wiley

ALERT

Louisiana Statute Providing for Automatic Damages Is a Penalty and Not Covered Loss

August 7, 2013

The Superior Court of Delaware, applying Delaware and Louisiana law, has held that a Louisiana statute that provided for an automatic award to the claimant for violations results in a "penalty" that was not covered Loss under an E&O policy. *Homeland Ins. Co. v. CorVel Corp.*, 2013 WL 3937022 (Del. Super. Ct. June 13, 2013).

Louisiana's "PPO Act" authorizes payment of health care costs within the framework of a preferred provider organization (PPO) at lower negotiated rates if a patient presents a benefit card at the time of service, or if written notice is given in advance to the provider. The statute provides that failure to comply with these notice provisions subjects the PPO "to damages payable to the provider of double the fair market value of the medical services provided, but in no event less than the greater of fifty dollars per day of noncompliance or two thousand dollars, together with attorney fees to be determined by the court."

A health insurer entered into a PPO agreement with a hospital in Louisiana, which provided that the hospital would discount rates for certain medical services. However, the agreement was silent as to the payment to be given for medical services in the context of workers compensation claims, which were paid. The health insurer paid for such medical services at the rates given for comparable services under the PPO agreement, but these rates were allegedly below the rates set forth in Louisiana's workers compensation fee schedule.

The hospital filed an arbitration proceeding against the health insurer. Additionally, a putative class action suit was subsequently filed alleging that the health insurer violated Louisiana's PPO Act on the grounds that the health insurer did not provide any notice that it

Practice Areas

D&O and Financial Institution Liability
E&O for Lawyers, Accountants and Other Professionals
General Liability
Insurance
Professional Liability Defense
Property Coverage

was to pay workers compensation claims below the rate set by Louisiana's fee schedule. Both the suit and the arbitration settled. The health insurer tendered the claims to its two E&O carriers for two different policy years. Each of the policies provided that "Loss," as defined in the policies, did not include "penalties." The E&O carriers denied coverage and brought a declaratory judgment suit on the grounds that the settlement was a penalty and not insurable Loss. The E&O carriers filed motions for summary judgment, which were granted.

The court determined that Delaware law was to apply to the construction of the insurance policy but that Louisiana law was relevant to whether the statute provided for a "penalty." The court went on to determine that the damages sought under the Louisiana statute fell within the plain meaning of a "penalty," and thus were not covered Loss. The court reasoned that the statute provided that the failure to comply with the notice requirements resulted in an automatic payment that has "no correlation to the amount of actual damages suffered." In addition, the court read the legislative history of the statute to evince a purpose that the statute was to constitute a penalty.