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Insurance Hospital Malpractice
24 M.R.S.A. § 2403

STATE OF MAINE

Inter-Departmental Memorandum Date October 22, 1976

To Frank M. Hogerty, Jr., Superintendent Dept. Bureau of Insurance

From S. Kirk Studstrup, Assistant

Dept. Attorney General

Subject JUA coverage of employed physicians

Your memorandum of October 20, 1976, requested our opinion concerning the legality of including coverage for employed physicians in policies written by the Joint Underwriting Association (JUA) for hospitals in Maine. It is our understanding from the information in the memorandum and our discussions on this matter, that present binders issued by the JUA to various hospitals are intended to include coverage of employed physicians. Furthermore, it is our understanding that such coverage was included in the previous policies of such hospitals and that it has been traditional for insurance companies writing hospital medical malpractice insurance to include coverage for employed physicians acting within the scope of their authority as an employee of the hospital.

The specific question you have asked is whether ". . . the words, 'including incidental coverage,' which are found in 24 M.R.S.A. § 2403.4 would accommodate the inclusion, within a hospital policy, of medical malpractice liability coverage for employed physicians while acting within the scope of their employment?" The answer is affirmative for the reasons stated below.

A similar question concerning premises liability as "incidental coverage" has already been answered by this office. In our opinion of February 11, 1976, a copy of which is attached for your reference, we concluded that the term "incidental coverage" is a commercial term and should be given its commercial meaning. The same conclusion applies to the present question, and if our understanding of the commercial meaning of the term is correct, then coverage for employed physicians acting within the scope of their authority as an employee of a hospital would be included within "incidental coverage." Since the JUA is directed by 24 M.R.S.A. § 2403.4 to issue policies including incidental coverage upon the appropriate determination of the Superintendent of Insurance, it is our opinion that coverage of employed physicians to the extent of their employment is legally proper.

This opinion is given with recognition that there are separate provisions in the Maine Medical and Hospital Malpractice Joint Underwriting Association Act (P.L. 1975, c. 442; H.P. 1160-L.D. 1459) for underwriting operations for physicians. Coverage for physicians under the Act would be exclusive once such underwriting operations begin. However, we do not believe these other provisions would preclude coverage for physician employees of hospitals in hospital policies. It is entirely possible that a hospital could be held liable for the acts of its employed physicians on the general grounds of an employer's responsibility for the acts of its employees. Therefore, if such coverage was not included in a hospital's policy, there could be a considerable gap in the hospital's insurance protection, a result which appears to frustrate the legislative intent.

Frank M. Hogerty, Jr., Superintendent

Page 2

October 22, 1976

This opinion does not extend to insurance coverage for any employed physician which is designed to supplement coverage under the hospital policy or to cover any medical activities outside the scope of the physician's employment. Excess or additional coverage of this sort would be at the discretion of the physician and would not be properly part of the hospital's policy.

S. KIRK STUDSTRUP
Assistant Attorney General

SKS:mfe

Enclosure