

# Insurer Had Duty to Defend, But Not to Indemnify, Dentist for Sexual Misconduct Claim

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In an unreported decision, a California court has held that an insurer had a duty to defend, but not to indemnify, a dentist who was sued for sexually molesting a patient where the underlying complaint alleged that dental assistants in the practice were negligent in failing to report the acts of the dentist. *Marie Y. v. Gen. Star Indem. Co.*, 2003 WL 21694551 (Cal. Ct. App. July 22, 2003).

The insurer issued a professional liability policy to a dentist. The policy provided coverage for "dental incidents," which was defined as "any act, error, omission, or mistake in the rendering of or failure to render services in the profession of dentistry by an insured or any person for whose acts or omissions an insured is legally responsible." The policy defined the "profession of dentistry" to include "services performed in the practice of the profession of dentistry as defined in the business and the professional codes of the state where you practice." The policy contained an exclusion "for liability for any damages arising out of a dental incident which is also a willful violation of a statute, ordinance or regulation imposing criminal penalties; however, (1) we will defend any civil suit against the insured seeking amounts which would be covered if this exclusion did not apply."

The dentist was sued by a patient who alleged that the dentist inappropriately touched her while she was under the influence of nitrous oxide. At that time, the insured agreed to provide a defense, subject to a reservation of rights. Subsequently, the dentist entered a plea of *nolo contendere* to two counts of misdemeanor sexual battery and served a year in jail. At that point, the insurer withdrew its defense in light of the plea of *nolo contendere*. The state dental board also conducted a hearing, and it revoked the dentist's license. The patient then amended her complaint to add, among other things, allegations that two chair-side assistants failed to stop the dentist or to report the incident. The amended complaint alleged that the dentist could be liable for the actions of the assistants as the "captain of the ship" or under the doctrine of *respondeat superior*. The insurer continued to deny a defense. The underlying trial court ultimately entered a judgment against the dentist for \$1.03 million, and the dentist assigned his rights against the insurer in exchange for a covenant not to sue.

With respect to the patient's original complaint, the California appellate court held that the insurer had no duty to defend or indemnify. The court reasoned that the sexual misconduct did not involve "the rendering of or failure to render services in the profession of dentistry." The court noted that the policy provided coverage for the "profession of dentistry," and the relevant business code expressly excluded sexual misconduct from the definition of dentistry. The court further reasoned that coverage was barred by a state statute stating that "[a]n insurer is not liable for a loss caused by the willful act of the insured; but he is not exonerated by the negligence of the insured, or of the insured's agents or others." Since the California Supreme Court had previously held that sexual molestation is a "willful act," coverage was therefore barred by statute.

With respect to the allegations in the amended complaint concerning the conduct of the chair-side assistants, the court held that the statutory bar on indemnity for willful acts applied to the claim. The court reasoned that "it would violate the public policy underlying [the statute] (which is to discourage willful torts) to create coverage for [the dentist] based on the assistants' conduct, because their 'negligence' was inextricably intertwined with [the dentist's] intentional wrongdoing." But the court also held that the statutory bar did not apply to the duty to defend since public policy concerns did not bar a defense for willful torts. The court therefore turned to the question whether the alleged failure of the assistants constituted a "dental incident" under the policy's exclusion, thereby obligating the insurer to provide a defense. The court held that it did because "the only evidence on this regard is to the effect that the failure of a dental assistant to report sexual misconduct constitutes a breach of the dental assistant's duty of care toward a patient."

The court held that the only damages available were the reasonable attorneys' fees and costs incurred in defending the action. The court rejected the dentist's argument that the court should award the entire underlying judgment because the insurer had breached its obligation to defend, reasoning that to do so "would contravene the strong policies" in the statute barring indemnification in these circumstances.

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