

Ky. Justices Revive Hospital's Malpractice Coverage Suit

By **Josh Liberatore**

Law360 (October 21, 2022, 7:04 PM EDT) -- A hospital may continue to seek insurance coverage for underlying medical malpractice lawsuits related to heart operations, the Kentucky Supreme Court said in a reversal, finding that insurers can't rely on a government subpoena issued to the hospital as a basis for triggering their policies' prior-notice exclusions.



The Kentucky Supreme Court ruled that a hospital is allowed to continue to seek insurance coverage for underlying medical malpractice lawsuits related to heart operations. (iStock.com/Michał Chodyra)

In a **5-1 opinion on Thursday**, Kentucky justices said a subpoena the U.S. Department of Justice served on King's Daughters Medical Center in 2011 didn't trigger the "prior notice of events" exclusion in professional liability policies issued by Allied World Surplus Lines Insurance Co. and Homeland Insurance Co. of New York.

The justices said the subpoena wasn't sufficiently related to Kentucky state court lawsuits filed against the hospital starting in 2013, so it didn't count as something that would trigger the prior-notice exclusion when King's Daughters sought coverage for those suits.

"The DOJ had clearly been investigating the same facts, matters and events from which the cardiac litigation also sprang," said Justice Robert B. Conley, writing for the majority. "That fact, however, was not clear in May 2011 when the subpoena was first issued."

The decision sends the case back to the appellate court, where Allied World and Homeland will seek to

prove that two other exclusions, one for "intentional acts" and another for "government-related claims," apply to bar coverage.

The DOJ first started investigating King's Daughters in 2011, seeking over 7 million documents on the Ashland, Kentucky, hospital's medical records, files and communications related to cardiac patients, according to Thursday's opinion. King's Daughters sought and obtained coverage for the subpoena under a directors and officers policy it had with Darwin National Insurance Co. for the 2010-11 policy period.

When around 500 patients made the hospital aware in June 2013 of their intent to bring litigation alleging unnecessary cardiac operations and lack of informed consent, King's Daughters sought coverage for those claims under a primary professional liability policy it had with Allied World and an excess policy with Homeland. Those policies covered the 2012-13 period.

Allied World agreed to defend King's Daughters from the state court lawsuits, but did so under a reservation of rights. The hospital sued its professional liability insurers in 2015, seeking a declaratory judgment that Allied World had to defend it under the primary policy and Homeland would too, if necessary, under the excess policy.

A Kentucky trial court sided with the hospital, finding that the insurers couldn't rely on any of the three exclusions, including the prior-notice exclusion.

The Kentucky Court of Appeals reversed that decision, finding that by notifying its D&O carrier of the 2011 subpoena, King's Daughters triggered the prior notice exclusion in the professional liability policies, which bars coverage for claims "in any way involving" facts, matters or events that were reported to a previous insurer. The DOJ subpoena and state court lawsuits were both related to cardiac operations performed at King's Daughters, so they were sufficiently related, the appellate court held.

On Thursday, the majority of the Kentucky Supreme Court said the appellate court erred in making that connection. The subpoena, the justices said, didn't contain specific enough details to constitute an "adequate notice of circumstances giving rise to a claim" under the professional liability policies.

The policies required that notice of any claim or occurrence had to include specific things like the time, date and place, as well as a description of the resulting injury or damages. That type of information was missing from the 2011 subpoena, the justices said.

Allied World and Homeland took that same position initially, when they told King's Daughters in July 2013 that the subpoena didn't constitute a proper notice of a claim, the justices noted.

"Curiously, the insurers now adopt the opposite reading of the subpoena and argue it did constitute adequate notice," Justice Conley wrote.

The high court justices also unanimously reversed the appellate court's ruling that Allied World and Homeland could seek reimbursement for amounts they spent to defend King's Daughters from the underlying suits, saying the issue of recoupment was never before the appellate court.

Chief Justice John D. Minton Jr. agreed with the court's recoupment ruling but dissented to its decision on the prior-notice exclusion. According to the chief justice, the DOJ's subpoena in 2011 was specific enough to count as a notice of claim under the professional liability policies.

The subpoena requested medical records related to all patients who were treated in the hospital by physicians associated with a certain cardiology practice, and even included names of the specific doctors, the chief justice noted.

"On the face of the subpoena, any reasonable person, especially a reasonable healthcare professional or attorney, would be aware that the DOJ was investigating potential impropriety by specified doctors performing cardiac procedures," Chief Justice Milton said.

Representatives for King's Daughters and the insurers didn't immediately respond to requests for comment Friday.

Kentucky Supreme Court Justice Debra Hembree Lambert didn't sit for the opinion.

King's Daughters and its doctors are represented by Perry M. Bentley and Todd S. Page of Stoll Keenon

Ogden PLLC and Kimberly S. McCann and W. Mitchell Hall Jr. of VanAntwerp Attorneys LLP.

Allied World is represented by Jamie Wilhite Dittert of Sturgill Turner Barker & Moloney PLLC, Jonathan D. Hacker of O'Melveny & Myers and Jeffrey Michael Cohen of Carlton Fields.

Homeland is represented by Ronald G. Sheffer of Sheffer Monhollen & Tackett PLLC and Charles E. Spevacek and William M. Hart of Meagher & Geer PLLP.

The case is Ashland Hospital Corp. et al. v. Darwin Select Insurance Co. et al., case number 2020-SC-0260-DG, in the Supreme Court of Kentucky.

--Editing by Nick Petruncio.