

ALERT

Failure to Report Abuse Was Wrongful Act Predating Retroactive Date; Also Constitutes Professional Services for Purposes of Exclusion

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A New Jersey appellate court has held that the failure to report suspected sexual abuse was an omission that occurred before a retroactive date in a professional liability policy issued to a community mental health facility, so no coverage existed for a lawsuit against it. The court also concluded that the failure to report constituted professional services excluded from coverage under the facility's commercial general liability policy. *Cumberland County Guidance Center v. Scottsdale Insurance Company*, 2011 WL 6260728 (N.J. Super. Ct. App. Div. Dec. 16, 2011).

The parents and younger siblings of a former patient of the insured facility brought suit, alleging that the siblings were sexually abused by their older brother following his discharge from the facility in 1985. The older brother allegedly had been molested by another patient while at the facility, which caused him to abuse his younger siblings. The complaint alleged that facility staff had reason to believe that the older brother had been molested on April 9, 1985, but failed to report the abuse to the Division of Youth and Family Services as required by statute.

Turning first to the professional liability policy, the court pointed out that the policy excluded coverage for injury caused by a wrongful act committed before the retroactive date of July 1, 1986. The policy defined "wrongful act" to include "any act, error or omission in the furnishing of professional health care services." Here, according to the court, the wrongful act was an omission – specifically, the failure to report the abuse. The court concluded that this omission occurred on April 9, 1985, and therefore the retroactive date limitation

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precluded coverage for the suit. In reaching this conclusion, the court rejected the insured's argument that the failure to report was an ongoing occurrence that continued beyond the retroactive date. The court noted that the statute imposed on the facility and its staff the duty to report suspected abuse of a child "immediately." The court also recognized that the argument posited by the insured drew an unjustifiable distinction between "acts" and "omissions," affording greater coverage for the latter under the theory that the omissions could continue indefinitely.

Next, the court held that coverage under the facility's commercial general liability policy was barred by the professional services exclusion, which applied to injury "due to the rendering or failure to render professional services." The policy did not define "professional services," but the insured took the position that the exclusion only applied to conduct committed by a professional. Here, the alleged injury purportedly resulted from the failure to report, which was an omission by, among others, "an aide with a high school education." According to the court, however, it is "the act itself" and not "the title or character or the party performing the act" that is determinative of whether the services at issue fall within the scope of the exclusion. In this regard, the court noted that the conduct complained of related directly to the provision of mental health services to the older brother and that the aide was assisting a mental health professional who was treating the older brother.