

ALERT

Claim for Employee Embezzlement Alleges a Wrongful Act But Is Excluded

September 3, 2013

The United States District Court for the Middle District of Georgia, applying Georgia law, has held that a professional liability policy afforded no coverage for the obligation of an insured billing and collection servicer to indemnify its client for employee embezzlement. *Nat'l Reimbursement Grp., Inc. v. Gemini Ins. Co.*, 2013 WL 4495846 (M.D. Ga. Aug. 21, 2013). The court concluded that an exclusion for claims arising out of criminal, fraudulent, dishonest, or knowingly wrongful acts precluded coverage.

The insured provided medical billing and collection services and learned that one of its employees had been diverting medical insurance checks payable to a client to her personal bank account. The client demanded that the insured repay losses incurred as a result of the embezzlement, and the insured sought coverage from its professional liability insurer. The insured contended that its negligent supervision of the embezzling employee constituted a "negligent or unintentional breach of duty imposed by law" and was therefore a "Wrongful Act" under the policy.

The insurer denied coverage in part on the basis that the underlying lawsuit did not allege a "Wrongful Act" because the insured's obligation arose under a contract rather than a duty "imposed by law." The court rejected this argument: the fact that the insured's billing services were performed pursuant to a contract did not, the court held, negate the coverage for billing services afforded by the policy. The court noted that the insured likely had a contractual relationship with all of its clients and had an independent duty to exercise reasonable care in the supervision of employees. Accordingly, the court found the claim to fall within the scope of coverage and proceeded to consider whether any exclusions applied

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to the insured's claim.

The policy barred coverage for claims arising out of any actual or alleged criminal, fraudulent, dishonest, or knowingly wrongful act omission committed by or with the knowledge of any "Insured," which was defined to include any employee rendering professional services on behalf of the named insured. The policyholder argued that its employee was not an "Insured" because the embezzlement was outside the scope of her employment. The court concluded that this argument "although creative, is without merit." According to the court, "the fact remains that [the employee] embezzled funds while engaging in billing services for [the named insured]." The policyholder's interpretation of the exclusion would, the court reasoned, render the exclusion meaningless: if committing any dishonest act would nullify that person's status as an insured, the exclusion would never apply to precluded claims arising out of an employee's criminal acts. Accordingly, the court concluded that the policy barred coverage for any claim for negligent supervision arising out of the employee's embezzlement.