United States Court of Appeals
For the Eighth Circuit

No. 22-1952

Bradley DeWall, M.D.; Wound Management Consultants, P.C.

Plaintiffs - Appellants

v.

Medical Protective Company

Defendant - Appellee

Appeal from United States District Court
for the Southern District of Iowa - Eastern

Submitted: October 19, 2022
Filed: February 7, 2023

Before LOKEN, GRUENDER, and GRASZ, Circuit Judges.

LOKEN, Circuit Judge.

Medical Protective Company ("MedPro") issued Professional Liability policies to Dr. Bradley DeWall and Wound Management Consultants, P.C. (collectively, "WMC"). Coverage Paragraph A insured WMC against "claim[s] for damages . . . based on professional services rendered or which should have been rendered . . . by the insured . . . in the practice of the insured's profession." In this coverage action,

the parties dispute whether Paragraph A covers a third party's claim to recover Medicare reimbursements it had to repay because of deficiencies in WMC's documentation of the professional services it provided. Applying Iowa law, the district court[1] ruled, consistent with other courts that have considered the issue, that the third party's "Medicare recoupment" claim is not "based upon professional services" and therefore coverage is limited to the $50,000 of defense costs provided in the policies' separate Medicare Endorsement.[2] See DeWall v. Med. Protective Co.,

[1]The Honorable Robert W. Pratt, United States District Judge for the Southern District of Iowa.

[2]As relevant here, coverage Paragraph A in Dr. DeWall's policy provides that MedPro:

> hereby agrees to defend and pay damages . . .
>
> A. In any claim first made, or potential claim first brought to the Insured's attention, during the term of this policy based upon professional services rendered, or which should have been rendered, after the retroactive date by the Insured, or any other person for whose acts or omissions the Insured is legally responsible, in the practice of the Insured's profession as hereinafter limited and defined.

"Professional services" is defined as "the rendering of medical . . . services to a patient and the provision of medical examinations, opinions, or consultations regarding a person's medical condition within the Insured's practice as a licensed health care provider."

The Medicare Endorsement in each policy, titled "Medicare/Medicaid Billing Actions Limited Defense Coverage," provides in relevant part:

> It is hereby understood and agreed the Company's obligation to defend the Insured under the terms of the policy is broadened to include the defense of an Insured in an investigation, civil suit and/or administrative proceeding which is brought by a state or federal agency which alleges improper submission of claims for reimbursement under the Medicare or Medicaid program. However, the . . . proceeding must

No. 3:21-cv-00010, 2022 WL 1447720 (S.D. Iowa Apr. 6, 2022). WMC appeals this summary judgment ruling, raising numerous issues. Reviewing the grant of summary judgment and the district court's interpretation of the policies *de novo*, we affirm. See Great W. Cas. Co. v. Nat'l Cas. Co., 807 F.3d 952, 956 (8th Cir. 2015).

I. Background

In a 2013 Management Services Agreement ("MSA") with Genesis Health System, WMC agreed to be the exclusive manager of care centers operated by Genesis in Illinois and Iowa (the "Clinic") specializing in wound care and hyperbaric therapy services. In a Physician Medical Direct Services Agreement ("PMDSA"), Dr. DeWall agreed to serve as Medical Director of the Clinic, including "participat[ion] in Medicare, Medicaid, and any other federal or state funded health care programs."

After an audit by the Inspector General of the Centers for Medicare and Medicaid Services ("CMS"), a CMS contractor notified Genesis that non-complying reimbursements had been found and directed Genesis to conduct an internal audit and return any overpayments. After an internal audit in which WMC Clinic staff located and identified documentation, and a repayment demand by the CMS contractor, Genesis repaid CMS $773,779 in Medicare overpayments. In January 2020, Genesis initiated an arbitration against WMC seeking to recoup the repayments, alleging breach of contract for failure to properly perform work under the two agreements.

WMC timely notified MedPro of the arbitration action in January 2020. MedPro promptly reviewed what it considered an "unusual Medicare billing issue"

> arise from bills or requests for reimbursement for professional services rendered or which should have been rendered by the Insured . . . .
>
> 5. The Company will not pay more than $25,000 in defense costs for any single "incident" covered by this endorsement.

and advised Dr. DeWall that the Medicare Endorsement in his policy "is triggered by the Genesis arbitration."[3] In February, March, and April, MedPro repeatedly communicated to Dr. DeWall and separately to WMC's outside counsel that coverage under the two policies was limited to the Medicare Endorsement's limit of $25,000 in legal expenses per policy and that "[o]nce the $50K threshold is met, you will be responsible for any amount over that." In July 2020, MedPro informed DeWall and WMC counsel that the defense coverage had been exhausted and that all future bills should be sent to WMC.

On August 19, 2020, counsel for WMC wrote MedPro's claims specialist, asserting for the first time that the policies' professional services coverage Paragraph A applied to the Genesis arbitration claim and therefore MedPro's duty to defend required it to pay all costs of defense, not just $50,000. Counsel for MedPro and WMC then exchanged lengthy letters debating this issue. In February 2021, WMC commenced this federal diversity action. WMC's Amended Complaint seeks a declaratory judgment that MedPro has a duty to defend and indemnify under Paragraph A, reimbursement of defense expenses already incurred -- $284,188.90 in attorney's fees and $43,375 in expert witness expenses -- and additional claims for breach of contract, promissory estoppel, and bad faith.[4]

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[3]Paragraph 75 of WMC's Amended Complaint falsely alleged that MedPro acknowledged "that [the Policies are] triggered by the Genesis Arbitration," a rather clear violation of Rule 11(b)(3) and counsel's duty of candor to the court. MedPro's letter to Dr. DeWall stated: "We have completed our review of the *Medicare Endorsement* included in your policy and concur that *it is triggered* by the Genesis arbitration." As the district court put it, while "Plaintiffs' attorney's repeated assertions including this integral omission may be viewed by some as acceptable practice, they may be viewed by others as crossing the line into dishonesty."

[4]Counsel for WMC did not include the Amended Complaint in the Sealed Joint Appendix, meaning they do not consider it a relevant pleading. See Fed. R. App. P. 30(a). Our decision to affirm takes that into account.

In March 2021, WMC sued Genesis in Iowa state court, alleging Genesis improperly terminated the MSA and PMDSA and seeking over $2 million in compensatory and punitive damages. Genesis counterclaimed, again asserting its Medicare recoupment claim. The arbitration action and this action were pending when the district judge ruled on the parties' cross motions for summary judgment.

WMC's motion for partial summary judgment argued that Genesis's arbitration claims fall within coverage Paragraph A, because they are "based upon" a doctor's orders and diagnoses which are within the policy definition of "professional services" and therefore triggered MedPro's unlimited duty to defend. Under the MSA and PMDSA agreements, Genesis had sole billing responsibilities; WMC and DeWall were responsible only for patient treatment and documentation. Moreover, WMC argued, the Medicare Endorsement did not apply "on its face" because the Genesis arbitration is not the defense of a proceeding "brought by a state or federal agency." MedPro argued that the Genesis claims fall squarely within the Medicare Endorsement, limiting MedPro's duty to defend under each policy to $25,000 per incident, a duty extinguished by its payment of $50,000.

II. Paragraph A Coverage Issues

Neither party challenges the district court's determination that Iowa law governs these issues. Under Iowa law, an insurer's "duty to defend arises whenever there is potential or possible liability to indemnify the insured based on the *facts* appearing at the outset of the case." Employers Mut. Cas. Co. v. Cedar Rapids TV Co., 552 N.W.2d 639, 641 (Iowa 1996) (emphasis in original; quotation omitted). The duty to defend "rests *solely* on whether the petition in the action against the insured contains any allegations that *arguably* or *potentially* bring the action within the policy coverage." Id. (emphasis in original; quotation omitted). "In deciding whether an insurer has a duty to defend, the first query is into [the third party] plaintiff's pleadings to see if the pleadings state *facts* which bring the claim within

the liability covered by the policy." Id. at 642 (emphasis in original; quotation omitted).

Reviewing *de novo*, we look to the facts alleged in Genesis's arbitration action. Regarding Medicare reimbursement, Genesis alleged:

> 31. WMC agreed to "assure compliance with all requirements from third party payors or other reimbursement programs, including, but no limited to, Medicare and Medicaid."
>
> 32. In the [MSA], Genesis agreed to 'retain responsibility for . . . the billing of the technical function for the operation of the Clinic . . . .
>
> 36. . . . Genesis employed case managers (RNs) who performed administrative billing functions in connection with the Clinic under the direction and supervision of WMC and Dr. DeWall.
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> 37. The case managers . . . relied on Dr. DeWall and WMC's policies, procedures and protocols regarding HBO-specific reimbursement guidance for hospital coding, finance and claims filing to gain an understanding of Medicare requirements and reimbursement rules for HBO therapy services.
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> 38. The case managers . . . relied on WMC physicians to appropriately document the medical records to support HBO therapy services provided at the Clinic.
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> 78. In an email dated January 7, 2019, Hal Wagher, Genesis' Chief Compliance & Enterprise Risk Officer, informed Dr. DeWall that the [CMS contractor] audit revealed a documentation error rate of 76% and, as a result, Genesis "refunded over $770,000 to [the contractor] for the 6 year period."
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> 79. Hal Wagher noted that the "main issues" found over the course of [the CMS contractor's] audit "were missing orders, unsigned

> orders, non-covered diagnoses, overuse of copy/paste leading to errors . . . ."
>
> 82. In a letter dated January 18, 2019, [the CMS contractor] notified [WMC's Clinic Director] of the results of [the contractor's] review process for hyperbaric services provided in the Clinic . . . .
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> 84. Notwithstanding WMC and/or Dr. DeWall's involvement with [the contractor's] review process, [the contractor] found a "Claim Error Rate of 100.00% . . . ."
>
> *85. The issues identified in [the contractor's] January 18, 2019 letter . . . relate exclusively to treatment authorization and documentation.*
>
> 86. Genesis was required to reimburse CMS $773,779.00 because WMC and Dr. DeWall failed to ensure clinical documents was accurate and/or adequate for claim submission to [the contractor] (CMS).

(Emphasis added.) The Genesis complaint does not allege or identify one instance where CMS required reimbursement by Genesis "based on [WMC's] professional [hyperbaric therapy] services rendered or which should have been rendered" to Genesis or patients at the Clinic.

After ignoring or misstating the above-quoted allegations in the Genesis arbitration complaint, in the district court and again on appeal, WMC argues that Iowa courts "routinely recognize that patient documentation and assessment are professional services," citing opinions in medical malpractice actions against physicians. But those cases do not address the insurance coverage issue in this case. Given the prevalence and importance of Medicare reimbursement to health care in this country, it is not surprising that the question whether Professional Liability policies cover claims for Medicare reimbursement has arisen in other contexts. The answer is, with perhaps surprising uniformity, "no."

We addressed the issue twenty years ago in Jenkins v. St. Paul Fire & Marine Insurance Co., 8 Fed. App'x 573 (2001) (per curiam). Jenkins was a False Claims Act *qui tam* action in which the physician insured was accused of knowingly submitting false reimbursement claims. We affirmed the district court's conclusion that the professional liability insurer owed no duty to defend this claim because "any award in that action would not have resulted from the 'providing or withholding of professional services.'" Id. Accord Zurich Am. Ins. Co. v. O'Hara Reg'l Ctr. for Rehab., 529 F.3d 916, 921-22 (10th Cir. 2008); Horizon W., Inc. v. St. Paul Fire & Marine Ins. Co. 45 Fed. App'x 752, 754 (9th Cir. 2002).[5]

The district court in a thorough opinion concluded that Genesis's claims are not covered under the policies' Paragraph A:

> Genesis does not allege a claim "based upon" Plaintiffs' "rendering of medical . . . services to a patient and the provision of medical examinations, opinions, or consultations regarding a person's medical condition . . . ." In fact, Genesis specifically told Plaintiffs that the dispute was not about "the quality of care provided or clinical expertise" but was solely "about billing documentation." In its Arbitration Statement, Genesis expressly stated the "[Plaintiffs] should reimburse Genesis for [the payments it made to the CMS contractor], which were required because of [Plaintiffs'] deficient record keeping."

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[5]WMC relies on a seemingly contrary Fourth Circuit decision, in which a divided panel held that "failure to render" services is a covered "medical incident" giving rise to potential coverage of a *qui tam* false billing claim because, under North Carolina law, the policy term "arising out of a medical incident" requires only a causal connection to the third party claim. Affinity Living Group v. Starstone Specialty Ins. Co., 959 F.3d 634, 641-43 (4th Cir. 2020). But in this case, the operative term in Paragraph A is "based upon," which in context must be interpreted in conjunction with the Medicare Endorsement. See Boelman v. Grinnell Mut. Reinsur. Co., 826 N.W.2d 494, 501-02 (Iowa 2013). In addition, Genesis does not claim a "failure to render services," unlike the plaintiff in Affinity.

DeWall, 2022 WL 1447720, at *9. We agree. Read as a whole, as Iowa law requires, Paragraph A covers claims "based on professional services," and the Medicare Endorsement "broadened" MedPro's duty to defend to include $25,000 of expenses incurred in defending allegations of "improper submission of claims for reimbursement under the Medicare or Medicaid program" when the allegations "arise from bills or requests for reimbursement for professional services." The court declined WMC's invitation to read Paragraph A as covering this Medicare billing dispute because that would render the Medicare Endorsement superfluous. See, e.g., Boelman, 826 N.W.2d at 502.

Plaintiffs argue, as they did in the district court, that Genesis's claims are not covered by the Medicare Endorsement because they are not "brought by a state or federal agency." The district court rejected this "misguided argument that the endorsement does not apply when the alternative is that Plaintiffs have no coverage for the underlying actions at all. The inapplicability of the Medicare Endorsement does not ensure Paragraph A will apply." DeWall, 2022 WL 1447720, at *10. Again, we agree. While the underlying claim against WMC was brought by Genesis, not by a state or federal agency, MedPro determined that the claim was covered by the Medicare Endorsement because "the ultimate claimant is a governmental agency." That was a sound interpretation of the Endorsement in this unusual context.

For these reasons, and for the reasons explained by the district court in rejecting WMC's "other unavailing arguments," we conclude MedPro had no duty to defend WMC from Genesis's Medicare recoupment claim under the policies' Paragraph A coverage. We also agree with the district court that there is no duty to defend the other claims Genesis asserted in its arbitration complaint because those claims are not "based upon professional services rendered . . . in the practice of [WMC's] profession."

The district court also granted summary judgment dismissing WMC's duty-to-indemnify claim because "if there is no duty to defend, there is no duty to indemnify," accurately quoting a broad statement in Stine Seed Farm, Inc. v. Farm Bureau Mut. Ins. Co., 591 N.W.2d 17, 18 (Iowa 1999). On appeal, without discussing this issue, WMC argues the court erred in concluding MedPro had no duty to defend under Paragraph A and therefore it erred in dismissing WMC's indemnity claim because Genesis's underlying claim and the state court action remain pending. "The rule allowing a coverage action to proceed prior to the resolution of the related liability action where the issues in each case are separable is well accepted." Greenbriar Group, L.L.C. v. Haines, 854 N.W.2d 46, 52 (Iowa App. 2014), citing Kelly v. Iowa Mut. Inc. Co., 620 N.W.2d 637, 643 (Iowa 2000). Here, the district court's coverage determination means there is no duty to defend under Paragraph A, making the broad statement in Stine Seed applicable. The principle was not discussed in Stine Seed and may not apply if "a ruling on the merits of the parties' indemnity coverage dispute hinges on resolution of the underlying [claim]." Certain Underwriters at Lloyd's, London v. C&S Properties, LLC, No. 4:21-cv-422-AGF, 2022 WL 103303, at *4 (E.D. Mo. 2022). But Stine Seed is the general rule, and WMC does not challenge its application in this case.

III. Other Issues

A. Promissory Estoppel. WMC argues that, under the equitable doctrine of promissory estoppel, MedPro is estopped to deny its duty to defend because it made representations to Dr. DeWall that its defense obligations were triggered by the Genesis arbitration claims. To support this contention, WMC cites internal emails between MedPro employees discussing coverage issues. Internal communications not conveyed to the promissee cannot support a prima facie case of promissory estoppel, which requires a "clear and definite promise" on which the promissee relied to his substantial detriment. See, e.g., Kunde v. Estate of Bowman, 920 N.W.2d 803, 810 (Iowa 2018). WMC also relies on its dishonest modification of a statement in

MedPro's letter to Dr. DeWall ("MedPro conveyed to Appellants that it 'concur[red] that [the Policies were] triggered by the Genesis Arbitration.'") See supra note 3. Finally, WMC frivolously argues that MedPro's payment of $50,000 under the Medicare Endorsement was an admission that Genesis's claims "arise from . . . professional services rendered." To read the policy this way would be to make the Medicare Endorsement superfluous and its $25,000 cap nonsensical. The district court properly granted MedPro summary judgment dismissing WMC's promissory estoppel claim.

B. Bad Faith. To succeed on a bad faith claim under Iowa law, the insured must demonstrate that "the insurer had no reasonable basis for denying benefits under the policy." United Fire & Cas. Co. v. Shelly Funeral Home, Inc., 642 N.W.2d 648, 657 (Iowa 2002). In the district court, WMC centered its bad faith argument on the assertion that the Medicare Endorsement does not apply. In rejecting WMC's argument, the district court noted that MedPro did not deny benefits. Rather, it determined the Medicare Endorsement applies and provided those benefits. The court granted MedPro summary judgment on this claim, concluding its interpretation of the coverage provisions was consistent with the plain, unambiguous language in the policies, and therefore MedPro's "denial of policy benefits under Paragraph A was objectively reasonable and there is no bad faith." DeWall, 2022 WL 1447720, at *13. We agree. The statement of issues in WMC's brief urges us to remand this ruling, but its argument section does not explain its contention so the issue is waived. See Fed. R. App. P. 28(a)(8).

IV. Conclusion

The judgment of the district court is affirmed.
