

excluded coverage for claims that arose after patients were allegedly administered tainted anesthesia during outpatient surgery and subsequently contracted Hepatitis C. The facts demonstrate that the patients sued the anesthesiologists, alleging, among other things, negligence in failing to properly secure anesthesia narcotics and in exposing patients to contaminated medication.

The Court holds that the patients' claims that the anesthesiologists exposed them to contaminated medication fall within the policy's exclusion, but that their claims for failing to properly secure anesthesia narcotics do not.² The Court therefore concludes that Utica had a duty to defend the anesthesiologists.³ The Court ostensibly predicates its holding on the conclusion that the phrase "due to" in the policy exclusion requires a more direct type of causation than other policy exclusions that use the phrase "arising out of."⁴ Specifically, the Court determines that the phrase "due to" requires causation that ties the insured's liability "to the manner in which the services were performed."⁵ Although the exclusion does not actually say that, the Court uses this construct to conclude that the patients' claims for failing to properly secure anesthesia narcotics may not fall within the exclusion.

But the Court's attempted distinction between "due to" and "arising out of," even if accurate, is immaterial. The only "bodily injury" that the patients alleged — contracting Hepatitis C — could not have occurred except through the anesthesiologists rendering professional services. I cannot think of a more

² *Id.* at ____.

³ *Id.* at ____.

⁴ *Id.* at ____.

⁵ *Id.* at ____.

direct tie of liability for “bodily injury” to the “manner in which the services were performed” than by anesthesiologists administering tainted anesthesia to patients.

Additionally, the Court concedes that the giving of the injection was conduct excluded from coverage under the policy,⁶ but relying on the false premise underlying Utica’s concession that narcotics are not subject to standards of professional care, the Court insists that claims for failing to properly secure anesthesia narcotics may not be excluded from coverage.⁷ But the premise is false. The storage and dispensing of narcotics is subject to a professional standard of care.⁸ In truth, the Court feels compelled to reach its conclusion, not because of the policy’s language, but based on the plurality’s supposition that any other interpretation would produce a “gaping hole” in the anesthesiologists’ insurance coverage.⁹ If the anesthesiologists were not negligent in providing professional services, the plurality says, their professional liability policy would not provide coverage.¹⁰ That goes without saying; but does this require the Court to conclude that Utica’s policy must provide coverage for all other conceivable claims not based on breach of a professional standard of care?¹¹ Hardly. The anesthesiologists bought whatever coverage they bought. Our job is to decide what they bought, not to decide what they should have bought. And in

⁶ *Id.* at ____.

⁷ *Id.* at ____.

⁸ *See, e.g.*, TEX. HEALTH & SAFETY CODE § 483.001(9), (10), (11); TEX. OCC. CODE §§ 551.003(28), (31), (33), 554.005(a).

⁹ ____ S.W.3d at ____.

¹⁰ *Id.* at ____.

¹¹ *Id.* at ____.

this case, they bought a policy that excludes coverage when a claim is based on injuries “due to” the rendering of professional services.

Because the patients’ claims in this case fall within the policy’s exclusion from coverage, Utica had no duty to defend the anesthesiologists against those claims. Therefore, I do not reach the question of whether Utica must indemnify the anesthesiologists’ other insurers. And because the Court, relying on a false premise, rewrites the policy’s exclusion to conclude there is a duty to defend here, I respectfully dissent.

Craig T. Enoch
Justice

Opinion delivered: June 26, 2003