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NEWSLETTER

Other Decisions of Note

January 2008

Court Rules Declaratory Judgment Action to Resolve Coverage Is Ripe for Adjudication
The United States District Court for the Middle District of Florida denied a policyholder's motion to dismiss a declaratory judgment action for lack of ripeness. *Executive Risk Specialty Ins. Co. v. Blue Cross & Blue Shield of Florida*, 2007 WL 4206642 (M.D. Fla. Nov. 27, 2007).

The policyholder sought coverage under its Managed Care Errors & Omissions Liability Policy for three lawsuits brought against it for allegedly mishandled medical claims. At the time of the decision, the policyholder had settled one of the underlying actions, and the other two were still pending. The policyholder treated the three actions as related and did not segregate the costs of defense for each action as the insurer had requested. In response, the insurer filed the instant declaratory judgment action and sought a declaration that the policy afforded no coverage for the settlement or for unreasonable and unnecessary defense expenses. The policyholder moved to dismiss the declaratory judgment because "it is not ripe for adjudication." The policyholder also asserted that "information developed in the [coverage action] may have an adverse impact on its ability to defend [the pending underlying actions]."

The court denied the motion, holding that the case "is clearly ready for review as there is a concrete and immediate demand from [the policyholder] for defense expenses . . . and settlement . . . ." In so holding, the court noted that the policyholder "is the architect of its own angst" and could "obviate the need for this Declaratory Action immediately by providing [the insurer] with a detailed and action specific accounting of the defense expenses billed to date and by dropping its demand for immediate payment of those expenses under the Policy. The Court will not step in to aid [the policyholder], when it has not exercised the self-help available to it."

Insured Cannot Veto an Insurer's Good Faith Settlement of a Claim Within Policy Limits Absent Prejudice
A Florida appellate court, applying Florida law, has held that an insured may not veto an insurer's settlement of an underlying claim within policy limits absent an allegation of prejudice to a pending counterclaim of the insured or exposure of the insured to additional damages above policy limits arising from the claim being settled. *Freeman, M.D. v. Cohen*, 2007 WL 4124604 (Fla. Dist. Ct. App. Nov. 21, 2007).

Two physicians insured with the same medical malpractice insurer sought coverage for an underlying

negligence suit. The insurer negotiated a settlement within the combined limits of the policies issued to the insureds. At about the same time that the plaintiffs accepted the settlement offer, one doctor sent a letter to the insurer purporting to release it from its obligations under the policy. Subsequently, the doctor sent a second letter canceling the policy and revoking the insurer's authority to negotiate a settlement on his behalf. When the doctor learned of the settlement, he sought leave to file a counterclaim against the plaintiffs and moved to block the settlement.

The appellate court affirmed the trial court's rejection of both motions. In accordance with a Florida statute, the policy contained a clause stating that the insurer "is authorized to compromise any claim hereunder without consent of the Insured, including any offers for admission of liability, settlement or judgment, unless such offer and compromise is in excess of the applicable limits of liability under this policy." Although he asserted that the insurer did not settle the underlying case in good faith, the doctor did not allege that the settlement prejudiced any counterclaim or subjected him to liability in excess of the policy limits.

The appellate court noted that Florida law requires that any settlement by an insurer be undertaken in the best interests of the insured's rights under the policy, "not some collateral effect unconnected to the claim." As such, an action for bad faith settlement of a claim only exists where a settlement prejudices a pending counterclaim of the insured or exposes the insured to damages above policy limits based on the settled claim. Higher future insurance premiums or alleged harm to an insured's reputation do not support a bad faith claim. Accordingly, the court rejected the doctor's challenge to the settlement and affirmed the trial court.

District Court Holds Mandatory Abstention Applies to Dispute Between Professional Liability Insurers

The United States District Court for the District of New Jersey has abstained from hearing a dispute between a primary and an excess professional liability insurer related to a bankruptcy settlement based on the mandatory abstention doctrine. *Royal Indemn. Co. v. Admiral Ins. Co., Inc.*, 2007 WL 4171649 (D.N.J. Nov. 19, 2007). After the insured corporation declared bankruptcy, the bankruptcy trustee settled claims with the insured's primary professional liability insurer.

Under the settlement, the primary policy was deemed exhausted, and the primary insurer received an assignment of rights to seek recovery of certain amounts from the bankruptcy estate. Based on the primary's asserted exhaustion, the bankruptcy trustee also settled with the excess insurer. The excess insurer then sued the primary insurer in New Jersey state court, arguing that the primary insurer's policy was not exhausted because of the assignment of recovery rights, and asserting that the excess carrier was entitled to any amounts the primary carrier recovered as a result of the assignment. The primary insurer then removed the state court action to federal court and moved to transfer the action to the bankruptcy court that had approved the settlements with the carriers. Although the district court concluded that it had subject matter jurisdiction under the Third Circuit's broad test for "related to" bankruptcy jurisdiction, it held that the mandatory abstention was required under 28 U.S.C. § 1334(c)(2) because (1) the excess carrier's cause of action was based on a state law claim; (2) that claim did not arise under Title 11; (3) there was no federal jurisdiction but for the case's relation to the bankruptcy; (4) the action was commenced in state court; and (5) the action

could be timely adjudicated in the state forum. Accordingly, the district court remanded the case to the New Jersey state court.