADEA

The United States District Court for the Northern District of Mississippi has held that a former employee lacked standing to sue the employment practices insurer of his bankrupt former employer for discriminatory termination under the Age Discrimination in Employment Act. *Kendall v. Nat'l Union Fire Ins. Co.*, 2005 WL 2239169 (N.D. Miss. Sept. 14, 2005). The court stated that, although the former employee had an injury in fact, since the insurer was not the plaintiff's employer and had no involvement in his termination, the employee could not establish a causal relation between the insurer and the injury as required for standing. The suit was therefore dismissed for lack of jurisdiction.

For more information, please contact us at 202.719.7130