

## Insured Must Prove that Claim Falls within Coverage Grant to Trigger Duty to Defend

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New York's highest court has held, *inter alia*, that the bodily and personal injury and the professional services exclusions in a D&O policy bar coverage for a doctor's claim against a hospital under 42 U.S.C. § 1983. The court also found that the hospital failed to meet its burden of proving that the doctor's tortious interference claim fell within the D&O policy's coverage grant. *Town of Massena v. Healthcare Underwriters Mut. Ins. Co., et al.*, No. 89, 2002 N.Y. LEXIS 2879 (N.Y. Sept. 17, 2002).

The insured, a hospital, had been sued by a doctor under 42 U.S.C. § 1983. The doctor's complaint alleged that in retaliation for his exercise of free speech, the hospital had engaged in a campaign of harassment to harm his medical reputation and to disparage him to patients. The doctor also alleged defamation and tortious interference with business relations and contract. The hospital tendered the claim to its D&O insurer under an Executive Liability and Indemnification Policy as well as to a professional liability insurer. The D&O insurer denied coverage for the doctor's claim based on a bodily and personal injury and a professional services exclusion. Thereafter, the hospital sued the insurers claiming they had a duty to defend the hospital.

The court held that the D&O insurer did not owe a duty to defend. The court reasoned that exclusions for loss arising out of "bodily injury, libel, slander, defamation of character" as well as resulting from the performance of "professional services" necessarily precluded coverage for all but the doctor's tortious interference claim, which was based on the alleged failure of three of the hospital's doctors to make referrals to the suing doctor. The insurer argued that there was no coverage for the tortious interference claim because the hospital employees' conduct occurred outside of their "insured capacity" or fell within the professional services exclusion. The court held that "[o]nce the insurance company asserted the exclusion, the [hospital] had the burden of showing that the conduct alleged was covered." The court concluded that the hospital had not made this showing and noted that the doctor's complaint did not allege that the three doctors' conduct had occurred while they were acting in their "insured capacity."

The court held that the professional liability insurer owed no duty to defend because of the broad exclusions contained in its policy. These exclusions precluded coverage for claims resulting from "any willful, fraudulent or malicious civil act," "defamation, libel, slander" and similar torts and interference with contract or prospective business advantage.

For more information, please contact one of WRF's Professional Liability Attorneys at 202.719.7130