“There’s Coverage For That?”: Liability Insurance Policies Fund The Defense Against Alleged Improper Publication of Patient Photographs

By Jeffrey L. Schulman

Prospective patients largely measure the surgical skill and ability of a plastic surgeon by reputation and prior successful cosmetic results. For that reason, plastic surgeons routinely take and disseminate “before and after” pictures of their patients for commercial advertising and marketing purposes. A lawsuit alleging damages arising from the potentially improper use of such pictures can be costly, both to a physician’s bottom line and reputation.

On June 13, 2013, a New York plastic surgeon, his medical practice, and the practice’s website developer were named as defendants in a lawsuit by a former patient seeking approximately $18 million in damages stemming from allegations of unlawful dissemination of such photographs. The suit alleged, among other things, violations of the patient’s: (i) right to privacy and confidentiality; (ii) civil rights; and (iii) rights under the Health Insurance Portability and Accountability Act (HIPPA). The suit further claimed that the physician and the practice were unjustly enriched by the use of the patient’s photographs in its advertising.

What many physicians may not know, is that most standard commercial general liability (CGL) insurance policies provide coverage for this type of “advertising injury” or “personal injury” liability, and courts typically interpret that coverage broadly in favor of policyholders.

The “Basics” of CGL Coverage

CGL policies are third-party policies, meaning they provide coverage to the policyholder for losses in connection with alleged harm to a third party caused by the policyholder. An insurer typically has two duties under a CGL policy: (i) to defend its policyholder by paying the expenses incurred in the investigation and defense of an underlying lawsuit; and (ii) to indemnify its policyholder by paying those amounts that the policyholder
becomes legally obligated to pay (by way of settlement or judgment). The coverage included in most CGL policies is for “bodily injury”, “property damage”, “personal injury,” and “advertising injury.” “Personal and advertising injury” coverage typically obligates insurers to defend and indemnify their policyholders against claims alleging injury arising out of specified “offenses.” These offenses usually include the “[o]ral or written publication, in any manner, of material that slanders or libels a person” or that “violates a person’s right of privacy.”

The duty to defend is far more broad than the duty to indemnify. The insurer is required to provide a defense based upon the mere potential for coverage, even where the allegations are later proven to be false. In addition, if one cause of action in a complaint triggers the duty to defend, the insurer must defend the entire suit. The insurer’s obligation to defend its policyholder is not based on the precise and narrow words pled in the underlying complaint against the policyholder – rather the insurer’s obligation to provide a defense is derived from the nature of those underlying allegations. Thus, when an uncertainty arises in connection with a factual, legal or policy interpretation, the duty to defend is triggered until such time that the uncertainty is resolved.

**Coverage For Allegedly Improper Publication of Patient Photographs**

This issue has not been widely litigated. However, the courts that have addressed this issue have ruled in favor of coverage. For example, a Pennsylvania court considered a complaint in which a patient alleged an invasion of privacy and breach of a confidential relationship stemming from her physician’s use of her image in a published newspaper advertisement without permission. The court held that the physician’s insurer had a duty to defend that suit, holding that “[i]t cannot be disputed that invasion of privacy is the type of injury covered by the policy” where the policy defines “personal injury” to include “invasion of privacy.”

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Conclusion

The expansive reading of the “personal injury” and “advertising injury” provisions of liability policies by courts across the country, together with an insurer's broad duty to defend, provides a level of protection to doctors and medical practices prone to claims for damages stemming from the allegedly improper publication of patient photographs. Critical to any such claim for coverage will be the circumstances that surround the policyholder’s particular situation. In the event that a policyholder is served with a lawsuit alleging misuse or improper publication of patient information or photographs (or where a policyholder becomes aware of the potential for such a claim), do not delay in seeking coverage. As with all insurance claims, the legal advice that you receive before and after the loss, and when submitting your claim can have a significant impact on whether and when your claim is paid.

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