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May 8, 2024

Via Email Only: dconklin@mhc.net

Daniel A. Conklin
Kalkaska Counter Hospital Authority
419 South Coral Street
Kalkaska, MI 49646

Re: Insured: Kalkaska County Hospital Authority
Policy No.: 024-LB-106600840
Claim No.: T2405320
Matter: *McKinnon and Cox Litigation*

Dear Mr. Conklin:

Travelers Casualty and Surety Company of America (“Travelers” or “the Company”) further acknowledges receipt of the above-captioned matter. **Based on our review of the materials provided to us, and for the reasons set forth below, Travelers must disclaim coverage for this matter under the above-referenced Travelers Wrap+ for Health Care Organizations Policy (the “Policy”).** Please note that certain terms in this letter are defined terms under the Policy. Kindly refer to the Policy for the specific meanings of those terms.

The Policy

Travelers issued the Policy to Kalkaska County Hospital Authority (“KCHA”) for the Policy Period of October 1, 2023 to October 1, 2024. We provide our analysis under the Health Care Organization Directors, Officers and Trustees Liability Coverage Part (“D&O Coverage Part”) based on the nature of the submission. The Insuring Agreements contained in the D&O Coverage Part state that Travelers shall pay on behalf of its Insureds, Loss resulting from Claims first made in the Policy Period.

The Claim

This preliminary evaluation is based on information provided to Travelers to date. While it is necessary to review the allegations against our Insureds as they relate to coverage under the Policy, by doing so, Travelers does not wish to suggest that they have any merit.

On March 21, 2024, Travelers received an email from you regarding the exclusion of three hospital board officers who have allegedly breached their duty under the Michigan Open Meetings Act (“OMA”). You also notified Travelers that there is a possibility that KCHA may receive a complaint against it due to the alleged breach of the OMA by the three board officers.

Thereafter, on or about April 26, 2024, you sent Travelers a copy of a complaint filed by Plaintiffs Stuart McKinnon and Michael Cox (“Plaintiffs”) on April 22, 2024 in the United States District Court of the Western District of Michigan, Southern Division (“Complaint”). The Complaint is styled as *Stuart*

***** Our toll-free number is 800-842-8496 *****

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May 8, 2024

T2405320

Page 2

McKinnon & Michael Cox v. Kalkaska County Board of Commissioners, Kalkaska Memorial Health Center, Kalkaska County Hospital Authority, Kalkaska Memorial Health Center Board of Trustees, Kevin Rogols, Nelson Jerry Cannon, Karl Klimek, Tracy Nichol, Bruce Zenner, and R. Troy Stobert, case no. 1:24-cv-00409. The Plaintiffs allege that they were both board members of the Kalkaska Memorial Health Center's ("KMHC")¹ Board of Trustees (the "Board") at all relevant times. The Plaintiffs further allege that the individuals named as defendants are or were trustees on the Board during the relevant time ("Trustees"), with the exception of Kevin Rogols, who Plaintiffs allege is the CEO of KMHC ("CEO").

In the Complaint, Plaintiffs allege that in October of 2023, the Board was considering whether to discontinue its status as an Act 47 hospital by converting to a non-profit organization, and each Board trustee was to submit a completed Act 47 Decision Matrix Survey prior to the October 17, 2023 special meeting. Plaintiffs claim that on October 9, 2023, they reserved the Kalkaska County Commissioners' Chambers and invited three other Board trustees to attend a private gathering to discuss the survey. Plaintiffs allege that they had an expectation of privacy during the gathering, but that they later learned the meeting was being audio recorded without their consent. Plaintiffs claim that none of the attending Board trustees were on a committee or subcommittee together and that the gathering was therefore, not a violation of the OMA. Plaintiffs claim that the CEO sent an email to some of the defendant Trustees stating that Plaintiff's meeting was a violation of the OMA.

Plaintiffs further claim that the CEO and the defendant Trustees participated in meetings to investigate the matter and to determine how to discipline Plaintiffs, without a quorum present and in violation of the OMA. Plaintiffs also claim that the Trustees unlawfully obtained the audio recording from the gathering and distributed it to at least one other person. Plaintiffs allege that they voted against becoming a non-profit organization, as opposed to the CEO and defendant Trustees who voted in favor. Plaintiffs claim that the CEO and defendant Trustees then retaliated against them and began taking steps to formalize their stance that Plaintiffs violated the OMA, including "closed door" sessions to determine that a violation had taken place and the disciplinary action. They further allege that the CEO wrongfully, and in violation of board rules, distributed the recording of the gathering to the defendant Trustees, as well as to third parties such as reporters, in retaliation for voting against the proposal. Plaintiff Cox alleges he resigned from the board at the end of 2023 because of these issues; Plaintiff McKinnon is still on the board.

Plaintiffs bring the following causes of action against Defendants: 1) violation of the Electronic Communications Privacy Act; 2) invasion of privacy/intrusion of seclusion; 3) invasion of privacy/public disclosure of private facts; 4) invasion of privacy/false light; 5) invasion of privacy/appropriation of Plaintiffs' likeness; 6) eavesdropping upon private conversation pursuant to MCL §750.739(a-h); 7) violation of due process pursuant to 42 U.S. Code §1983; 8) conspiracy pursuant to 42 U.S. Code §1983; 9) tortious interference with a business relationship; 10) violation of the OMA; and 11) violation of the Freedom of Information Act.

Plaintiffs seek compensatory, actual, statutory, exemplary, and punitive damages; disgorgement of profits; injunctive relief, including but not limited to reversing the decisions made; and attorneys' fees and costs. Plaintiffs also make a jury demand.

Coverage Analysis

As stated above, the Insuring Agreements of the D&O Coverage Part state Travelers shall pay on behalf of Insureds, Loss for Wrongful Acts resulting from Claims first made during the Policy Period. As defined in

¹ Travelers understands that KMHC is a d/b/a for KCHA, the Named Insured. If this is incorrect, please advise. Travelers reserves its rights under the Policy in the event that this understanding is incorrect.

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Section II.N of the D&O Coverage Part, Insured means the Insured Persons and the Insured Organization. Pursuant to Section II.O of the D&O Coverage Part, Insured Organization means the Named Insured and any Subsidiary. Pursuant to Section II.P.1 of the D&O Coverage Part, Insured Person is defined as follows:

1. Any natural person who was, is or becomes a duly elected or appointed member of the board of directors, officer, LLC manager, member of the board of trustees, member of the board of regents, member of the board of governors, or a functional equivalent thereof, Executive Officer, Employee, or member of a duly constituted committee of the Insured Organization[.]

Based on the allegations in the Complaint and the information we have reviewed, both Plaintiffs McKinnon and Cox fall within the definition of Insured Person because McKinnon was and still is on the Board, and Cox was on the Board until the end of 2023.

Pursuant to Section III.A.10², Exclusions, of the D&O Coverage Part, Liability Coverage shall not apply to, and the Company shall have no duty to defend or to pay, advance or reimburse Defense Expenses for, any Claim:

10. By or on behalf of, or in the name or right of, any Insured; provided that this exclusion shall not apply to:
 - a. any Claim brought by a receiver, liquidator, bankruptcy trustee, creditors' committee, or similar official of the Insured Organization;
 - b. any Claim brought by any current, former or prospective member of the Health Care Staff with respect to Peer Review or Credentialing activities;
 - c. any Claim in the form of a crossclaim, third party claim or other claim for contribution or indemnity by an Insured Person and which is part of or results directly from a Claim which is not otherwise excluded by the terms of this Liability Coverage;
 - d. any Claim brought or maintained by a natural person who was a member of the board of directors, officer, member of the board of trustees, member of the board of managers, or a functional equivalent thereof, but who has not served in such capacity for at least two years preceding the date the Claim is first made; and who brings and maintains the Claim without the solicitation, assistance or participation of any current member of the board of directors, officer, member of the board of trustees, board of managers, or functional equivalent thereof or anyone who has served in such capacity during the two year period immediately preceding the date the Claim is first made;
 - e. any Security Holder Derivative Claim or any Security Holder Derivative Demand;
 - f. any Whistleblower Activity;

² As amended by endorsement Insured v. Insured Exclusion with Additional Carvebacks, HCD-19019 Ed. 11-19.

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This Claim is brought by Plaintiffs who are Insureds under the Policy and does not satisfy any of the carve-backs in Section III.A.10.d.-f.³ As such the exclusion in Section III.A.10 applies to this Claim and therefore, there is no coverage for same.

Additionally, pursuant to Section III.A.2⁴, Exclusions, of the D&O Coverage Part, Liability Coverage shall not apply to, and the Company shall have no duty to defend or to pay, advance or reimburse Defense Expenses for, any Claim:

2. based upon, alleging, arising out of, or in any way relating to, directly or indirectly any actual or alleged bodily injury, sickness, disease, death, loss of consortium, emotional distress, mental anguish, humiliation, loss of reputation, libel, slander, oral or written publication of defamatory or disparaging material, or invasion of privacy; provided that this exclusion shall not apply to allegations of emotional distress, mental anguish, humiliation, or loss of reputation if and only to the extent that such allegations are made by a current, former or prospective member of the Health Care Staff as part of a Claim relating to Peer Review or Credentialing activities.

In the Complaint, Plaintiffs allege that they have suffered emotional distress, defamation, humiliation, embarrassment, emotional distress, pain and mental anguish, amongst others. The allegations do not fit within the carve-back of Section III.A.2 because the allegations in the Complaint are not made by a member of the Healthcare Staff and are not related to Peer Review or Credentialing activities. Accordingly, coverage is also precluded under this exclusion.

Conclusion

As stated above, Travelers is disclaiming coverage for this Claim based on the exclusions contained in Section III.A.2 and III.A.10.

Because we view the foregoing as dispositive of coverage for this matter, we have not raised other Policy terms, conditions, limitations or exclusions that may further limit or exclude coverage for this matter. Travelers' attention to this matter is subject to a full and complete reservation of all rights, remedies and defenses under the Policy or otherwise including, but not limited to the right to raise other Policy terms and conditions as defenses to coverage in the future as appropriate. Neither this letter, nor any actions by Travelers or any of its agents shall constitute or be deemed a waiver of any right or defense available to Travelers under the Policy or applicable law.

We regret we are unable to advise you more favorably regarding this matter and invite you to submit any other information you may have which may bear on our coverage decision. Of course, please do not hesitate to contact us if you have any questions regarding Travelers' position in this matter.

Please do not hesitate to contact me if you should have any questions or comments regarding this preliminary coverage evaluation.

³ The only carve-back which relates to this Claim is in Section III.A.10.d. because Cox is no longer a board member. However, it does not apply because Cox served on the Board up to the end of 2023, which is less than two years preceding the date of the Complaint (April 22, 2024). Furthermore, McKinnon is a co-plaintiff and he still serves on the Board. As such, the carve-back to the exclusion does not apply to this Claim.

⁴ As amended by HIPAA Violation Endorsement, HCS 19012 Rev. 10-22.

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May 8, 2024
T2405320
Page 5

Very truly yours,

/s/ Monica V. Banasiuk

Monica V. Banasiuk, Esq.

CC: David Schwaner (via email only: David_Schwaner@ajg.com)

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