Martin, Disiere, Jefferson & Wisdom

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TEXAS INSURANCE LAW NEWSBRIEF

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NORTHERN DISTRICT OF TEXAS ORDERS EXCESS CARRIER TO PAY POST-JUDGMENT INTEREST IN E-FEROL SUIT

This week, the United States District Court for the Northern District of Texas addressed an excess insurance carrier's obligation to pay post-judgment interest in *Klein et. al v. Federal Insurance Co. et. al.*, No. 7:03-CV-102-D, 2018 WL 5084888 (N.D. Tex. Oct. 18, 2018). The case centered around a coverage dispute between plaintiffs and Federal Insurance Co. in a certified class action involving the administration of the vitamin E supplement E-Ferol Aqueous Solutions.

Plaintiffs consisted of individuals who, between November 1, 1983 and April 30, 1984, were administered E-Ferol and suffered injury or death as a result. In 2003, plaintiffs initiated suit against numerous defendants including Revco D.S., Inc. and its wholly-owned subsidiary, Carter-Glogau Laboratories, Inc. a/k/a Retract Inc. alleging negligence, negligent misrepresentation and strict liability. Federal Insurance served as the excess insurance carrier for Revco. In 2009, the plaintiffs settled with various defendants including Retract and Revco, for claims relating to the manufacture and distribution of E-Ferol. The settlement was funded by the settling defendants' various excess carriers, however Federal Insurance did not participate and disputed its duty to indemnify its insureds, (Retract and Revco) pursuant to the underlying policy. Accordingly, under the settlement agreement, Revco and Retract agreed to assign to plaintiffs their right to seek indemnity from Federal Insurance based on plaintiffs' claims asserted in the Consolidated Declaratory Judgment Actions. At the same time the settlement agreements were signed, Federal Insurance executed a Non-Waiver Agreement agreeing to deposit the $15 million policy limits of the Revco policy into an interest bearing escrow account to be distributed to either Federal Insurance or plaintiffs following final judgment on the Consolidated Declaratory Judgment Actions and exhaustion of all appeals.

Following the indemnity assignment, plaintiffs amended their complaint seeking declaratory judgment that the Revco policy covered their claims and that Federal Insurance must indemnify the plaintiffs as assignees to the full extent of the settlement agreement. Plaintiffs won summary judgment, and the court found the Revco policy provided coverage, that the settlement agreement did not release claims against Revco, and that plaintiffs were entitled to summary judgment on Federal Insurance's affirmative defenses. The Fifth Circuit Court of Appeals affirmed. The funds in the escrow account were transferred to plaintiffs, including the accrued interest, however, Federal Insurance refused to pay the post-judgment interest, asserting that it did not owe post-judgment interest as the parties contracted for a different interest rate when they agreed to deposit the funds in the escrow account. Accordingly, plaintiffs moved for declaration that Federal Insurance owed $157,217.50 in post-judgment interest.

Analyzing the post-judgment interest provision of 28 U.S.C. § 1961(a) against the language of the Non-Waiver Agreement, the Court concluded that Federal Insurance still owed the statutory post-judgment interest. Specifically, the Non-Waiver Agreement provided for the contracted interest rate in the escrow account funds, but did not directly address the post-judgment interest rate, nor did it waive the plaintiff's entitlement to post-judgment interest under §1961(a). Because variation to the statutory post-judgment interest rate must be clear and unambiguous, the Court rejected Federal Insurance's position and ultimately granted Plaintiffs' motion for declaration that Federal Insurance owed the plaintiffs $157,217.50 in post-judgment interest.

FIFTH CIRCUIT COURT OF APPEALS DENIES LAW FIRM RECOVERY FROM EXCESS PROFESSIONAL LIABILITY CARRIER FROM LITIGATION EXPENSE DISPUTE

This week, the United States Court of Appeals, Fifth Circuit denied the John M. O'Quinn P.C. law firm's claim against its excess professional liability carrier stemming from a fee dispute between the firm and its clients. *John M. O'Quinn, P.C. et. al. v. Lexington Insurance Company*, No. 16-20224, 2018 WL 5075485 (5th Cir. Oct. 18, 2018) originated from a dispute regarding fees deducted by the firm in a number of cases representing plaintiffs in suits against breast implant manufacturers. The firm obtained extraordinary results for the plaintiffs, however the clients alleged that certain expenses incurred by O'Quinn should not have been deducted from the settlement proceeds.

The client dispute proceeded to arbitration where the clients prevailed on breach of contract and breach of fiduciary duty claims. The arbitration award was affirmed by the state trial court and O'Quinn ultimately settled with the clients. During the dispute, O'Quinn's primary professional liability carrier brought suit in federal court seeking a declaratory judgment that it had no duty to defend or indemnify the firm in the litigation. O'Quinn counterclaimed seeking defense and indemnity from both the primary carrier and Lexington Insurance Company, the excess carrier. The court held that the primary carrier owed a defense and stayed the indemnity issues pending the state-court case resolution. After settlement with the clients, the insurance dispute continued and the firm ultimately settled with the primary carrier. The federal court granted Lexington's motion for summary judgment finding it had no duty to

indemnify O'Quinn but the court did not address the duty to defend. O'Quinn filed a motion to alter or amend the judgment alleging that Lexington also breached its duty to defend. The Court denied the motion and O'Quinn appealed both the denial and Lexington's summary judgment.

Analyzing the insurance policy's definitions of "loss" and "wrongful act" against the arbitration panel findings, the Court noted that the underlying client fee agreements did not allow for the deduction of the disputed expenses and the deduction of the expenses from the settlements was inappropriate. Although the arbitration panel found O'Quinn breached its contract with the clients, and "breach of contract" was included under the policy's definition of "wrongful act," the district court found the policy did not cover this type of breach of contract and the Fifth Circuit agreed. The policy provision for loss coverage did not include the reimbursement of legal fees—which is what the arbitration panel concluded was the appropriate remedy for the expense deduction. Accordingly, O'Quinn could not seek reimbursement from its insurance carrier for costs that its clients were not required to bear. Further, the district court and Fifth Circuit agreed that the definition of "loss" did not cover the arbitration panel's finding of breach of fiduciary duty as "loss" did not include "fines, penalties, [and] sanctions." Finally, the Court found that Lexington was not obligated to pay costs of defense since the underlying defense costs did not exceed the primary coverage, thereby failing to trigger the excess policy. Accordingly, the Fifth Circuit affirmed the district court judgment.