

No Coverage under Professional Liability Policy for Doctor's Intentional Acts

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In an unpublished decision, the California Court of Appeals has held that a doctor's actions against his former patient constituted intentional acts for which a professional liability insurer owed no duty to defend under the terms of the policy and the California Insurance Code. *Uhrich v. Am. Home Assurance Co.*, 2004 WL 2897948 (Cal. Ct. App. Dec. 15, 2004).

The insurer issued a professional liability policy to a psychologist. The policy provided that the insurer would pay "all sums which the insured shall become legally obligated to pay as damages because of any wrongful act committed during the policy period by the insured . . . and arising solely out of the performance of professional services for others . . ." The policy defined "wrongful act" as "any actual or alleged negligent act, error, or omission, or any actual or alleged defamation." The policy excluded coverage for "any dishonest, criminal, fraudulent or malicious act or omission" or "any wrongful act committed with knowledge that it was a wrongful act."

During the period when the psychologist was treating a patient, the psychologist hired the patient to direct a residential treatment facility. After the patient learned that the doctor had diverted property that had been donated to the facility, the patient sued the doctor, alleging malpractice and breach of contract. Although the parties settled, the doctor breached a condition of the settlement requiring attendance at a confrontational mediation session. The doctor then faced a disciplinary proceeding initiated by the Attorney General. During this investigation, the doctor falsely alleged that the patient had stolen his patient files and records. The doctor conspired with two other men to support this allegation and convince the authorities that the patient had perjured herself during the first case.

The patient sued the doctor a second time for malpractice, defamation and negligent infliction of emotional distress. The doctor tendered the second complaint to his professional liability insurer. The insurer denied coverage on the grounds that the conduct "did not arise 'solely' out of the performance of professional services and were intentional, criminal acts for which there could be no insurance coverage." However, the doctor's umbrella liability insurer accepted the defense until the doctor plead guilty to "conspiracy to 'pervert and obstruct justice.'" The patient then received a judgment for the doctor's "tortious conduct" and punitive damages. The patient filed suit against the professional liability insurer, seeking the policy limits, as a judgment holder against the doctor, and bad faith damages as an assignee of the doctor's claim that the

insurer breached its duty to defend the actions.

The court first rejected the patient's contention that the doctor had suffered damages by the professional liability insurer's failure to defend the doctor prior to his guilty plea. The court concluded that even if the insurer owed a duty to defend, the doctor suffered no damages because the umbrella liability insurer had provided a defense during that time period and "the failure of one insurer to defend is of no consequence to an insured whose representation is provided by another insurer." The court also noted that the patient's assertion that the umbrella carrier did not adequately represent him because it was not a malpractice carrier was "bald speculation," which was contradicted by her prior assertions.

The court next held that any possibility of the insurer's duty to defend "evaporated with [the doctor's] guilty plea" because of the policy language and California Insurance Code § 533, providing that "[a]n insurer is not liable for a loss caused by the willful act of the insured." According to the court, the patient alleged two counts of negligence against the doctor. In the first count, the patient alleged that the doctor had breached "continuing" professional duties despite the cessation of treatment by: (1) not completing the required mediation as required by the settlement, (2) making false reports to authorities and (3) disclosing confidential information to his co-conspirators. In the second count, the patient alleged that the doctor had breached his "duty to monitor his own mental state, including monitoring and utilizing his feelings for [the patient] and seeking treatment' to avoid harming her." The court found that each of the patient's allegations, except for the one with respect to the breach of the settlement provision, were "inextricably intertwined with the conspiracy and cannot be characterized as covered nonintentional conduct." The court concluded that "[t]o say it is professional negligence for a psychologist to commit an intentional tort against a patient may be true, but it does not make the tort less intentional, and in such a case the malpractice is inextricably intertwined with intentional conduct." For example, the court noted that the alleged defamations by the doctor were either pre-conspiracy statements intentionally made to the disciplinary board or "the mechanism used to accomplish the conspiracy." In addition, the court found that whether or not the doctor failed to monitor his mental state was not the cause of the patient's harm. Instead, the plaintiff was harmed by the doctor's intentional fabrication of evidence in an attempt to incriminate her.

Finally, the court addressed the doctor's failure to complete the mediation required by the settlement. The court rejected the patient's claim that this breach was covered malpractice, holding that the doctor had "breached the settlement deliberately, with knowledge that he was doing so," which represented intentional conduct for which coverage was precluded under the terms of the policy and the California Insurance Code.

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