

Insurer Waives Right to Allocate Settlement

April 2013

The Court of Appeals of Georgia has held that an insurer waived its right to seek reimbursement for uncovered amounts of a settlement where it settled the underlying suit with knowledge of uncovered claims but without specifically reserving its rights with regard to the policy's allocation provision. *Facility Invs., LP v. Homeland Ins. Co. of N.Y.*, 2013 WL 1277797 (Ga. App. Mar. 29, 2013).

The insured nursing home was sued for professional negligence. The insurer agreed to provide a defense, expressly reserving its rights with regard to losses or defense costs arising out of allegations of fraud, malice or violations of state or federal regulations, but not as to allocation or recoupment of uncovered losses. The underlying plaintiffs presented evidence of fraud relating to the nursing home patient's medical chart and asserted that they were entitled to punitive damages. The plaintiffs demanded payment of the policy's \$1 million limit within 30 days. Three days before the expiration of the demand, the nursing home requested that the insurer settle the suit.

The insurer offered to settle the case but noted that the policy required the nursing home to determine a fair and proper allocation of amounts attributable to covered and uncovered losses. The insurer asked the nursing home to contribute 50 percent of the settlement amount, but the nursing home refused to contribute or otherwise allocate the settlement between covered and uncovered losses. The insurer reserved its rights to pursue claims for breach of contract, recoupment, allocation and contribution and made an interim payment to settle the underlying suit. The insurer then sued the nursing home to recover the portion of the settlement attributable to the uncovered losses, alleging that the nursing home breached the policy's terms by failing to contribute to the settlement or indemnify the insurer for uncovered losses. The trial court denied the nursing home's motion to dismiss, and the nursing home filed an interlocutory appeal.

The Georgia intermediate appellate court held that the insurer had waived its right to pursue the uncovered amounts of the settlement when it made the payment with knowledge of the circumstances that gave rise to a coverage defense. The court found that the express terms of the policy excluded losses and defense expenses arising out of fraudulent conduct and that the insurer was aware that the plaintiffs were seeking punitive damages for fraudulent conduct. The court noted that, under Georgia law, uncovered claims may be subject to the doctrines of waiver or estoppel if an insurer does not unambiguously reserve its rights when it defends an action with knowledge that the claims are not covered. The court found that the insurer's initial reservation of rights did not unambiguously reserve its rights under the uncovered loss allocation provision, and any attempt to reserve additional defenses using boilerplate language was insufficient.

The court further noted that the insurer had unilaterally reserved its rights as to the allocation provision only after the nursing home informed the insurer that it would not contribute to the settlement. According to the court, the insurer's only options at that point were to deny coverage or to seek immediate declaratory relief. Because the insurer had instead settled the case, the court held that the insurer had waived any right to seek reimbursement for the uncovered amounts.