

# Professional Services Exclusion Bars Coverage for Insured Entity's Vicarious Liability

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A New Jersey appellate court has held that a professional services exclusion in a medical center's professional liability insurance policy precluded coverage for the center's vicarious liability for the negligence of its doctor. *Valentin-Rivera v. New Jersey Property-Liability Ins. Guaranty Ass'n*, 2011 WL 1085559 (N.J. Super. Ct. App. Div. Mar. 25, 2011). The court also held that the state insurance guaranty association was not estopped from denying coverage where the insolvent insurer that issued the policy had failed to reserve its rights or to disclaim coverage.

In the underlying suit, the plaintiff alleged that a doctor at the medical center had committed malpractice and that the medical center was vicariously liable under a theory of *respondeat superior*. Both the doctor and the medical center sought coverage under the policy, and the insurer began providing a defense. After the insurer was declared insolvent, the guaranty association settled the malpractice claim against the doctor but refused to pay the claim against the medical center because it believed the professional services exclusion barred coverage. The guaranty association and the plaintiff then entered into a settlement in which they agreed to litigate the coverage dispute which, should the plaintiff prevail, would require the guaranty association to pay the plaintiff an additional sum. In the declaratory judgment action that ensued, the trial court granted summary judgment to the insurer, and the plaintiff appealed.

On appeal, the court considered whether the professional services exclusion barred coverage for the medical center's vicarious liability. The policy's insuring agreement for the entity afforded the medical center coverage for "[i]njury arising out of the rendering of or failure to render . . . professional services by any person for whose acts or omission the [medical center] is legally responsible." However, the professional services exclusion barred entity coverage for the medical center "with respect to injury arising solely out of the acts or omissions in the rendering or failure to render professional services by individual physicians or nurse anesthetists, or by any paramedical for whom a premium charge is shown on the declarations page." The court held that the plain intent of the exclusion was to provide coverage for the medical center's vicarious liability arising out of the activities of its staff, except for those staff specifically omitted by the exclusion. In so holding, the court rejected the plaintiff's argument that the coverage was illusory because "professional services" could only be provided by a "medical professional," a term not used in the policy. Instead, the court concluded that the definition of "professional services" applied broadly to any person who was "rendering services 'in the practice of the profession' [where] the services require 'specialized knowledge and mental

skill.” The court thus held that the entity coverage was broader than the exclusion and therefore not illusory.

The court also rejected the plaintiff's argument that the guaranty association should be estopped from asserting coverage defenses because the insurer failed timely to reserve its rights or disclaim coverage. In doing so, the court first noted that the guaranty association's enabling statute granted it immunity from liability due to its actions. The court then reasoned that, because the guaranty association could not be estopped from asserting its rights under the policy, even if it acted in bad faith while doing so, there was no reason why the insurer's failure to reserve rights should estop the guaranty association either.