

GL Coverage Excluded But PL Coverage Potentially Implicated for Sexual Assault Claim

In a March 3, 2010 decision, a U.S. District Court held that alleged unauthorized touching during an ultrasound procedure resulting in a sexual assault was (1) an excluded professional service under the insured's commercial general liability ("CGL") policy but (2) not necessarily an excluded "sexual act" under its professional liability ("PL") policy. See *National Fire Ins. Co. of Hartford v. Radiology Assocs., L.L.P.*, 2010 WL 790517 (S.D. Tex. March 3, 2010).

CGL Carrier had no Duty to Defend

Marie and Daniel Pecore alleged that a Radiology Associates technician inserted his fingers into Mrs. Pecore's vagina during a trans-vaginal ultrasound which (1) was not part of a normal trans-vaginal procedure and (2) resulted in a sexual assault which caused physical and mental injuries and consequential damages. *Radiology Assocs.*, 2010 WL at *3. The CGL policy issued by National Fire Insurance Company of Hartford excluded coverage for bodily injuries "arising out of 'medical or diagnostic testing . . .'" and bodily injuries arising out of "'the rendering or failure to render medical, surgical, dental, x-ray or nursing service, treatment or instruction. . .'" *Id.* at *2, 4.

The court found that both exclusions applied to negate coverage, emphasizing the broad interpretation given to the phrase "arising out of" by Texas courts. *Radiology Assocs.*, 2010 WL at *3 (citing *Utica Nat'l Ins. Co. of Tex. v. American Indem. Co.*, 141 S.W.3d 198 (Tex. 2004) (distinguishing "arising out of" which requires mere but-for causation with "due to" which requires that plaintiff's injury be caused by breach of professional standard of care). As the plaintiffs' alleged injuries would not exist *but for* the ultrasound procedure, their claims arose out of a diagnostic procedure and hence were excluded by the diagnostic testing exclusion. With regard to the medical services exclusion, the court determined that the plaintiffs' claims constituted "health care liability claims" under Chapter 74 of the Texas Civil Practice and Remedies Code. See TEX. CIV. PRAC. & REM. CODE §§ 74.001-74.507; *Diversicare Gen'l Partner, Inc. v. Rubio*, 185 S.W.3d 842 (Tex. 2005) (alleged sexual abuse and assault inflicted on nursing home resident was health care liability claim because based on claimed departure from accepted standard of care which was inseparable part of rendition of medical services). As Mrs. Pecore's ultrasound and subsequent allegedly unauthorized vaginal exam were an inseparable part of the rendition of health care services, the claims arose out of medical services, despite the insured's contention that it faced liability for negligent staffing and other "business decisions." *Id.* at *5.

PL Carrier Obligated to Defend

CGL and professional services coverage is intended to be mutually exclusive, so it is not necessarily surprising that the court found a duty to defend on the part of the professional liability carrier. But what is surprising is that the PL carrier's policy contained a "sexual misconduct" exclusion which applied to "any claims . . . whether the injury or damage itself was intended or not, which arises out of any sexual act." *Id.* at *7. The court emphasized that the duty to defend requires the court to focus on whether the facts potentially state a cause of action, resolving all doubts in favor of coverage. To that end, "[w]hile the Pecores characterize the vaginal exam as being sexual in nature and tantamount to a sexual assault, their factual description of what actually occurred during the vaginal exam does not necessarily frame it as being a sexual act." *Id.* It was equally unclear whether the unauthorized exam as described in the live pleading would constitute an "intentional tort" (the petition alleged negligence) or a violation of the Texas penal code. As such, the PL carrier was obligated to defend the suit. *Id.* at * 8.

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