

Professional Liability Policy May Provide Coverage for Sexual Abuse Claims by Insured's Foster Children

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The Wyoming Supreme Court, applying Wyoming law, has held that (1) coverage existed under a psychologist's professional liability policy for sexual abuse to the insured's foster children if the psychologist provided psychological services to the children and (2) the application of a household member exclusion required a factual determination as to whether the foster children "regularly reside[d] with" the insured. *T.M. ex rel. Cox v. Executive Risk Indem. Inc.*, 59 P.3d 721 (Wyo. Dec. 16, 2002).

A psychologist's foster children brought a negligence action against the psychologist for sexual abuse by the psychologist's husband, alleging, among other things, that the insured breached her professional duties by failing to disclose her husband's alleged history of sexual abuse. The psychologist's professional liability policy provided coverage for "wrongful acts," which was defined as "any actual or alleged negligent act, error or omission, or any actual or alleged Defamation solely in the performance of, or actual or alleged failure to perform, professional services for others in your profession as a psychologist." The policy also contained a household member exclusion precluding coverage for claims by household members of the insured. The exclusion defined "household member" as "any person who regularly resides with" the insured. Coverage litigation ensued between the insurer and the foster children, who intervened in a declaratory action brought by the insurer against the psychologist.

The court first held that the definition of "wrongful acts" was poorly drafted and ambiguous. It pointed to a number of perceived ambiguities in the definition, such as that the policy could be read to provide negligence coverage for providing services to "others" rather than only to "patients" or "clients" and that the policy provided coverage for "any" negligent act rather than enumerated acts. The court rejected the insurer's argument that the term "solely" limited coverage to those acts exclusively performed as a psychologist, reasoning that a narrow interpretation of the term "solely" might also preclude coverage for professional services rendered to persons with whom the policyholder also has a nonprofessional relationship, despite the otherwise broad language of the policy. Given the finding of ambiguity, the court held that coverage existed if a jury determined that the insured provided psychological services to the foster children. The court stated that

the jury must determine whether the psychologist "provided services to the children arising out of her specialized knowledge or experience as a psychologist," and if so, whether such services fell below the applicable standard of care.

The court also held that the application of the household member exclusion was a matter for the jury. The children argued that, as foster children, they did not "regularly reside with" the policyholder. The court considered the meaning of "regularly resides with" a matter of first impression and noted that Wyoming cases interpreting the term "resident" in the context of statutes have found that the determination of residency is generally a question of fact. The court also pointed to decisions from other jurisdictions holding that the phrase "regularly resides with," in the insurance context, was ambiguous and should be construed in favor of coverage. The court therefore refused to apply the exclusion as a matter of law and instead remanded the issue for a jury's factual determination as to whether the foster children "regularly resided" with the insured.

For more information, please contact one of WRF's Professional Liability Attorneys at 202.719.7130.