

Court Refuses to Strike Affirmative Defenses of Insurer

January 2001

A federal district court, applying New York law, has denied the motion to strike the affirmative defenses of an insurer in a coverage dispute under a professional liability policy. *Cattaraugus County Project Head Start, Inc. v. Executive Risk Indem. Inc.*, No. 00-CV-0167E(F) (W.D.N.Y. Nov. 8, 2000). The court also denied the policyholder's motion to strike the insurer's answer relating to the performance of a condition precedent as insufficiently pled. Having ruled against the policyholder on the motion to strike, the court also denied the policyholder's motion for sanctions and attorneys fees.

Head Start was accused of employment discrimination by one of its employees, who filed a charge with the EEOC in March, 1999. Head Start thereafter filed a claim with its insurer, Executive Risk Indemnity Inc., which denied coverage on grounds not identified in the opinion. The insured then filed suit against Executive Risk seeking a declaration of coverage. In its answer, Executive Risk raised six affirmative defenses. Head Start then filed a motion under Rule 12(f) of the Federal Rules of Civil Procedure to strike all of the affirmative defenses on the basis that each defense failed to include facts and elements in support of the defense. Head Start also moved to strike part of Executive Risk's answer under Rule 9(c) because it was not made with the requisite specificity and particularity. Finally, Head Start sought sanctions and attorneys fees based on Executive Risk's asserted "bad faith and frivolous conduct" in raising and refusing to withdraw its affirmative defenses.

The court denied the motion to strike any of the affirmative defenses. According to the court, in order to succeed on a motion to strike affirmative defenses, a plaintiff must establish three elements: (1) that there is no question of fact which would allow the defense to succeed; (2) that there is no question of law which would allow the defense to succeed; and (3) that the plaintiff would suffer prejudice from inclusion of the defense.

The first three affirmative defenses were equitable in nature: unclean hands, public policy and estoppel. The court held that, insofar as Head Start sought the equitable remedy of declaratory relief, the court could not hold as a matter of law based on the pleadings that no questions of fact or law existed that would allow the affirmative defenses to succeed, or that Head Start would be prejudiced by their inclusion. The fourth and fifth affirmative defenses alleged a failure to state a cause of action. The court observed that including failure to state a claim as an affirmative defense is a "routine practice which is rarely, if ever stricken by the court as legally insufficient." The court held that legal and factual issues existed that would allow these defenses to

succeed because they concern the "very issue to be decided," i.e., whether the insurance policy covers the claims asserted by Head Start. The motion to strike as to the sixth affirmative defense, a general reservation of rights, was also denied. According to the court, while it may not have been a proper defense, Head Start suffered no prejudice by its inclusion.

Lastly, the court addressed the insured's contention that Executive Risk violated Rule 9(c) because its answer did not specify how or whether Head Start had failed to meet conditions precedent. The court determined that the answer was sufficient because Executive Risk merely stated that it possessed insufficient information without discovery to determine whether or not Head Start had complied with all conditions precedent. Having denied the motion to strike, the court also declined to sanction Executive Risk for raising the affirmative defenses.