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NONPROFITS: Employee-Related Exclusions; They Might Not Apply.

It is not wrong to think that a nonprofit's general liability insurance is unlikely to pay for a claim brought by an employee. Most general liability policies contain exclusions concerning, and other types of insurance (workers compensation; employment practices liability) exist to cover, injuries to or damages suffered by an employee during or as a result of their employment. Colony Insurance Company v. Hearts with Hope Found, 2018 U.S. Dist. LEXIS 32280 (S.D. Tex. Feb. 28, 2018), illustrates how we should all look twice at the facts presented and policy language at play before assuming that the employee-related exclusions apply.

Hearts with Hope Found involved "an organization that provides care for children with mental and emotional disturbances." An employee, who was pregnant at the time, was assigned to dispense medication to certain of the children in the nonprofit's care. One of those children punched the employee in the stomach, causing her amniotic fluid to rupture and her own child to be born prematurely with "severe physical and emotional injuries." The nonprofit's general liability insurer refused to defend or indemnify the organization against the ensuing lawsuit based on an exclusion contained in the policy concerning employees. The Court reviewed the exclusionary language at issue and held that, based on the facts presented, and at least with respect to the duty to defend, it did not apply to defeat coverage.

The exclusion at issue provided, in pertinent part, that the policy did not apply to a claim "[b]ased upon or arising out of "bodily injury" to . . . (1) an "employee" of the insured arising out of and in the course of: (a) employment by the insured; or (b) performing the duties related to the conduct of the insured's business; or (2) the spouse, child, parent, brother or sister of that "employee" as a consequence of Paragraph (1) above." First, the lawsuit was commenced by the employee but as the guardian of and on behalf of her newborn child. Therefore, the claimant was not an employee and Paragraph (1) of the exclusion did not apply. Second, the newborn's underlying complaint alleged that "the hit to the stomach caused [the employee]'s amniotic sac to rupture *and* cause [the newborn child] to be injured." Therefore, at least as alleged, the child's action in punching the employee's stomach directly injured the newborn regardless of the harm it also caused the employee. Paragraph (2) of the exclusion (requiring that the injuries to an employee's child be the "consequence of" the injuries to the employee), therefore, did not apply either at least for purposes of the duty to defend.

For assistance with your risk management and/or insurance needs, please call or email Fannie Minot at: fannie@minotreports.com; (978) 578-2076.