

## Ruling Offers Cure For Health Contractors Chasing Coverage

By Bibeka Shrestha

*Law360, New York (February 11, 2013, 6:37 PM ET)* -- A California judge weighing an antitrust coverage dispute recently ruled that the "insured person" language in a widely used professional liability policy issued by Travelers Casualty and Surety Co. of America was ambiguous, a decision that helps solidify basic coverage for the many hospitals nationwide that categorize doctors as independent contractors.

In what could be first ruling to interpret the policy language, Judge Thomas Anderle held that Travelers' definition of a covered "independent contractor" was ambiguous and squashed the insurer's request for summary judgment in a coverage fight with Cottage Health System and Santa Barbara Cottage Hospital.

According to the decision from late January, Travelers' proposed interpretation of the "independent contractor" language in the directors and officers and employment practices liability policy would make it practically impossible for the hospital's contractors to be considered insured persons.

Cassandra Franklin, a deputy practice leader in Dickstein Shapiro LLP's insurance coverage group, said the decision could be "tremendously important" to hospitals that have similar language in their policies.

"The court has made it very clear that the carrier's interpretation here is not very reasonable, and that the insured's is," Franklin said.

Though the ruling comes from a trial court, it's still a positive for health care providers because Judge Anderle interpreted standard form policy language, according to Linda Kornfeld, a Jenner & Block LLP partner who represented Cottage Health.

"The ruling may help other policyholders in California and other states also addressing that language," Kornfeld said.

Cottage Health and Santa Barbara Cottage Hospital sued to push Travelers to cover a lawsuit accusing the hospital and its neurosurgeon contractors of conspiring to block another group of surgeons from working there. While Travelers initially agreed to cover defense costs, it disclaimed coverage in November 2010.

The insurer focused on a section of its policy that promised to cover independent contractors who carried out work that was under "the exclusive direction" of the hospital. According to Travelers, the neurosurgeons targeted in the underlying suit were not covered because Cottage was contractually barred from exercising control over them.

The neurosurgeons had signed a physician services agreement establishing that the hospital would not control the doctor's work, according to the ruling.

But Judge Anderle held that that "exclusive direction" language in the Travelers policy was ambiguous.

Under a California appeals court ruling, a worker is classified as an independent contractor if an employer can control only the results of the work, not the method of carrying it out, the ruling said.

"Under Travelers' reasoning, in order to qualify as an independent contractor, the person must at the same time both be an independent contractor ... and not be an independent contractor," Judge Anderle said. "When 'exclusive direction' is so broadly interpreted as to include direction over the means of accomplishing the work, the 'exclusive direction' requirement becomes self-contradictory, eliminating coverage for any independent contractor who, by definition, must not be controlled or directed over the means of accomplishing his work."

Though the PSAs did limit Cottage's control over the neurosurgeons' methods of carrying out work, Cottage could still hold exclusive direction over the doctors in other ways, the judge said. The agreement did not, for example, restrict Cottage's control over the results of the neurosurgeons' work, according to the ruling.

Judge Anderle noted that even the drafter of the policy language seemed unsure of the meaning of "exclusive direction."

Cottage Health is among the many hospitals around the country that hire doctors as independent contractors. Some states, like California and Texas, have an outright ban on doctors as employees.

"This is a typical arrangement between hospitals and doctors," Douglas Rawles, a partner at Reed Smith LLP's insurance recovery group, said. "It's important to understand how that 'independent contractor' definition interfaces with the agreement between the doctors."

Rawles said it would be helpful for hospitals and doctors to review the Travelers ruling and their own contracts, as Judge Anderle has provided a guidepost for health care providers that want to make sure they have sufficient coverage.

The decision also shows that policyholders should take special care while negotiating over who would be covered under insurance policies, attorneys said.

"You want to be careful that whatever coverage you are buying, the insurer is well aware of your contracts, both with independent contractors and with employees," Franklin said.

On the flip side, Judge Anderle's ruling cautions those inking independent contractor agreements that they could be held up by insurers in coverage disputes, according to William Passannante, a shareholder at Anderson Kill & Olick PC.

"Most employment contracts ... [and] service agreements are entered into without much thought about insurance," Passannante said. "I don't think most people drafting those sorts of contracts think that the liability insurance company of that organization is likely to use the terms of the contract against them."

Attorneys for Travelers did not respond to requests for comment.

Cottage Health is represented by Jerold Oshinsky, Linda Kornfeld, Mary Calkins, Kirsten Jackson and Christopher Lindsay of Jenner & Block LLP, and L. Donald Boden of Griffith & Thornburgh LLP.

Travelers is represented by Brian Harrison of Sedgwick LLP and Robert Gebhardt of Wilson Elser Moskowitz Edelman & Dicker LLP.

The case is Cottage Health System et al. v. Travelers Casualty and Surety Co. of America et al., case number 1382220, in the Superior Court of the State of California, Santa Barbara County.

--Editing by John Quinn and Jeremy Barker.

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