THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2016-0390, Massachusetts Bay Insurance Company v. American Healthcare Services Association & a., the court on November 13, 2017, issued the following order:

After review of the motions for reconsideration and/or rehearing filed by Exeter Hospital, Inc. and by Triage Staffing, Inc., the court modifies the slip opinion as set forth below. In all other respects, the two motions are denied.

The slip opinion dated September 28, 2017, is modified on page 10.

1. The word "wholly" is deleted from the last sentence of the first full paragraph.

2. The following footnote is inserted at the end of the last sentence of the first full paragraph, and the remaining footnotes in the opinion are renumbered sequentially:

> 7. In motions for reconsideration and/or rehearing filed subsequent to the original release of this opinion, Exeter and Triage argue that the court erred in concluding that the healthcare professional services exclusion bars coverage under the general liability coverage form because, but for the provision of health care services to the Exeter Patients, they would not have suffered any injuries. Exeter and Triage argue that, instead of applying a "but for" test, we should employ the "efficient proximate cause" test, which they assert we applied in such cases as Therrien v. Insurance Co., 96 N.H. 182, 185-87 (1950) and Nassif Realty Co. v. National Fire Ins. Co., 109 N.H. 117, 119 (1968).
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> In the foregoing cases, in which we applied the efficient proximate cause doctrine, the covered cause of harm and the excluded cause of harm each alone appears to have been capable of producing the harm, which means that the excluded cause may have played no role in causing the harm. As the court recognized in Amherst Country Club v. Harleysville Worcester Ins. Co., 561 F. Supp. 2d 138 (D.N.H. 2008), on which Exeter and Triage rely, the efficient proximate cause analysis does not apply in cases, such as this one, "in which there is more than one cause of loss and none of the causes is

sufficient by itself to cause the loss." Harleysville, 561 F. Supp. 2d at 150 (citation omitted). But, contrary to what the Harleysville court appeared to assume, it does not follow from the inapplicability of the efficient proximate cause doctrine in this circumstance that the excluded cause can be effective to bar coverage only if the exclusion contains anti-concurrent cause language. On the contrary, both Preferred Nat'l Ins. Co., 149 N.H. at 763-64 and Philbrick v. Liberty Mut. Fire Ins. Co., 156 N.H. 389 (2007) demonstrate that this is not the case. Rather, in cases in which both a covered cause and an excluded cause were claimed to be necessary contributors to produce the harm, we have employed the "but for" test to determine whether the exclusion applies. See Philbrick, 156 N.H. at 393 ("Indeed, there would have been no injuries and, therefore, no damage under the negligence claims absent the sexual molestation." (emphasis added)).

Reconsideration denied;
slip opinion modified.

Dalianis, C.J., and Lynn and Bassett, JJ., concurred.

Eileen Fox,
Clerk