CARR MALONEY PC

4TH CIRCUIT COURT OF APPEALS INSURANCE COVERAGE UPDATE

By J. Peter Glaws, IV, Esq.

On December 6th, a three-judge panel of the 4th Circuit Court of Appeals unanimously overturned a District Court's award of summary judgment in favor of a hospital's insurer. The insurer had denied coverage in a malpractice action to a nurse working at the hospital through an agreement with an independent staffing agency. The case is Interstate Fire and Casualty Company v. Dimensions Assurance Ltd., No. 15-1801 (4th Cir. Dec. 6, 2016).

As noted, the case arises out of an underlying malpractice claim. In that case, a former patient sued the hospital, several doctors, and several nurses. One of the defendant nurses had been placed at the hospital through a staffing agency that, by contract, placed nurses and other healthcare professionals at the facility. The contract between the agency and the hospital dictated that agency-provided practitioners are employees of the agency, not the hospital. On that basis, the hospital's liability insurer, Dimensions Assurance Ltd., denied coverage to the nurse. At that time, the agency's liability insurer, Interstate Fire and Casualty Company, assumed her defense. Interstate subsequently settled the case against the nurse for $2.5 million and incurred approximately $500,000.00 in legal fees in the process. Interstate then filed an equitable contribution action against Dimensions alleging it had wrongfully denied coverage and, since the Dimensions policy would have been primary, it was liable for the entire settlement and defense costs.

The professional-liability section of the of the Dimensions policy at issue extends coverage to those classified as "protected persons." Among other categories, the policy states that: "present and former employees, students and authorized volunteer workers are protected persons while working or when they did work for you within the scope of their duties." The professional-liability section did not specifically exclude agency-provided practitioners from coverage.

The District Court granted judgement in favor of Dimensions based on its finding that, pursuant to the terms of the contract between the hospital and the agency, agency-provided practitioners were not employees of the hospital. **(continued)**

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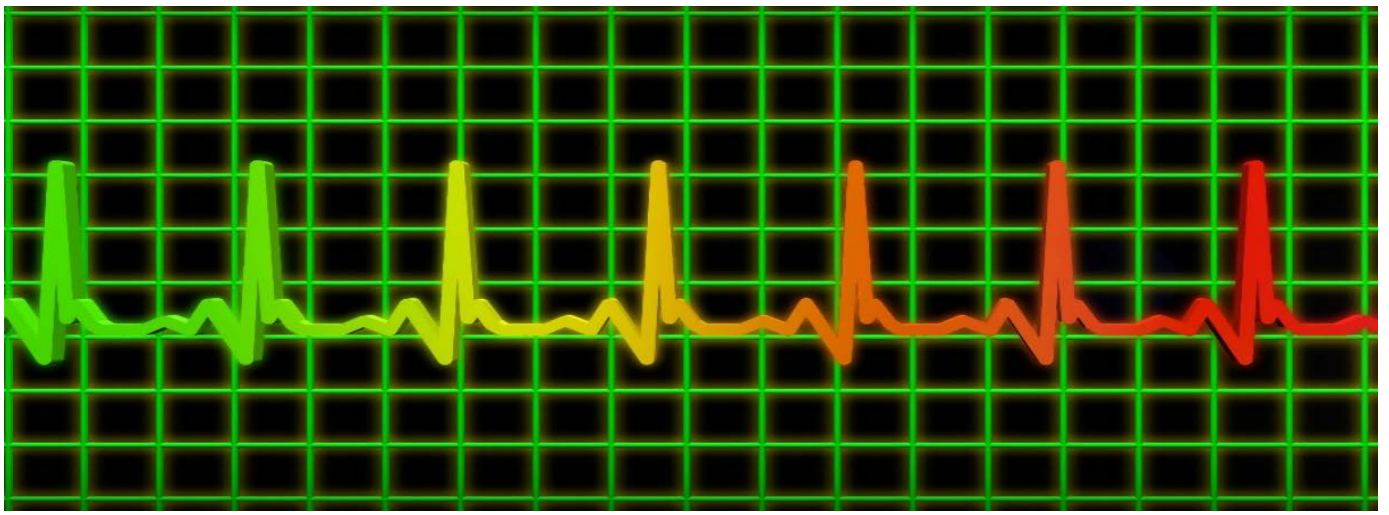
Peter litigates trust and estate disputes, broker and agent liability, and personal injury and property damage claims. As a counselor, Peter advises businesses on general legal matters including contract formation and interpretation, data loss and other cyber liability issues, selected tax issues and subpoena matters.

Peter is a *cum laude* graduate of The Catholic University of America, Columbus School of Law. At Catholic, Peter served as notes-and-comments editor for the Journal of Law, Philosophy, and Culture and was a member of the Willem C. Vis International Arbitration Moot Court Team.



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The Court of Appeals, however, found that the District Court erred, as a matter of law, by looking to the hospital/ agency contract to define "employee" in the Dimensions policy, a wholly independent contract that did not incorporate the hospital agency contract in any manner.

The Court of Appeals reasoned that word "employee" is not ambiguous. And, under well settled principles of contract interpretation, the District Court should not have looked to extrinsic evidence to define an unambiguous term. Rather, unambiguous language that is not otherwise defined in the contract or insurance policy is given its ordinary legal meaning. In this circumstance, an "employee," as defined under settled Maryland law applicable to the case, is "[s]omeone who works in the service of another person (the employer) under an express or implied contract of hire, under which the employer has the right to control the details of work performance" (citing Black's Law Dictionary (10th Ed. 2014)). This is also known as the "control test."

The Court of Appeals then applied the undisputed facts of the case to the unambiguous definition of "employee," and determined that the nurse at issue was an employee for purposes of the Dimensions policy. This is because the hospital had complete control of agency-provided practitioners while at the facility. Such control included orienting the agency-provided practitioners, floating agency-provided practitioners to areas they were not originally assigned to, and dismissing any agency-provided practitioners whose performance is unsatisfactory. Thus, the nurse was an "employee" of the hospital and a "protected person" under the terms of the Dimensions policy, within the scope of insurance coverage thereunder.

The Court of Appeals also stated it was telling that the Dimensions policy explicitly excluded agency-provided practitioners from the definition of "employee" under the general-liability portion of the policy. Under those facts, the Court stated that failure to make the same exclusion in the professional-liability section of the policy must be viewed as intentional. The Court noted, however, it need not base its ruling on that reasoning because examining the professional-liability section of the policy in isolation compels the same conclusion.

The take away for this decision is not entirely novel. Rather, it conjures up the old adage about what it means to "assume." There is no room for assumptions in contracts, whether those contracts are insurance agreements or otherwise. If the parties intend to give specific meaning to a word or phrase, it needs to be defined. Otherwise, if and when litigation arises, settled principles that are applicable under Maryland law and across the country will govern. Namely, the objective theory of contract interpretation that gives effect to unambiguous terms of the contract, regardless of what the parties may have believed those terms to mean. It underscores the importance of precision in drafting. Failure to do so can be costly.

J. PETER GLAWS, IV is licensed to practice law in the District of Columbia, Virginia, and the U.S. District Court of the District of Columbia, Maryland, and the Eastern and Western Districts of Virginia.