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Injuries in a Health Care Practitioner's Office: Where is the Insurance Coverage?

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In our increasingly litigious society, many health care practitioners enter into the financially worrisome position of not knowing whether they have the appropriate liability insurance to cover injuries suffered by their patients. Generally, a health care practitioner carries two types of liability insurance. The practitioner carries professional liability insurance to cover injuries to patients that occur in the course of treatment. To cover premises liability claims—slips and falls, and other types of similar injuries—the practitioner carries comprehensive general liability (CGL) coverage. For many types of injuries, the applicable coverage is clear, but questions often arise regarding injuries to patients that are in the nature of a premises liability injury, but which occur, arguably, within the course of medical treatment.

When a patient is injured in the course of a medical procedure being conducted by a physician, the professional liability policy will generally respond. If a delivery person trips and falls on a loose rug in the reception area, generally the CGL policy will respond. But in the aforementioned gray area, when a premises liability-type injury occurs arguably during the course of treatment, which policy responds? As you will see from the cases outlined below, decisions by the courts vary from state to state. Some courts have held that the CGL policy will respond, some courts have held that the professional liability policy will respond, and some have ruled that both policies will potentially provide coverage.

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The Main Insurance Policy Provisions

The typical CGL policy that might be purchased by a medical practitioner is defined as that which provides the following coverage:

> We will pay those sums that the insured becomes legally obligated to pay as damages because of ''bodily injury'' or ''property damage'' to which this insurance applies. We will have the right and duty to defend the insured against any ''suit'' seeking those damages. However, we will have no duty to defend the insured against any ''suit'' seeking damages for ''bodily injury'' or ''property damage'' to which this insurance does not apply.

However, it is important to note that each CGL policy normally contains a professional exclusion. A typical professional exclusion indicates that the insurance will not apply to:

> ''Bodily injury'' or ''property damage'' arising out of the rendering or failure to render any professional service, including but not limited to medical, cosmetic, dental, ear piercing, hair dressing,

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> massage, physical therapy, veterinary, nursing, surgical or x-ray services, advice and instruction.

A professional liability policy, on the other hand, will generally contain a coverage provision that reads as follows:

> We will pay those sums that the insured becomes legally obligated to pay as damages because of injury to which this insurance applies. We will have the right and duty to defend the insured against any ''suit'' seeking those damages. However, we will have no duty to defend the insured against any ''suit'' seeking damages for injury to which this insurance does not apply.

The professional liability policy goes on to indicate that the insurance applies to injury only if the injury is caused by a ''medical incident'' that takes place in the ''coverage territory,'' or if the injury arises out of the individual insured's profession as a physician, surgeon or dentist.

The policy defines ''medical incident'' to include any act or omission arising out of the providing of or failure to provide professional, medical or dental services by the insured, or a person acting under the personal direction, control or supervision of the insured.

What the Courts Have Said in Insurance Cases

Given the coverage grants, definitions, and in the case of the CGL policy, the language of the exclusion, perhaps it's no surprise that a question often arises about which policy should respond when a patient is injured in a physician's office. Fortunately, there are a number of cases that have been decided across the country that can provide guidance on which policy will apply in the context of injuries to patients in a medical facility.

For example, in *St. Paul Fire & Marine Ins. Co. v. Medical Protective Company of Ft. Wayne, Indiana*, 2006 WL 3544817 (M.D. Fla. Dec. 8, 2006), the court considered a case in which an individual sustained injuries while assisting a physician, at the physician's direction, in moving a patient during a cardiac catherization procedure. In the complaint, it was alleged that two procedures were being performed on a patient in a catherization laboratory at Naples Community Hospital. While the doctor was transitioning from the first procedure to the second, the patient fell off the operating table. The doctor called for assistance in getting the patient back on the table, and the plaintiff in the action, a cardiovascular technologist acting at the doctor's direction, assisted in lifting the patient back to a stretcher. In the process, he injured his back.

The court found that the injury suffered by the technician resulted from and was based upon professional services rendered by the insured, and therefore the professional liability policy should respond. The court found that the injury was excluded by the professional services exclusion in the CGL policy. The court noted that had the doctor's patient sued for injuries that arose from his fall from the table or from being moved back onto the table after the fall, it was ''obvious'' that his claim would have been covered by the professional liability policy. In making that statement, the court cited to a case from another jurisdiction, *Executive Health Servs. Inc. v. State Farm Fire & Cas. Co.*, 498 So. 2d 1268 (Fla. 2d DCA 1986), which held that a policy exclusion in a CGL policy for injury due to ''any service or treatment conducive to health or of a professional nature'' applied where a patient, while being treated, was asked to lie back on an examination table. The table tilted up at one end and the patient fell off, was injured, and brought suit.

The case of *Pikulski v. Waterbury Hospital Health Center*, 269 Conn. 1, 848 A.2d 373 (2004) involved a plaintiff who was injured when she slipped and fell on the premises of a hospital health center. She was awarded damages at trial, but this award was subject to a Connecticut statute that reduces jury awards, in personal injury actions arising out of the rendition of professional services, by the amount of collateral source payments that were related to damages actually awarded. The question on appeal centered on what the trial court could consider in calculating the reduction, but it was not disputed that the slip and fall occurred while professional services were being rendered.

In *Harris v. Sternberg*, 819 So. 2d 1134 (La. App. 4 Cir. 2002), a patient brought suit after falling from a scale in a doctor's office. Because Louisiana is a direct action state, the patient named as defendants the doctor as well as his CGL and professional liability carriers. The CGL carrier filed a motion for summary judgment, arguing that the plaintiffs' petition alleged damages that were incurred in the course of medical treatment and the Hartford policy excluded claims for medical malpractice. The professional liability carrier also filed a motion for summary judgment, asserting that Harris's claims constituted ordinary negligence because neither the doctor nor his assistant were assisting Harris at the time of the fall, nor were they administering any medical treatment.

Meanwhile, the plaintiff alleged that Dr. Sternberg's employee did not properly secure the scale upon which he was to be weighed. The plaintiff alleged that the scale was not intended for use by obese or infirm patients, but that Dr. Sternberg still used it in his medical practice. The plaintiff also alleged that Dr. Sternberg did nothing to prevent the scale from rolling, despite knowing that the scale had the capability to roll. The court interpreted the plaintiff's petition to allege that the doctor was negligent, rather than to allege the scale was defective. Thus, the court found that the allegations came within the purview of the medical malpractice act. Previously, the trial court had denied the CGL carrier's motion for summary judgment and granted summary judgment filed in favor of the professional liability carrier. The appellate court overturned the decision in favor of the professional liability carrier and remanded the case.

Interestingly, that ruling was in opposition to a decision by a Louisiana court years earlier. In *American Cas. Co. v. Hartford Ins. Co.*, 479 So. 2d 577 (Ct. App. La. 1985), the court refused to apply the professional liability exclusion in a CGL policy where a patient was instructed by an EKG operator to enter an examination room, remove his shirt, and place himself upon a table. The technician briefly turned her back, and when she did, she heard the patient fall to the floor. The patient apparently fell while climbing onto the table or while moving about on the table. Because the court found the actions of the EKG technician were purely mechanical and administrative and could be performed by any unskilled or untrained employee, it ruled that the nonmedical administrative act would be covered by the CGL policy. Even though the accident was caused by the negligent administration of nonmedical services by

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the technician, the court held that the doctor, who was ultimately in control, was equally at fault for failing to protect the plaintiff and therefore to properly furnish medical services. Consequently, the court found there was also coverage under the professional liability policy.

In *Executive Health Services Inc. v. State Farm Fire and Cas. Co.*, 498 So. 2d 1268 (Fla. App. 2 Dist. 1986), a Florida court was asked to interpret an exclusion included in a liability policy that stated the insurance would not apply to the rendering of, or failure to render, medical, surgical, dental, X-ray or nursing service or treatment, or any service or treatment conducive to health or of a professional nature. In that case, a patient was seated on a table in an examination room, after which a doctor entered, read the nurse's notes and asked the patient about his injury. The doctor then instructed the patient to lie down on the table. When the patient did so, the table tilted up at one end causing the patient to fall off and land on his shoulder. After the fall, the patient was assisted and examined by the doctor, both in regard to any possible injuries caused by the fall, and his original injury. Subsequently the patient sued the hospital and the doctor alleging that their negligence caused the fall. While that case was pending, the general liability carrier filed a separate declaratory judgment action to determine whether the professional liability exclusion from its policy precluded coverage for the accident as alleged. That exclusion provided that the policy would not apply to bodily injury due to the rendering of medical service and any service conducive to health. The court in the declaratory judgment action found that the accident unquestionably came within the exclusion, and the policy therefore provided the patient no coverage.

While reviewing *Wild v. NsNg Inc.*, 898 So. 2d 466 (La. App. 1 Cir. 2004), the court considered a case in which a nursing home resident walked out of the building through an unlocked exit door and fell. It was alleged he tripped over a cement drop-off leading to an area of uneven, broken pavement. The question was whether the claim constituted one for malpractice that should go through the medical malpractice act procedures. The court found that it did not, and indicated that the negligence alleged in the plaintiff's petition was failure to maintain the premises adequately to ensure that no one would fall upon crossing the threshold and stepping onto a walkway. The court ruled that building maintenance was not within the scope of activities that a nursing home would be licensed to perform in the exercise of its care giving function.

In *Duke University v. St. Paul Fire & Marine Insurance Co.*, 96 N.C. App. 635, 386 S.E. 2d 762 (1990), a North Carolina court held that the professional services exclusion in a CGL policy would not apply in a case where a plaintiff was injured by two attendants who dropped her to the floor while lifting her from a dialysis table to a wheel chair. The court stated that the negligence of the plaintiff's employees consisted of their failure to lock castors or take other steps to stabilize the chair. The court indicated that a ''professional service'' was generally defined as one arising out of a vocation or occupation involving specialized knowledge or skills, skills that would be mental as opposed to manual. The court also indicated that the nature of the activity, rather than the position of the person responsible for the act or omission, determined whether a particular act fell within the scope of a professional services exclusion. The court stated that in its view there would be coverage under a professional liability type of policy as well as under the CGL policy.

In making its ruling, the court noted that in *American Policy Holders Ins. Co. v. Michota*, 156 Ohio St., 578 103 N.E. 2d 817 (1952), it was determined that a professional liability policy would provide coverage for a claim arising out of a patient's fall from a specially designed chair. The court noted that the *American Policy* court was construing a policy liberally to favor coverage. In the case before it, the *Duke University* court said it was construing an exclusion that would be strictly construed to also provide coverage. The *Duke* court held that the term ''professional services'' was ambiguous, and that it should be interpreted to denote only those services for which professional training was a prerequisite to performance.

The Courts' History in Applying Medical Malpractice Acts

Many cases that address whether a patient's injury was caused by professional negligence or simple negligence arise in the context of courts determining whether a claim is subject to mandatory medical malpractice act procedures. Various states have such acts, which provide that if a patient is injured due to professional negligence, then he/she cannot bring suit without complying with various administrative procedures. For injuries due to simple negligence, the patient may bring suit directly. While these cases are not insurance cases, they provide guidance as to how courts might categorize a specific act of negligence.

In a case that addressed whether a claim came within the purview of a malpractice act, *Lakeshore Hospital, Inc. v. Clarke*, 768 So. 2d 1251 (Fla. 2000), a patient fell as she walked from her hospital bed to the bathroom. The court held that the pre-suit conditions of the medical malpractice act did not apply because the patient did not state any claim for medical negligence in her cause of action, and thus the patient could bring the suit directly in state court.

In an earlier case decided by the Florida courts, however, there was a contrary ruling. In *Neilinger v. Baptist Hosp. of Miami Inc.*, 460 So. 2d 564 (Fla. 3d DCA 1984), the plaintiff, a maternity patient, slipped and fell on a pool of amniotic fluid while descending from an examination table under the direction and care of employees of the hospital. The court determined that on its face, the complaint alleged a breach of professional standard of care, and therefore the medical malpractice act would apply.

At issue in *Rothman v. Sacred Heart Hosp.*, 13 Pa. D&C 3d 496 (1979) was a patient who slipped and fell on water that leaked from an ice bag used to treat another patient in her room. In ruling that the state malpractice act applied, the court held that furnishing a hospital room comprised part of the health care provided by a hospital to a patient, and therefore came within the act's purview.

Breaking Down the Impact

A cursory review of the above-decided cases could lead one to believe that the determination of which policy will respond—the CGL policy, the professional liability policy, or both—is a shifting target that various courts have hit or missed based on each individual ju-

rist's view. However, a closer reading of the cases demonstrates that their results can, for the most part, be logically explained.

Initially, one must start with the concept that applies in most jurisdictions, that a court will interpret coverage under a policy of insurance broadly, to provide as much coverage as possible for the insured. At the same time, courts will construe any exclusions to coverage very narrowly, again, to insure the broadest scope of coverage for the insured. Finally, to the extent that any clause or phrase in a policy is found to be ambiguous, a court will construe that ambiguity against the drafter of the policy—the insurer—and in favor of the insured. Applying those general insurance law concepts, one can see that many courts' decisions are based on basic principles of insurance law.

In addition to those broad insurance concepts, the particular facts of each case must be considered. If the injury to the patient is suffered clearly within the course of treatment, either by a physician or other health care professional, or under the health care practitioner's supervision, it is likely that a court will find that a professional liability insurance policy will respond to the injury. If it is clear that the patient is injured outside the course of treatment, for example, when the patient is leaving the building after treatment has been completed, and slips and falls on stairs on the way to his or her vehicle, the CGL policy will respond to the injury.

In the cases discussed above that appear to indicate that both the CGL policy and the professional liability policy will respond to an injury to a patient, consider that those cases are generally decided in the context of a court trying to determine whether an insurance carrier has a duty to defend its insured when suit is brought by an injured claimant. Remember this key point: the law in virtually every jurisdiction is that an insurance carrier's duty to defend is broader than its duty to indemnify its insured for claims. If there is the potential that a claim may be covered by a policy based upon the allegations contained in the complaint, an insurance company must defend. It is possible that facts can be alleged in a complaint against an insured that are broad enough that they will enable coverage under both the professional liability policy and the CGL policy; double coverage can and does happen. It is worth noting that in such cases, however, only one of the two policies will actually respond to pay any indemnity that may be due.

Health care professionals would be wise to have both CGL policies and professional liability policies in place, to respond to all types of risks that may arise in the context of their practices. While an injury to a patient can present some challenging and complex issues with regard to coverage under policies of insurance, if both types of coverage are in place, the health care professional should rest assured that he or she should be able to claim a defense and coverage under one or both of the policies.

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