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NEWSLETTER

Insurer Not Required to Defend Suit "Related" to Previous Suit that Exhausted Policy Limits

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The California Court of Appeal has held that an insurer had no duty to defend a doctor against a patient's battery suit under a 1996 medical malpractice policy because the battery suit was "related" to the patient's earlier malpractice action, which had exhausted the limits under a 1993 medical malpractice policy. *Friedman Prof'l Mgmt. Co., Inc. v. Norcal Mut. Ins. Co.,* 2004 WL 1462202 (Cal. Ct. App. June 29, 2004).

The insurer issued a series of one-year, $1 million claims-made medical malpractice policies to the owner of an outpatient surgical center. One policy covered claims made in 1993; a second covered claims made in 1996. The policies provided that if a second claim was made that stemmed from the same "occurrence" at issue in a prior claim, then only the policy covering the first claim would cover the second claim. Both policies defined "occurrence" as a "single act or omission or series of related acts or omissions involving direct patient treatment."

In 1993, a patient was injured during surgery at an outpatient center. The patient subsequently brought a medial malpractice action against the owner and the medical center and won a $9 million judgment. The case eventually settled for more than $1 million and the insurer paid out its policy limits under the 1993 policy.

In 1996, the patient filed a second suit against the owner and the center for battery, sexual battery and invasion of privacy, stemming from actions taken by the owner during the botched medical procedure that had been the subject of the prior litigation. The insurer denied coverage for this lawsuit since it involved the same occurrence covered under the 1993 policy, and the limits of that policy had been exhausted.

The Court of Appeal initially addressed the question of why, if the medical malpractice and battery suits were "related," the second suit was not subject to a *res judicata* defense. The court explained that California courts use a different standard for *res judicata* than federal courts or the courts in most other states. According to the court, the majority of jurisdictions assess *res judicata* based on whether the second action resulted from the "same transaction." Here, there was "no doubt" that the two lawsuits arose from the same "series of interconnected events." The court noted that under California law, however, *res judicata* is based on the "primary right" test, which looks to the type of harm suffered. In this case, the patient had suffered two different types of harm—the owner and center had violated her right to be free from negligence, as a result of errors during the operation, and the owner had violated her "dignitary and privacy interests" as alleged in the

second underlying suit. Therefore, at least in California, the patient was able to bring two separate actions arising from the same underlying "transaction." The court advised, however, that even though the lawsuits involved different harms, that fact did not resolve the question whether the harms were "related" for purposes of insurance coverage.

The court then looked to California precedent on the meaning of "related" under a claims-made insurance policy. The court pointed to the decision of the California Supreme Court in *Bay Cities Paving & Grading, Inc. v. Lawyers' Mutual Insurance Co.*, 855 P.2d 1263 (Cal. 1993), which held that "the term 'related' as it is commonly understood and used encompasses both logical and causal connections." That is, if two events are either causally connected or logically connected, then they are "related." In the court's opinion, there was "absolutely no doubt that the battery and invasion of privacy claims were causally related to the malpractice claim," and therefore that the two lawsuits involved interrelated acts arising out of the same occurrence.

The court also addressed the owner's argument that because a "claim" was made during the effective period of the 1996 claims-made policy, there was the "potential" for coverage. Although the court acknowledged that the determination of coverage "potential" rested on facts known to the insurer in addition to facts alleged in the underlying complaints, the court stated that "[a]n insured is not entitled to a defense just because one can imagine some additional facts which would create the potential for coverage." In this instance, the insurer was aware of no facts that suggested the owner touched the patient for any other reason than to stop the damage caused by the botched operation. Since this act was related to the basis of the medical malpractice claim, there was no potential for coverage under the 1996 policy. As a result, the court held that the insurer was within its rights to discontinue defending the owner in the battery action once the 1993 policy limits were exhausted by the medical malpractice action.

In rendering its decision, the court briefly discussed some of the policy reasons for including related act provisions in claims-made policies. In the court's opinion, related act provisions make insurers more willing to write renewal policies to insureds who have been "hit with a claim" because they know that any related claims will be covered by an earlier policy. Absent such provisions, insurers would have an incentive to drop every insured that had suffered a claim in order to avoid the possibility of a second claim from the same occurrence.

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