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NEWSLETTER

Other Decisions of Note

June 2006

Member of LLC Found Jointly and Severally Liable for LLC's Obligation to Pay Deductible

In an unpublished opinion, the Minnesota Court of Appeals has held, in connection with an insurer's efforts to obtain payment for a deductible under a malpractice policy, that an individual member of an LLC could not rely on general restrictions preventing creditors from pursuing LLC debts against individual members where the malpractice policy at issue provided that the member would be jointly and severally liable for the deductible and where the individual had benefited from the insurer's defense of the underlying malpractice claim. *Continental Casualty Co. v. Duckson-Carlson, LLC*, 2006 WL 1073075 (Minn. App. April 25, 2006).

The insurer provided attorney malpractice coverage to the insured LLC that stated "in the event the Named Insured fails to pay, the deductible shall be paid jointly and severally by all Insureds." The LLC dissolved after suffering a malpractice judgment and the insurer sought payment of the deductible from the member as an "Insured" under the policy. The member argued that he was protected from liability by statutes governing LLCs and because he never personally signed the insurance policy. The appellate court, first relying on Minnesota case law, noted that "an attorney who is sued for malpractice remains personally liable under [the professional corporation's] insurance policy for the deductible arising out of . . . defense of the malpractice lawsuit." It then rejected the member's contention that subsequent statutory revisions undermined that conclusion, determining that relevant statutory commentary clarified that the court's conclusion was correct. The appellate court then observed that the member had accepted the benefits of the malpractice policy, and thus was equitably estopped from denying personal liability for the deductible.

Bankruptcy Court Denies Insurer's Challenge to Arbitration Award

The United States Bankruptcy Court for the Eastern District of Pennsylvania has confirmed a $1.6 million arbitration award against an insurer, rejecting the insurer's attempt to vacate the award on the grounds that the arbitrator's award was premised on "manifest disregard" for applicable bankruptcy law. *In re Elcom Technologies, Corp.*, 339 B.R. 354 (Bankr. E.D. Pa. 2006).

The bankruptcy trustee and Official Committee of Unsecured Creditors sued directors and officers of the bankrupt entity alleging breaches of fiduciary duties and other malfeasance, and the insurer denied coverage. After significant procedural fencing, the directors and officers settled the underlying claims and assigned their rights under the policy, and the insurer, the trustee and the creditors' committee agreed to arbitrate the coverage dispute. The arbitrator ruled against the insurer, and the insurer subsequently opposed the trustee's and creditors' committee's motion seeking bankruptcy court confirmation of the resulting $1.7

million award. The insurer contended that the arbitrator showed manifest disregard for applicable bankruptcy law because the creditors' committee assertedly lacked standing to bring derivative claims against the insureds.

In rejecting the insurer's argument, the bankruptcy court noted that there is a strong presumption in favor of enforcing arbitration awards and that judicial review of such awards "is extremely narrow and severely limited." Regarding the specific objection raised by the insurer, the bankruptcy court upheld the arbitrator's award because it concluded that the arbitrator properly found that the creditors' committee had standing since the record, construed broadly, did not foreclose the possibility that the creditors' committee sought to recover for post-insolvency claims that it had standing to pursue.

Suit Seeking Damages from Chiropractor for Sexual Assault of Patient Not Professional Services
The United States District Court for the Southern District of Illinois, applying Illinois law, has held that an insurer does not have a duty to defend a policyholder in a suit alleging sexual assault. NCMIC Ins. Co. v. Johnson, 2006 WL 1004862 (S.D. Ill. April 17, 2006). Looking solely at the complaint, the court noted that the plaintiff was not alleging that the policyholder breached any professional standard of care or that the assault was even connected with treatment. Moreover, the court concluded that the non-consensual touching was a battery and therefore did not constitute an "accident" under the policy.

No Constitutionally Protected Property Interest in Settlement by Insurer Without Consent of Policyholder
A Florida appellate court has held that:

- The trial court had jurisdiction to enter a declaratory judgment on behalf of an insurer approving a settlement entered into without the consent of an insured.
- The insured did not have a constitutionally protected property interest in being able to challenge the settlement.
- The insured's due process rights were not violated by the settlement hearing. *Bland v. Cage*, 2006 WL 1006625 (Fla. Dist. Ct. App. Apr. 19, 2006).

The policy provided that the insurer "shall have the right, without [the insured's] consent, to investigate, negotiate, and settle the Claim as we deem necessary or expedient." The appellate court rejected the insured's claim that the trial court did not have jurisdiction to enter a declaratory judgment approving the settlement. The court concluded that there was a "bona fide, actual, present practical need for a declaration" because the insurer wanted to settle the case while the insured objected to the settlement, and thus there was a justiciable controversy.

Additionally, the court held that because, under Florida law, there is no action for bad faith when an insurer enters into a settlement agreement without the insured's consent for an amount within the policy's limits, the insured had no protected property interest. Finally, the court suggested that even if the insured had a property interest "sufficient to invoke the protection of the due process clause," the insured's due process rights were not violated because she was afforded two adversarial evidentiary hearings on the settlement.