

## Second Circuit Asks New York Court Of Appeals To Decide Whether A Failure-To-Accommodate Discrimination Claim Is A Covered “Occurrence” Under General Liability Policy

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The Second Circuit asked the New York Court of Appeals to address whether a general liability insurer must defend a discrimination suit alleging failure to accommodate—a question that turns on whether such discrimination can be a covered “occurrence.” *Brooklyn Ctr. for Psychotherapy, Inc. v. Phila. Indem. Ins. Co.*, 2020 WL 1777211 (2d Cir. Apr. 9, 2020).

A hearing-impaired woman sued the Brooklyn Center for Psychotherapy for allegedly discriminating against her in violation of various city ordinances and state and federal statutes. Her complaint alleged that the Center refused to provide interpreter services, causing her humiliation and emotional distress. The Center’s insurer refused to defend or indemnify the suit on the basis that it did not allege an “occurrence” under the policy. A New York district court granted the insurer’s motion to dismiss, ruling that the complaint alleged only intentional acts that were not accidental “occurrences” for purposes of policy coverage. The Center appealed.

New York coverage case law has distinguished between discrimination claims that are based on intentional discrimination (which are intentional wrongs not covered by insurance) and discrimination claims based on disparate impact (which are potentially covered if based on unintentional behavior). In considering the Center’s appeal, the Second Circuit noted the uncertainty regarding failure-to-accommodate claims. The Center argued that so long as it reasonably believed that hiring interpreters to accommodate the claimant’s hearing disability would have been an undue hardship on its business, any harm resulting from that decision would be accidental and within the scope of coverage. Conversely, the insurer contended that the Center’s refusal to accommodate was, itself, an intentional act, regardless of its reasons for doing so, and therefore not covered under the policy.

Noting the lack of precedent and the important public policy implications relating to this issue, the Second Circuit certified the following question to the New York Court of Appeals: “Must a general liability insurance carrier defend an insured in an action alleging discrimination under a failure-to-accommodate theory?”

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