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ALERT

Exclusion for Sexual Misconduct Precludes Duty to Defend Against Employer

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Applying Texas law, the United States Court of Appeals has held that an exclusion for claims "arising out of" sexual misconduct applied to bar coverage for a medical group for a lawsuit alleging that its employee sexually assaulted a patient. *Nat'l Fire Ins. Co. of Hartford v. Radiology Assocs., L.L.P.*, 2011 WL 3444213 (5th Cir. Aug. 8, 2011).

The complaint in the underlying lawsuit alleged that an employee of the insured performed an unauthorized vaginal examination of a patient during an ultrasound procedure at one of the insured's radiology facilities. The patient further alleged that the medical group was negligent in that it failed to provide a chaperone during the examination, failed to post notices around the facility advising patients of their right to a chaperone and failed to monitor its employees properly.

The medical group tendered the defense of the lawsuit under its professional liability policy. The insurer denied coverage based on a number of grounds, including an exclusion in the policy for "claims made against [an insured], whether the injury or damage itself was intended or not, which arises out of any sexual act."

In the coverage litigation that followed, the insured argued that the duty to defend was triggered because the employee may have negligently believed his actions were authorized. The court rejected this position, finding that the complaint included no such allegations of negligence on the part of the employee and noting that a court may not "imagine factual scenarios which might trigger coverage." The court also pointed out that, in any event, the employee was not an insured under the policy and the issue was whether the allegations against the medical group arose out of a purported

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sexual act. In this regard, the court recognized that the Texas Supreme Court has held that "arise out of" means there is "simply a 'causal connection or relation, which is interpreted to mean that there is but for causation, though not necessarily direct or proximate causation." The court further noted that it previously concluded that "when an exclusion prevents coverage for injuries 'arising out of' particular conduct, [a] claim need only bear an *incidental relationship* to the described conduct for the exclusion to apply." According to the court, this standard was met here because "but for" the employee's allegedly unauthorized sexual conduct, there would have been no claim by the patient against the medical group.

Finally, in concluding that the insurer had no duty to defend, the court rejected the insured's argument that the court was to view the allegations in the complaint from "the standpoint of the insured," and therefore the exclusion did not apply because there was no allegation by the patient that medical group itself committed a sexual act. According to the court, to the extent Texas law requires a court to analyze the duty to defend from this perspective, it is only with respect to analyzing whether a potentially covered occurrence is alleged, and not whether a coverage exclusion may apply.