The State of South Carolina

Office of the Attorney General

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The Honorable John G. Richards
Chief Insurance Commissioner
S. C. Department of Insurance
Post Office Box 100105
Columbia, South Carolina 29202-3105

Dear Commissioner Richards:

As you are aware, your letter of April 12, 1991 to Attorney General Medlock was referred to me for response. In that letter, you indicate that you are Chairman of the Board of the South Carolina Medical Malpractice Liability Insurance Joint Underwriting Association (Association) and the South Carolina Medical Malpractice Patients Compensation Fund (Fund). The Association is an organization created, pursuant to the provisions of 1976 South Carolina Code, Ann., Section 38-79-120, for the purpose of providing "medical malpractice insurance on a self-supporting basis to the fullest extent possible" to licensed health care providers. The purpose of the Fund, as set forth in Section 38-79-420, Code, is to pay "that portion of medical malpractice or general liability claim, settlement or judgment rendered against licensed health care providers which is in excess of one hundred thousand dollars for each incident or in excess of three hundred thousand dollars in the aggregate for one year.

You further indicate that you are advised that all health care providers, of a given medical specialty, in a defined geographical area, who are insureds of the Association and/or members of the Fund, may have decided, as a group, to no longer accept as patients any person who is involved in litigation. You are also advised that the providers' conduct may place them in violation of federal antitrust statutes regarding unlawful restraints of trade; and, that such conduct may subject the providers to the imposition of criminal sanctions and civil damages.

With this information in mind, you ask the following questions of this Office:

(1) Is the Association obligated to defend a suit brought against one or more of its insureds under the provisions of federal antitrust statutes for restraint of trade?

(2) Are the Association and the Fund obligated to pay any damages assessed against insured/members as a result of violations by the insured/members of federal antitrust statutes?

It should be noted at the outset, that we do not, by this letter, decide or offer an opinion on the merits of the hypothetical lawsuit. We address only the issue of the coverage afforded the insured and not the legality or illegality of the conduct of the insured vis-a-vis applicable federal law.

It seems appropriate to begin the analysis of your questions by acknowledging the fundamental precept of insurance law which holds that the terms of an insurance policy should be liberally construed so as to provide coverage to the insured. Myers v. Calvert Fire Ins. Co., 246 S.C. 46, 142 S.E.2d 704, (1965). In addition, where the terms of a policy are ambiguous, or capable of two reasonable interpretations, the interpretation most favorable to the insured should be adopted. Edens v. S. C. Farm Bureau Mutual Ins. Co., 279 S.C. 377, 308 S.E.2d 670, (1983). These precepts are doubtless applicable to the insurance coverages provided by the Association and the Fund.

With these principles in mind, we look next to the interplay between the nature of the coverage provided to an insured by the liability policy issued by the Association and the nature of the legal action brought against the insured. For it has been held in this State that "if the facts alleged in a complaint against an insured fail to bring a claim within policy coverage, an insurer has no duty to defend." South Carolina Medical Malpractice Joint Underwriting Association v. Ferry, 291 S.C. 460, 354 S.E.2d 378, (1987).

Included with your letter to this Office was a sample copy of the Professional Liability Policy issued by the Association. The professional liability coverage provisions of that policy obligate the Association "to pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay as damages because of any claim or claims made against the Insured arising out of the

performance of professional services rendered or which should have been rendered, during the policy period, by the Insured or by any person for whose acts or omissions the Insured is legally responsible...." (emphasis supplied). The coverage provided by the policy is consistent with the definition of "medical malpractice insurance" found in Section 38-79-110(3), Code, i.e. "medical professional liability insurance against the legal liability of the insured and against loss, damage or expense incident to a claim arising out of the death or injury of any person as the result of negligence or malpractice in rendering or failing to render professional service by any licensed physician...." (emphasis supplied).

Based upon the facts set forth in your letter, a well-pleaded Complaint against the providers would, in essence, accuse them of engaging in a boycott. See: Washington State Bowling Proprietors Assoc. v. Pacific Lanes, Inc., 356 F.2d 371, cert. den. 384 U.S. 963, 86 S.Ct. 1590, (1966), wherein it is stated: "The rule that group boycotts are per se violations of the Sherman Antitrust Act applies not only to boycotts directed against other traders but also to group refusals of manufacturers or traders to deal with customers."

Thus, the question becomes whether the coverage provisions of the policy issued by the Association includes by its terms, the conduct of an insured who engages in a group boycott. Stated another way, the issue is whether the participation by the Insured in a concerted group "refusal to deal" is a "professional service rendered or which should have been rendered" within the context of the coverage provisions of the Association's liability policy.

For guidance on that issue, we look, again, to JUA v. Ferry, supra. In that case, the South Carolina Supreme Court considered whether the "performance of professional services" included the intentional sexual assault of a patient. In deciding that sexual assault did not come with the coverage provisions of the policy issued by JUA, the Court declared that "the scope of professional services does not include all forms of a physician's conduct simply because he is a physician." Quoting from an opinion of the Nebraska Supreme Court in Marx v. Hartford Accident and Indemnity Co., 183 Neb. 212, 157 N.W.2d 870, (1968), the Court stated that:

"The insurer's liability is thus limited to the performing or rendering of professional acts or services. Something more than an act flowing from mere employment or vocation is essential.... In determining whether a particular act is of a professional nature or a 'professional service' we must look not to the title or character

of the party performing the act, but to the act itself." Ferry, supra, at page 380.

In Buckner v. Physicians Protective Trust Fund, Fla. App., 376 So.2d 461, (1979), the Court denied coverage to a physician who was alleged to have made slanderous comments regarding a colleague. The Court held that the physician's conduct did not constitute the performance of professional services "rendered or which should have been rendered..."

Likewise, in Albert J. Schiff Assoc. Inc. v. Flack, 51 N.Y.2d 692, 417 N.E.2d 84, (1980), the Court held that the professional "errors and omissions" indemnity insurance policy issued to a firm of life insurance agents and employee benefit plan consultants did not provide coverage for a claim brought by a competitor or firm for willful and malicious usurpation of a trade or commercial secret where the policies obligated the insurer to pay for the insured's liability arising out of any error, omission or negligent act committed while in the performance of services in its professional capacity. In so holding, the Court stated that "an errors or omission policy is intended to insure a member of a designated calling against liability arising out of the mistakes inherent in the practice of that particular profession or business." Flack, supra, at page 88.

It is clear from the cases mentioned above that, in determining the liability insurer's duty to defend, the courts have focused more on the nature of the insured's conduct rather than the title or character of the insured. The mere fact that an act is committed by an insured does not necessarily bring the act within the scope of policy provisions which limit the insurer's liability to claims arising out of "professional services rendered or which should have been rendered." Consequently, in the matter at hand, we conclude that where the insured intentionally engages in a group boycott, such conduct would not come within the coverage provisions of the policy issued by the Association and, as a result, the Association would have no duty to defend. After all, the participation by the insured health care provider in a group boycott would hardly appear to be the type of "mistake inherent in the practice of the insured's health care profession." To hold otherwise would seem to be an enlargement of the provisions of the policy beyond the parameters contemplated by the parties. Helton v. St. Paul Fire and Marine Ins. Co., 286 S.C. 220, 332 S.E.2d 776, (1985).

The above-stated conclusion is based upon the assumption, drawn from your hypothetical, that the legal pleadings filed

against the insured allege only the violation of federal antitrust statutes. Of course, the addition of other claims to the pleadings such as, for instance, medical malpractice arising out of the refusal to treat, could result in a different opinion.

Your second inquiry concerns the Association's and/or Fund's obligation to pay any damages assessed against insureds/members as a result of the insureds/members' violations of federal antitrust statutes. The Association's liability policy defines damages as "all damages, including damages for death, which are payable because of injury to which this insurance applies." Having determined that participation in a group boycott is not the type of conduct such as would come within the coverage provisions of the Association's liability policy, it follows that any damages flowing from the conduct would not result from an injury to which the insurance applies. Accordingly, the Association would not be obligated to pay any such damages.

With respect to the Fund's obligation to pay damages flowing from an antitrust violation by the insured, it should be noted that the Fund may be used for general liability claims as well as medical malpractice claims, settlements or judgements (see: Section 38-79-420, Code). Generally speaking, liability insurance is a contract whereby the insurer agrees to pay damages with which the insured may be legally charged or which he may be liable to pay. 43 Am.Jur.2d, Insurance, pp. 771. Thus, the Fund's obligation to pay is not limited by the terms of an "errors or omissions" provision such as is contained in the Association's enabling statutes and liability policy. Accordingly, assuming the health care provider is a member of the Fund, it appears that the Fund would be obligated to pay damages assessed against the insured/member as a result of the insured/member's violation of federal antitrust statutes. Of course the extent of the Fund's obligation to pay is limited, somewhat, by the provisions of Section 38-79-420, Code.

In conclusion, we would advise you that:

(1) The Association most probably would have no duty to defend an insured facing a lawsuit wherein the legal pleadings allege only the violation of the provisions of federal antitrust statutes prohibiting unlawful restraints of trade.

(2) Consonant with number 1 above, the Association would not be obligated to pay damages assessed against an insured as a result of the insured's violation of federal antitrust statutes.

(3) The Fund would be obligated to pay, to the extent permitted by Section 38-79-420, Code, damages assessed against an insured/member as a result of the insured/member's violation of federal antitrust statutes.

I trust that you will find the foregoing information to be responsive to your concerns. Please contact me if I can be of further assistance.

Very truly yours,

Wilbur E. Johnson
Assistant Attorney General

WEJ/fc

REVIEWED AND APPROVED BY:

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