

Tenth Circuit Holds Improper Medicaid Billing Is Not a Professional Service

July 2008

The United States Court of Appeals for the Tenth Circuit, applying Colorado law, has held that E&O insurers owed no duty to defend or indemnify their policyholder for False Claims Act and common law claims by the government seeking recovery of Medicaid overpayments. *Zurich Am. Ins. Co. v. O'Hara Reg'l Ctr. for Rehab.*, 2008 WL 2440525 (10th Cir. Jun. 18, 2008). The court held that the underlying claims did not fall within the policies' professional services coverage because the alleged injury was caused by improper billing rather than by the policyholder's failure to provide professional services and because the policyholder's billing practices did not constitute professional services.

The policyholder company provided care to nursing center residents who required a substantially higher quality and quantity of skilled nursing care than residents in ordinary nursing homes. Three insurers issued policies that provided coverage for injuries caused by the company's errors or omissions in providing professional services, including nursing or medical services or treatment, to residents of long-term care facilities.

Pursuant to provider agreements with the United States and the State of Colorado under the Medicare and Medicaid programs, the company received Medicaid reimbursement payments at nearly twice the rate of other long-term care facilities in Colorado. The government audited the company's billing practices and concluded that the company had understaffed its facility in violation of the provider agreements and that, from 1997 through 2000, it had submitted inflated invoices for patient services. The government sued the company to recover the overpayments under the False Claims Act and Colorado common law.

The company tendered the suits to its insurers, arguing that the allegations of overbilling fell under the policies' professional services coverage. Two insurers accepted the tender of defense under a reservation of rights, while the third disclaimed coverage entirely. The insurers then filed separate complaints seeking declaratory judgments that they owed no duty to defend or indemnify the company in connection with the underlying suit.

On appeal, the court first determined that the government's injury was caused by the company's submission of false and fraudulent claims for reimbursement and not by a failure to provide professional services. It

reasoned that "the problem was not the actual level of services provided to [the company's patients], but rather that [the company] billed for services it did not provide."

The court rejected the company's arguments that the language of the policies at issue covered injuries broadly related to the provision of nursing services and not just injuries directly caused by its failure to provide such services. Finding that the language in the policies required something more than a "but for" causal connection between a failure to provide professional services and the alleged injury, the court concluded that "no causal connection exists between the failure to perform nursing services and the damages alleged by the government, *i.e.*, over-billing." It further reasoned that the company's "false representations to the government . . . constituted an independent act that interrupted the causal chain between [its] failure to furnish adequate nursing services and the government's injury."

Next, the court held that the term "professional services" as used in the policies did not include billing practices. The court noted that the definition of "professional services" that courts most frequently employ provides that a "'professional' act or service is one arising out of a vocation, calling, occupation, or employment involving specialized knowledge, labor, or skill [that is] predominantly mental or intellectual, rather than physical or manual." The court explained that processing Medicare and Medicaid claims does not fall within this definition and that "courts generally have concluded the preparation of bills or invoices does not qualify as professional services."