

Underlying Facts, Not Claims Alleged or Actions of Insureds, Determine Applicability of Bodily Injury Exclusion

December 2009

The United States District Court for the Western District of Kentucky has held that an exclusion for claims arising out of bodily injury is triggered by the facts underlying the claim, regardless of the nature of claim itself or the alleged actions of the insured. *Lifeline Health Group, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 2009 WL 3378963 (W.D. Ky. Oct. 16, 2009).

The case involved a directors, officers corporate and employment practices liability policy issued to a health care services provider. A provision in the policy barred coverage for any claim "alleging, arising out of, based upon, attributable to, or in any way involving, directly or indirectly, bodily injury, sickness, disease or death of any person" The insured sought coverage for a lawsuit filed by a former employee who was assaulted by a client while performing professional services. The complaint asserted causes of action for prohibited employment practices and maintaining an unsafe work environment, among others.

The court recognized that the "arising out of" language is interpreted broadly under Kentucky law and held that it requires the application of a "but for" test with respect to the underlying facts of the claims. In so holding, the court rejected the argument that the claims alleged and the purported actions of the insured are determinative of whether the exclusion is triggered. The court found that the bodily injury exclusion applied here because "but for [the former employee's] bodily injury at the hands of the third-party, she would have [had] no claim against [the insured]." In other words, according to the court, the exclusion was triggered even though no insured was the perpetrator of the bodily injury.