

Settlement of RICO Claims Not Uninsurable as a Matter of Law; Bad Faith Claim Allowed by Virtue of “Special Relationship” Between Insurer and Insureds

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Applying Oregon law, the United States District Court for the District of Oregon has held that a settlement of Racketeer Influenced and Corrupt Organizations (RICO) Act claims was not uninsurable as a matter of law because the settlement did not necessarily establish that the insureds had engaged in intentional conduct. *Regence Group v. TIG Spec. Ins. Co.*, 2012 WL 4897370 (D. Or. Oct. 12, 2012). The court also held that a “special relationship” existed between the insurer and its insureds by virtue of the insurer's involvement in the defense of the underlying actions, and thus the insureds were entitled to assert a bad faith claim against the insurer.

An insurer issued an errors and omissions policy to a health care insurer. The policy was subsequently amended to provide coverage for claims for actual or alleged violations of RICO. Thereafter, health care providers filed several putative class action lawsuits against the insureds, alleging that the insureds had violated RICO by conspiring with other health maintenance organizations (HMOs) to deny, delay and diminish payments due to providers through the use of computerized claims payment and processing systems. The insurer provided a defense subject to a reservation of rights, and the actions ultimately settled. The insureds then filed suit against the insurer seeking indemnity for one of the settlements, and the parties filed cross-motions for summary judgment.

The insurer argued, *inter alia*, that RICO provides for civil and criminal liability for intentional conduct, and thus that the settlement was uninsurable as a matter of law. The court disagreed. The court reasoned that the insureds could have settled for financial reasons, and thus the settlement did not establish that the insureds necessarily engaged in intentional conduct. Further, the court held that, even if the insureds had committed the RICO violations, the insurer had not established that the insureds had specifically intended to injure the claimants by entering into the alleged conspiracy. Rather, the insureds could have been held vicariously liable for their co-conspirators' intentional acts, or held liable for their reckless conduct in aiding and abetting their co-defendants. The court thus concluded that whether the insureds maintained an intentional scheme to harm the claimants was a question for a jury.

The insurer also argued that the insureds' claim for bad faith necessarily failed as a matter of law because there was no "special relationship" between the insurer and the insureds, as required under Oregon law. Again, the court disagreed. The court held that, even though the insureds had retained their choice of defense counsel and maintained control of their defense, a special relationship existed as a matter of law by virtue of the following: (i) the insureds had provided confidential and privileged documents to the insurer; (ii) the insurer was granted access to defense counsel's strategic decisions; (iii) the insurer participated in discussions with the insureds as to how to resolve the underlying actions; and (iv) the insurer maintained control over monetary decisions.