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EXPERT ANALYSIS

4th Circuit: Employee's Liability Covered by Insurance Held by Both Employment Agency and Hospital

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A nurse who works at a hospital — and is also an employee of the employment agency the hospital contracts with to fill professional staffing needs — is covered under the professional liability malpractice policies of *both* entities, under a decision from the Fourth U.S. Circuit Court of Appeals decided under Maryland law late in 2016. *Interstate Fire & Cas. Co. v. Dimensions Assur. Ltd.*, 843 F.3d 133 (4th Cir. 2016).

The employment agency, Favorite Healthcare Staffing, provides nurses and other health care professionals to Laurel Regional Hospital.

When a nurse working at the hospital was named alongside the hospital and other individuals as a defendant in a medical malpractice action, the hospital notified its professional liability insurance company, Dimensions Assurance, as well as the agency's, Interstate Fire & Casualty.

All parties agreed that any coverage sold by Interstate to the agency would be excess to coverage sold by Dimensions to the hospital.

Dimensions denied coverage, however, stating that the nurse was not an employee of the hospital and therefore not covered by its policy.

In response, Interstate defended the underlying claim against the nurse, settling it for $2.5 million and paying almost $500,000 in defense costs.

Afterwards, Interstate sued Dimensions for equitable contribution, on the grounds that the nurse did qualify as an employee under the hospital's Dimensions policy.

After Dimensions won a motion for summary judgment, the trial court ruled that the nurse was not an employee under the hospital's Dimensions policy, based on a provision in the staffing agreement between the agency and the hospital.

On appeal, the Fourth Circuit reversed, and held on multiple alternative grounds that the nurse did qualify as an employee of the hospital under the terms of the Dimensions policy sold to the hospital.

First, the Fourth Circuit ruled that the nurse qualified as an employee under a careful reading of the interplay between the professional liability and general liability sections of the Dimensions policy.

Both sections provide coverage for "employees," a term undefined in the policy, but only the general liability section specifically excluded employees provided by an agency.

The Fourth Circuit ruled that the "decision to use different language in different sections of the Policy while addressing coverage for employees must be understood as an intentional decision."

This Fourth Circuit opinion should be viewed as very favorable for policyholders, with positive ramifications not just in the health care industry or even other professions, but for probably any company that purchases liability insurance of any kind.

The court also rejected Dimensions' argument that it was improper to use one part of the policy to interpret a different section.

Second, the Fourth Circuit rejected Dimensions' argument that the nurse could not be considered an employee of the hospital under the policy when that term was understood under the terms of the staffing agreement.

The court agreed with Interstate that the meaning of the term "employee" in the Dimensions policy could not turn upon a separate agreement involving different parties.

Instead, in understanding the term "employee" in the policy, the court relied upon the everyday use and common legal standard known as the right-to-control test.

Because the hospital and not the agency directed the nurse's professional services, she was an employee of the hospital under the Dimensions policy.

Finally, the court also rejected the argument that an "affiliated health care provider" clause in the Dimensions policy operated to eliminate coverage for the nurse.

While the intricacies of this argument are probably of interest only to those with this exact situation and policy language, this section of the decision represents a prime example of a court reading an insurance policy carefully, and deftly rejecting a reading that has superficial appeal, but which also would negate substantial areas of coverage reasonably expected by most policyholders if such a reading were adopted.

As a result of these determinations, the Fourth Circuit vacated the district court decision granting summary judgment, and remanded the case for further proceedings consistent with its opinion.

Although this case was between two insurance companies, this Fourth Circuit opinion should be viewed as very favorable for policyholders, with positive ramifications not just in the health care industry or even other professions, but for probably any company that purchases liability insurance of any kind.

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