Are Temp Nurses Hospital Employees For Insurance Policies?

*Law360, New York (February 26, 2014, 5:18 PM ET)* -- The hospital you represent has a contract with a temporary nurse agency. You’ve reviewed the contract and made sure that it says temporary nurses are employees of the agency, that the agency indemnifies the hospital against malpractice claims arising out of agency nurses’ acts and omissions and that the agency will provide malpractice insurance for the nurses’ acts and omissions. You’ve gone the extra mile and reviewed the agency’s certificate of liability insurance.

With all that due diligence, your hospital and its insurer are completely protected — right? Well, maybe not. The Federal Court of Appeals for the District of Columbia Circuit is currently wrestling with this very issue. What’s more, the district court decision that’s on appeal holds that under precisely the facts outlined above, the agency nurse working at MedStar Washington Hospital Center was an “employee” of the hospital under its liability policy. And the court has ordered the hospital’s insurer to reimburse the agency’s insurer for its payment of over $3 million to settle a malpractice suit based on the negligence of an agency nurse working at the hospital.

**Factual Background**

MedStar Washington Hospital Center entered into a temporary staffing agreement with Progressive Nursing Staffers of Virginia Inc. Progressive employed Nurse Chichio Hand as one of its temporary nurses. Progressive paid all its nurses, including Nurse Hand, directly and withheld taxes from their paychecks. On April 6, 2004, Nurse Hand was working in the delivery room. Something went wrong in a caesarian section procedure, and patient Radianne Banks was left partially paralyzed.

**Procedural Background of Malpractice Claim**

The patient sued MedStar and two of its employed physicians.

In response, MedStar filed a third-party complaint against Nurse Hand and her employer, Progressive, alleging that her actions were the sole cause of the patient’s injuries and that Progressive was liable under the theory of respondeat superior. The hospital claimed a right of contribution and indemnification.

Nurse Hand and Progressive filed a fourth-party complaint against the hospital, asserting their own rights to contribution and indemnification. Banks amended her complaint to add Nurse Hand and Progressive as direct defendants.

**Settlement of Malpractice Claim**
In August 2009 the patient entered into a settlement agreement and release with the hospital, Progressive and Nurse Hand, with the patient releasing her claims and dismissing her suit in exchange for a total payment of $4,105,000. Of that amount, Interstate Fire & Casualty Co., Progressive’s insurer, paid $3,055,000 and the hospital paid $1,050,000.

The hospital, its insurer Greenspring Financial Insurance Ltd., Progressive and Nurse Hand released all claims among themselves. However, the settlement agreement contained a carve-out provision:

Nothing contained in this [a]greement should be construed as waiver of [Interstate’s] rights under its policies to seek reallocation of the settlement. The [h]ospital agrees and understands that [Interstate] does not waive and expressly reserves the right to rely on the “other insurance” clauses incorporated into its policies to seek reallocation of the settlement as may be warranted.

Procedural Background of Current Suit

Interstate sued the hospital, Greenspring and MedStar Health Inc., the parent of both the hospital and its captive insurer, Greenspring. (MedStar was the purchaser of the Greenspring policy and a named insured under it.) The district court granted MedStar’s and the hospital’s motions for summary judgment (leaving only the two insurers as parties), denied Greenspring’s motion for summary judgment and granted Interstate’s motion for partial summary judgment as to liability on ly. The court found that Interstate was entitled to damages of $3,208,249, plus prejudgment interest.

Greenspring appealed to the Circuit Court of Appeals. It’s that appeal that the court is now considering.


The hospital was insured under a policy issued by Greenspring and purchased by its parent MedStar. The hospital was a “named insured” under the policy. The policy also provided coverage for persons who were “insured.” The definition of “insured” included “employees,” defined as follows:

any employee other than a [p]hysician, [p]odiatrist, [d]entist, medical or dental intern or resident of a [n]amed [i]nsured while acting within the scope of his or her duties as such for a [n]amed [i]nsured.

The policy also contained this provision:

The insurance afforded by this policy is primary insurance, except when stated to apply in excess of or contingent upon other insurance. When this insurance is primary and the [i]nsured has other insurance that is stated to be applicable to the loss on an excess or contingent basis, this amount of the [c]ompany’s liability under this policy shall not be reduced by the existence of other insurance.

However, with respect to coverage afforded by this policy as it may apply to employees, this insurance is designated primary and the foregoing provision contained in this section shall not apply.

As noted above, Interstate was the insurer of Progressive and Nurse Hand. That policy contained an “Other Insurance” clause, which provided that

If there is other valid insurance (whether primary, excess, contingent or self-insurance) which may apply against a loss or claim covered by this policy, the insurance provided hereunder shall be deemed excess insurance over and above the applicable limit of all other insurance or self-insurance.
Position of Temporary Agency’s Insurer

The position of agency insurer Interstate is relatively simple, and the district court agreed with it: Nurse Hand, while admittedly an employee of Progressive, was also an employee of the hospital. Why? Because she had the same duties as nurses employed directly by the hospital, and the hospital controlled her in precisely the same manner it controlled the nurses it directly employed. She was a “borrowed servant,” and as such, she was an employee for whose actions the borrower of the servant — the hospital — was responsible.

If one accepts the notion that the nurse was an employee of the hospital — an “employee” under the terms of the Greenspring policy — it follows that Greenspring is obligated under its policy to act as the “primary insurer.” Why? Because the Greenspring policy says that it is the primary insurer with respect to the acts and omissions of all “employees.”

As to Greenspring’s argument that the settlement agreement of August 2009 (discussed below) released the hospital and Greenspring, Interstate relies on the carve-out provision, which expressly stated that Interstate was not waiving or releasing its rights under the “other insurance” provisions of its policy.

Position of Hospital’s Insurer

The position of the hospital’s insurer, Greenspring, consists of two parts.

The first argument is that its contractual relationship with the agency makes it clear that the nurse was to be an employee of the agency and not an employee of the hospital. Greenspring points to the contract, which states that all nurses “are employees of PROGRESSIVE and will remain so unless hired by the HOSPITAL.” The contract also requires the agency: (1) to indemnify the hospital against claims arising out of the acts and omissions of its temporary nurses and (2) to purchase liability insurance covering its nurses. And, of course, the agency did, in fact, purchase such insurance: the Interstate policy.

As for the language of its own policy, Greenspring argues that its obligation to cover the hospital’s “employees” does not apply, because agency nurses are employees of the agency alone and not the hospital.

The second Greenspring argument focuses on the August 2009 settlement of Banks’s claim — the settlement for which Progressive paid over $3 million and the hospital paid over $1 million. The argument is that “some portion of Interstate’s contribution ... was allocable to the [h]ospital’s indemnity claims against Progressive.” Unfortunately for Greenspring — and to the delight of Interstate — Greenspring has to rely on the argument of common sense rather than on language in the settlement agreement, to make that argument. And then, of course, there is the carve-out provision preserving Interstate’s right to pursue “other” insurance.

Current Status of the Case

The case is now pending on appeal before the D.C. Circuit. The appeal is by hospital insurer Greenspring from a district court decision in favor of temporary agency insurer Interstate. That decision reflects acceptance by the district court of the argument by Interstate that: (1) as a borrowed servant, the nurse
was an “employee” of the hospital under the hospital’s policy with Greenspring, and (2) the 2009 settlement of the patient’s claim did not release Interstate’s right of indemnity under its “other” insurer clause.

Lessons for Hospital Counsel

What are the lessons of this case for attorneys representing hospitals and their insurers? We can’t be certain until the D.C. Circuit issues its opinion. But, in the meantime, hospitals we represent continue to enter into and rely on contracts with temporary agencies, and their insurers continue to insure those same hospitals. So, we can’t simply wait for the court of appeals to issue its decision. Besides, even if the court reverses and issues an opinion in favor of the hospital’s insurer, we’re on notice that a cloud hovers over the fundamental issue.

At an absolute minimum, the case tells us that the documents necessary for protecting our hospital and insurer clients are not limited to the three mentioned in the first paragraph of this paper: the agency contract, the hospital’s insurance policy and the agency’s certificate of insurance.

There are at a minimum of two more that need to be reviewed. The first is the agency’s insurance policy — the one that is supposed to cover the acts and omissions of the nurses supplied by the agency. That policy must be carefully reviewed, with special attention to provisions concerning the insurer’s rights of indemnity and contribution, including references to “other” and “primary” insurance.

The second document is any settlement or release agreement that the hospital enters into in connection with a claim involving acts or omissions of an agency nurse. There is no doubt in the case at hand that the carve-out provision in the settlement agreement strengthened the agency insurer’s position mightily and correspondingly weakened the hospital insurer’s.

Besides scrutinizing these two additional documents, it may be advisable to address the underlying issue head-on in the agency contract by stating expressly what the understanding is on the matter of liability and indemnity for acts and omissions of agency nurses, including, of course, the rights and duties of the respective insurance companies. But, based on the arguments in the pending appeal, even that might not be sufficient to put the issue fully to rest.

To put the issue completely to rest — if that’s ever possible with a legal issue — the matter should also be addressed directly not only in the agency contract, but also in both the hospital and agency policy, most likely by special rider or addendum. And to sleep soundly at night, the attorney for the hospital or its insurer should review the actual policy language rather than relying on a certificate of insurance.

No matter which position is correct in the pending suit between hospital insurer Greenspring and agency insurer Interstate, it’s undeniable that both sides have been forced to argue on the basis of provisions that fail to address the underlying issue directly and explicitly.

The Unanswerable Question

The decision in Greenspring v. Interstate, when it comes, will presumably provide enlightenment on the issue of whether or not an agency employee working in a hospital is also a hospital employee. But odds are that it won’t shed any light on the question that baffles those of us in the business of representing hospitals and their insurers: With hundreds of hospitals all over the United States utilizing temporary agency nurses for decades now, how can there still be an issue whether an agency nurse working in a
hospital is a hospital employee?

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