

No Insurance Coverage for Doctors Who Snoop in Patient Records

By Christopher C. Taintor

In *Medical Mutual Insurance Company of Maine v. Burka*, the First Circuit Court of Appeals addressed a question that has come up with increasing frequency in recent years: what liability insurance coverage, if any, is available to a doctor (or other health care professional) who uses a hospital's electronic medical record to "snoop" on a person with whom he has no professional relationship? In *Burka*, the Court of Appeals found no coverage under a policy which was written to protect against risks associated with the delivery of healthcare services.

Douglas Burka was a surgeon who moved to Maine in 2013 with his wife, Allison, and briefly practiced in the Southern Maine Healthcare system. In 2016, Allison (having taken back her maiden name, Cayne) sued Dr. Burka in both Maine and Maryland. She alleged, among other things, that Dr. Burka had "used his clinical privileges at Southern Maine Medical Center to access [her] medical records"; that he had done so as part of a "campaign to . . . to learn about her mental and gynecological health and other confidential medical information," which he then exploited in a pattern of "abusive, emotionally destructive and controlling" behavior; that he continued to enter her electronic record even after she left him and started divorce proceedings; and that because of Dr. Burka's access to her records, Allison was harmed when she chose not to seek out necessary psychiatric treatment. Notably, although Dr. Burka claimed that Allison had given him authority to look at her records when he was advising her about her health, Allison did *not* allege that he had ever been her doctor.

Dr. Burka tendered the defense of both lawsuits to Medical Mutual, under the terms of a policy issued to his employer. Medical Mutual denied that it had a duty to defend, and promptly brought suit in federal court, asking for a judgment declaring that the company had no obligation to defend Dr. Burka in either action. Under Maine law, an insurer declining a defense faces an uphill battle, since a duty to defend exists so long as a complaint, when compared to an insurance policy, "discloses a potential for liability within the coverage and contains no allegation of facts which would necessarily exclude coverage." *Travelers Indemnity Co. v. Dingwell*, 414 A.2d 220, 227 (Me. 1980). Nonetheless, the United States District Court entered a judgment in Medical Mutual's favor, which was affirmed by the First Circuit Court of Appeals.

The critical issue in the lawsuit was whether Dr. Burka's act of accessing his wife's records constituted "Professional Services" within the meaning of the policy – or, more precisely, whether the Complaint left open the *possibility* that he had been providing "professional services." Dr. Burka argued that because the Complaint said nothing about the existence or non-existence of a physician-patient relationship, there was a "potential factual basis" for coverage, which was enough to trigger a duty to defend. The Court disagreed, reasoning:

The pleading does not merely omit any reference to a doctor-patient relationship between Burka and Cayne; its allegations directly contradict a professional association between them. We note, in particular, Cayne's assertion that Burka's actions involved unauthorized access to her medical records in Maine and improper disclosure to himself. The allegation that Burka was not entitled even to see her records leaves no room for a factual finding that he was involved in her medical treatment. Indeed, the complaint depicts his actions as solely animated by his personal objectives. Accordingly, the complaint unequivocally places Burka's alleged improper access to, and disclosure of, Cayne's medical records

outside the Policy's coverage.

Although the Court of Appeals recognized that Maine courts historically have "employ[ed] an expansive concept of the duty to defend," it cited a recent decision of the Law Court, *Barnie's Bar & Grill, Inc. v. U.S. Liability Insurance Co.*, for the proposition that a "court may neither 'read extrinsic facts or allegations *into* an underlying complaint' nor 'selectively read facts or allegations *out of* that complaint in order to conclude that the insurer has a duty to defend.' " Because it was impossible to rule in Dr. Burka's favor without ignoring Allison Cayne's allegations that he had acted maliciously, and with the intent to cause her harm, the Court properly concluded that Medical Mutual owed Douglas no defense as a matter of law.