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News

CLAIMS OF NEGLIGENT FAILURE TO PROVIDE CHAPERONE AGAINST EMPLOYER “ARISE OUT OF” EMPLOYEE’S SEXUAL MISCONDUCT – EXCLUSION APPLIES

Newsbrief
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The Fifth Circuit recently addressed whether negligence claims against the named insured, Radiology Associates, asserted after an employee inappropriately touched a patient while performing an ultrasound, were covered under a professional liability policy and determined that coverage was excluded. In *National Fire Insurance Company of Hartford v. Radiology Associates, L.L.P.,* 2011 WL 3444213 (5th Cir. (Tex.) August 8, 2011), the trial court granted summary judgment in a declaratory judgment action finding that the insurer had a duty to defend claims that Radiology Associates was negligent in failing to provide a chaperone during the examination and for failing to monitor its employee. The insurers appealed.

On appeal, the Fifth Circuit observed that the complaint alleged facts against the employee establishing that a “sexual assault” occurred and that the policy exclusions for sexual misconduct and intentional acts applied. The court also examined Texas courts’ analysis of the term “arising out of” in that the alleged acts need only bear an “incidental relationship to the described conduct for the exclusion to apply.” Applying this standard to the allegations that Radiology Associates negligently failed to provide a chaperone, failed to post notices that patients had a right to a chaperone and failed to monitor its employees, the court found that the claims arose out of the employee’s unauthorized sexual conduct. Accordingly, the court held that the insurers had *no* duty to defend and reversed and rendered judgment in favor of the insurers.