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PROFESSIONAL LIABILITY BLOG

Despite Agreement, Staffing Agency's Nurse Was Hospital's Employee

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Firms, hospitals, and professional companies across the country have insurance policies in place to protect them when their professionals are accused of malpractice. But who qualifies as "their" professionals?

In Interstate Fire & Casualty Company v. Dimensions Assurance Ltd., 843 F.3d 133 (4th Cir. 2016), the Fourth Circuit was tasked with determining whether a nurse who had been placed at a hospital by a staffing agency qualified as an "employee" or "protected person" under the professional liability section of the hospital's insurance policy.

Background: Who's Covered by Who?

The staffing agency and hospital had a contract that said the agency's folks were to be treated as employees of the agency, not the hospital. The contract also gave the hospital the right to "float" agency practitioners to areas to which they were not originally assigned, to immediately cut loose anyone who refused to float, and to dismiss anyone at any time if the hospital determined his or her work was unsatisfactory.

The staffing agency had a professional liability insurance policy covering the doctors and nurses it placed to work at various medical facilities. The hospital, in turn, had a policy that provided coverage to the hospital and other persons or entities who met its definition of "protected person." The hospital's policy consisted of three main parts, two of which provided coverage for "hospital professional liability" and another for "group physicians' professional liability."

In 2012, a former patient brought a medical malpractice action against the hospital and several of its doctors and nurses, one of whom (sure enough) had been placed there by the staffing agency. The hospital's insurer claimed the nurse was not an "employee" of the hospital and refused to defend her. Ultimately, the staffing agency's insurer defended the nurse, settled the case for $2.5 million, and incurred nearly $500,000 in defense costs. Thereafter, the staffing agency's insurer (no surprise) filed an equitable contribution action against the hospital's insurer in federal district court. Time for some payback?

The District Court Makes the Initial Call

Relying on the terms of the contract between the staffing agency and the hospital, the district court granted summary judgment in favor of the hospital's insurer, and determined that the agency-provided workers were not "employees" within the meaning of the hospital's professional liability policy.

The staffing agency's insurer threw the red flag, challenging the call on the field. As far as the agency's insurer was concerned, the nurse most definitely qualified as an "employee" under the terms of the hospital's policy, and the district court surely erred by looking to a separate contract between the parties to determine the meaning of the policy. Or at least, so went the argument.

The Court of Appeals Reviews the Play

On appeal, the Fourth Circuit highlighted the fact that the hospital's policy excluded agency-provided practitioners from its definition of "employee" in the general liability portion of the policy, but did not exclude agency-provided practitioners from the definition in the professional liability section of the policy.

In the court's view, the policy's reference to practitioners from the agency indicated the hospital's insurer knew the hospital was staffed by direct-hire and agency-provided practitioners, such that "employee" included practitioners from both sources. Also, the insurer's decision to use different language in different sections of the policy was taken to represent an extension of "protected person" status to hospital workers without excluding agency-provided workers. Even if the court examined the professional liability section of the policy in isolation and without considering other sections of the policy, the court still would have concluded the policy provided coverage, because the nurse qualified as an "employee" of the hospital under the right-to-control test.

As for the contract between the staffing agency and the hospital, the court noted the terms of that contract did not determine the scope of the entirely separate insurance contract issued by the hospital's insurer to the hospital, or diminish the protection provided to the nurse by the policy.

Ultimately, the Fourth Circuit concluded that whether or not the hospital intended to provide insurance for agency-provided employees, the hospital's insurer—by virtue of the policy it issued—had an independent obligation to cover the nurse. The contract between the hospital and the agency simply had no impact on the hospital's insurer's independent obligation to provide coverage. Therefore, the Fourth Circuit vacated the district court's opinion, taking away the summary judgment that had been granted to the hospital's insurer.

The Takeaway

When there is an issue of coverage under a professional liability insurance policy, the language of the policy generally will control, despite any contracts between two entities that are independently insured. As such, when an insurer does not want to provide coverage to individuals provided by a staffing agency, the language of the policy must unequivocally exclude coverage for such individuals, including in definitional terms such as "employee" and "protected person."

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