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Transporting Patient Covered Under Professional and Auto Liability Policies

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In **National Casualty Co. v. Western World Ins. Co.,** No. 10-41012, 2012 U.S. App. LEXIS 2109 (5th Cir. Feb. 3, 2012), the Fifth Circuit held that National Casualty and Western World each owed a **duty to defend and provided primary coverage for an underlying lawsuit alleging that an insured ambulance company and its emergency medical technicians were negligent in loading and transporting a patient to and from dialysis**. In a decision emphasizing the difference between evaluating coverageterms and exclusionary provisions, the court held that the allegations in the underlying lawsuit established that the accident resulted from "use" of the ambulance for purposes of establishing coverage under the National Casualty policy, but did not establish that the Western World policy exclusion for bodily injury arising out of the "use" of an auto applied to preclude coverage under that policy. The court also held that National Casualty's professional services exclusion did not apply, because the underlying complaint alleged injuries caused by both professional tasks and administrative tasks. Last, the court held that Western World's "other insurance" provision did not limit its duty to defend the underlying suit, reasoning that an "other insurance" provision limits an already-triggered duty to defend only if all of the allegations in the underlying lawsuit that fall under the coverage provision also fall under the "other insurance" provision.

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The insured operated an ambulance service whose EMTs allegedly: failed to properly secure the decedent to a gurney for transportation to dialysis; moved her when it was unsafe to do so; failed to provide competent personnel to safely transport her; failed to properly train employees; and failed to use appropriate equipment and devices to assist in safely transporting the decedent. National Union and Western World each issued insurance policies to the insured – National Casualty issued a business auto policy and Western World issued a commercial general liability policy. The National Casualty required National Casualty to pay "all sums an insured must pay as damages because of 'bodily injury … to which this insurance applies, caused by an 'accident' and resulting from the ownership, maintenance or use of a covered 'auto.'" The National Casualty policy also included a professional services exclusion, excluding from coverage injuries "resulting from the providing or the failure to provide any medical or other professional services." National Casualty argued that the alleged injuries did not result from the "use" of an auto and that the professional services exclusion barred coverage. The Western World policy provided coverage for "those sums the insured becomes legally obligated to pay as damages because of any 'bodily injury,' 'property damage' or 'personal injury' to which this coverage part applies caused by a 'professional accident.'" The Western World policy excluded from coverage "'bodily injury' … arising out of the … use … of any … 'auto'" and provided that it was excess over "any other insurance, whether primary, excess, contingent or on any other basis … if the loss arises out of the maintenance or use of aircraft, 'autos,' or watercraft …"

In considering whether the underlying complaint alleged bodily injury arising out of the "use" of an auto for purposes of coverage under the National Casualty policy, the court noted that Texas courts apply three-part test for determining whether an injury relates to the "use" of an auto – "(1) the accident must have arisen out of the inherent nature of the automobile, as such, (2) the accident must have arisen within the natural territorial limits of

an automobile, and the actual use must not have terminated, [and] (3) the automobile must not merely contribute to cause the condition which produces the injury, but must itself produce the injury." (quoting **Mid-Continent Cas. Co. v. Global Enercom Mgmt., Inc**., 323 S.W.3d 151, 154 (Tex. 2010)). The underlying plaintiff's allegation that the decedent was injured "during an attempt to load her into the Preferred Ambulance vehicle," which the Fifth Circuit interpreted to mean that she was injured while being placed into the ambulance. National Casualty argued that the ambulance was merely the site of the injury, and that as a result the third element of the test could not be satisfied. Rejecting the argument, the court noted that Texas courts "broadly" interpret "use" in automobile policies. Relying on Mid-Century Ins. Co. v. Lindsey, 997 S.W.2d 153 (Tex. 1999), in which the court concluded that a passenger's gunshot injury arose from the "use" of an auto when a boy accidentally set of a loaded shotgun while attempting to enter the cab of a locked pickup truck to retrieve his clothing, the Fifth Circuit reasoned that the "sole purpose" of the alleged attempt to place the decedent into the ambulance was to use the ambulance, and that attempt "directly caused" her injury. The court reasoned that an attempt "to load a patient onto an ambulance is not an unexpected or unnatural use of the vehicle." (citing id. at 158.)

Having determined that the underlying complaint alleged the "use" of an auto, the Fifth Circuit turned to National Casualty's argument that the professional services exclusion nevertheless precluded coverage. National Casualty argued that that responsibilities like securing and transporting a patient are professional services and that the exclusion therefore applied. Noting that the underlying lawsuit alleged injuries arising from the provision of both professional services and non-professional (administrative) services such as decisions regarding which resources to direct to an accident scene, the court held that the exclusion did not limit National Casualty's duty to defend.

Interestingly, Western World attempted to piggy-back onto the lower court's conclusion that under the National Casualty policy, the alleged injuries arose out of the "use" of an auto. In particular, Western World argued that the underlying suit triggered its CGL policy's exclusion for the "use" of an automobile for the same reason that the suit triggered the coverage provision in the National Casualty policy relating to "use of an auto. The Fifth Circuit rejected Western World's argument, pointing out that exclusions and coverage provisions are interpreted differently in determining the scope of a duty to defend. In particular, "[w]hile the duty to defend is triggered by a single alleged injury that falls within the scope of the coverage provision, exclusions negate the insured's duty to defend only when all of the alleged injuries that fall into the coverage provision are subsumed under the exclusionary provision." (Emphasis added). Here, the underlying complaint alleged a number of injuries covered under the policy as "ambulance" services but not excluded as resulting from the "use" of an auto, such as the failure to properly secure the decedent to the gurney.

The Fifth Circuit likewise rejected Western World's argument that its "other insurance" provision limited its duty to defend the underlying litigation. That provision provided that the Western World policy afforded coverage that is excess of other insurers for "losses that arise out of the maintenance or use of … 'autos' to the extent not subject to Exclusion g…" It further limited the duty to defend a lawsuit when the "other insurance" provision was triggered and another insurer had a duty to defend the lawsuit. According to Western World, its obligation was limited to providing excess coverage over that provided by National Casualty, again for the same reason National Casualty had a duty to defend – because the underlying lawsuit alleged injuries arising out of the "use of 'autos.'" Once again noting that "other insurance" provisions, like exclusionary provisions, are interpreted differently from coverage provisions, the court explained that such a provision limits an already-triggered duty to defend onlywhen all of the allegations in the underlying litigation falling within the policy's coverage provision also fall under the "other insurance" provision. In considering whether the injuries resulted from the "use" of an automobile, the court noted that the underlying lawsuit contained some allegations triggering the duty to defend but not falling under the "other insurance" provision. Accordingly, the "other insurance" provision did not limit Western World's duty to defend.

Finally, because neither of the insurers' exclusions nor Western World's "other insurance" provision limited their duty to defend,both insurers owed a duty to provide primary coverage for the underlying lawsuit.

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