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NEWSLETTER

Excess Insurer Has Right to Select Counsel in Medical Malpractice Action

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The U.S. Court of Appeals for the Third Circuit, in an unpublished opinion applying Pennsylvania law, held that an insurer that issued excess and umbrella policies to a hospital has the right to select counsel for and defend a medical malpractice claim against the hospital. *St. Paul Fire & Marine Ins. Co. v. Temple Univ. Hosp.*, No. 01-4467, 2003 WL 550031 (3d Cir. Feb. 27, 2003).

The policyholder was a hospital that had an insurance program in which it had a self-insurance retention of $1.2 million, an excess policy of $1, a shared excess retention of $2 million and an umbrella policy of $23 million. The same insurer provided coverage for the excess, shared excess retention and umbrella policies. Subsequent to purchasing the policies for the program, the hospital purchased a fronting policy from a second insurer that obligated the second insurer to assume the hospital's obligations in the event of insolvency. When parents of a minor child sued the policyholder for medical malpractice, the hospital refused to allow the excess insurer to select counsel for, and defend, the medical malpractice action. The excess insurance contract provided:

Right to Defend. We'll have the right but not the duty to defend any covered claim or suit for injury or property damage made against any protected person. We have this right even if we believe defense costs and the total amount any protected person will be legally required to pay as damages for injury or property damage will not exceed the self-insured retentions. We have no duty to perform other acts or services.

The umbrella policy provided that the insurer has no duty to defend "if your Basic Insurance has such a duty to defend. However, we do have the right to associate in defense and control of any claim or suit that is reasonably likely to involve us."

The appellate court first held that the plain language of the excess policy afforded the excess insurer the right to defend, which includes the right to select counsel. The hospital argued that the insurance contract as a whole was ambiguous because the umbrella policy did not provide a right or duty to defend. Disagreeing, the court noted that it was not necessary that the excess and umbrella agreements provide the same duty to defend to avoid ambiguity and that each insuring agreement need not contain the same obligations and rights. Thus, the court concluded that under the excess agreement it was unambiguous that the excess insurer had the right to defend the hospital's medical malpractice action.

The court also held that the excess insurer's policy language did not contravene the Pennsylvania Medical Professional Liability Catastrophe Loss Fund statute, which provided that only basic insurers, including self-insurers, can defend medical malpractice claims. The court explained that "[n]othing in the statute or in the general principles of contract law prevents such a contracting away by the self-insured of the duty to defend." Rather, the purpose of the statutory requirement was to ensure that the insurer defend post-exhaustion claims, even though the Fund would pay post-exhaustion losses or damages.

The hospital also argued that its contract with a second insurer for a fronting policy served to name that insurer as the basic insurance carrier and conferred the duty and right to defend on the second insurer. Disagreeing, the court held that a fronting policy is not a contract for basic insurance, but instead is a surety agreement because the insurer only assumes the policyholder's liability if it becomes insolvent. In any event, the court noted, the excess insurer's agreement would be valid against a subsequent agreement conferring a right to defend on another insurer. Thus, the court concluded that the excess insurer had a right to defend the hospital and select its counsel in the underlying medical malpractice action.

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