IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

CONDUENT STATE HEALTHCARE, LLC, f/k/a/ XEROX STATE HEALTHCARE, LLC, f/k/a ACS STATE HEALTHCARE, LLC,	)	
Plaintiff,	)	C.A. No. N18C-12-074 MMJ CCLD
v.	)	
AIG SPECIALTY INSURANCE CO., f/k/a CHARTIS SPECIALTY INSURANCE COMPANY, et. al.,	)	
Defendants.	)	

Submitted: July 9, 2021
Decided: August 3, 2021

On Plaintiff Conduent State Healthcare LLC's Motion for Clarification and Reconsideration Regarding the Court's Ruling on Excess Insurers' Motion for Summary Judgment as to Endorsement 34

Notice of Intent to Unseal

OPINION

Robin L. Cohen, Esq., Keith McKenna, Esq., McKool Smith, P.C., New York, New York; Jennifer C. Wasson, Esq., Carla M. Jones, Esq., Potter, Anderson, & Corroon, LLP, Wilmington, Delaware, *Attorneys for Plaintiff*

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JOHNSTON, J.

THE MOTION

The Court issued an opinion dated June 23, 2021. The Court ruled that Endorsement 34 is not binding on Excess Insurers "because the unambiguous terms of the respective Excess Policies required Conduent to obtain consent or approval for any changes or modifications to the Primary Policy." Therefore, "Excess Insurer Defendants' Motion for Summary Judgment as to Endorsement 34 is hereby **GRANTED**."[1]

Conduent filed the instant motion. Conduent requests the following clarification:

> *First*, Conduent seeks confirmation that although the Court concluded that Endorsement 34 to the Primary Policy is not binding on certain Excess Insurers, the Court's Decision did not absolve those Excess Insurers of *all* potential coverage obligations, but instead left that issue for trial. Reading the Decision in its entirety, Conduent believes that was the Court's intent. However, the Excess Insurers are contending otherwise. Thus, Conduent respectfully requests that the Court address this issue now, so that the parties can properly prepare for trial.
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> *Second*, Conduent seeks reconsideration of this Court's conclusion that Endorsement 34 is not binding on ACE.

1 *Conduent State Healthcare, LLC v. AIG Specialty Ins.Co.*, Del. Super., C.A. No. N18-12-074 MMJ CCLD (June 23, 2021).

ISSUES PRESENTED BY EXCESS INSURER DEFENDANTS

Conduent contends:

> The Excess Insurers' Motion for Summary Judgment as to Endorsement 34 sought two types of relief. First, it requested that the Court find that, as a matter of law, the Excess Insurers are not bound by Endorsement 34 because it modified the terms of the Primary Policy without their consent. Defs' Endorsement 34 Motion (Trans. ID 66207652), at 14-18, 27. Second, it requested that the Court find that, if the Excess Insurers were not bound by Endorsement 34, summary judgment be entered in their favor holding that they owed no duties of coverage for the Medicaid Related Claims on the ground that the unreformed Policy only covers a Subsidiary for Wrongful Acts occurring while it was a Subsidiary and the State's allegations should be deemed to allege one "continuous" Wrongful Act that began before Conduent was a Subsidiary of Xerox. *Id.* at 19-25, 27.
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> It appears that the Court intended to grant the first request, but not the second.

In its Opening Brief, Excess Insurer Defendants presented three questions.

> (1) **Non-Binding Nature of Endorsement 34 on Excess Insurers.** The Primary Policy was amended in 2014 -- after the Primary Policy had expired and after Conduent had tendered its claim for losses that evolved into this lawsuit for coverage -- by the primary insurer to include Endorsement 34. It is undisputed that none of the Excess Insurers consented to Endorsement 34 in writing. Are the Excess Insurers bound by Endorsement 34?
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> (2) **Definition of "Subsidiary."** For subsidiaries of Xerox (like Conduent), the Primary Policy only covers Loss arising out of Wrongful Acts that occurred after Xerox obtained "Management Control" over those entities. Here, it is undisputed that Xerox obtained "Management Control" over Conduent in

> February 2010 and, further, that the allegations regarding Conduent's Medicaid fraud date back to 2004 and allege a continuous pattern of wrongdoing and fraudulent acts by Conduent. Do the Excess Insurers owe any obligations of coverage to Conduent as a "Subsidiary" for the "Medicaid-Related Claims"?
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> (3) **Failure to seek Reformation.** Conduent alleges that Endorsement 34 should be binding on the Excess Insurers due to a "mutual mistake" in the underwriting of the Primary Policy. Can this Court ignore the plain language of the Primary Policy and Excess Policies as written and grant the remedy of reformation? The answer to each of these questions is "no." Thus, the Excess Insurers are entitled to summary judgment and full dismissal of Conduent's claims against them.

None of these questions requests that Court find, as Conduent now suggests, that the Court was specifically asked to determine whether the conclusion that Excess Insurers did not follow Endorsement 34, and resolution of subsidiary obligations, mean that those Insurers have ***no*** potential liability for the State Action settlement.

In its Brief in Opposition to...Excess Insurer Defendants' Motion for Summary Judgment as to Endorsement 34, and subsidiary liability, Conduent concluded by requesting the following relief:

> For the forgoing reasons, Conduent respectfully requests that the Court deny (1) Defendants' Choice of Law Motion, (2) Defendants' D&I Motion; and (3) the Excess Insurers' Endorsement 34 Motion.

Neither party posited the question in a way that would frame the Court's rulings on Endorsement 34 and subsidiary liability in a manner to unequivocally address the issues presented in Conduent's Motion for Clarification.

EXCESS INSURERS' SUBSIDIARY POTENTIAL LIABILITY

The policy definition of subsidiary provides that "coverage under this policy shall only apply to **Loss** rising out of [Events] occurring or allegedly occurring after the effective time [February 8, 2010]...." "Related Acts" is defined as Events "which are the same, related or continuous, or...which arise from a common nucleus of facts or legal causes of action. All **Related Acts** shall be considered to have occurred at the time the first such **Related Act** occurred."

In the Motion for Clarification, Conduent contends that certain losses are attributable to covered Wrongful Acts occurring after Conduent became a Subsidiary. Thus, according to Conduent, even if Endorsement 34 does not apply, Conduent is entitled to coverage for losses attributable to post February 8, 2010 losses.

Excess Insurers counter that the Court's ruling on Endorsement 34 must be read together with the Court's findings of undisputed facts (in connection with QBE) regarding events in 2008 into 2009 - prior to February 8, 2010 when Conduent

became a subsidiary of Xerox. Because the later claims arose out of prior Wrongful Acts, Plaintiff is entitled to coverage for all Loss alleged to have taken place after Conduent became a subsidiary. Excess Insurers also refer to the policy definition of "Related Acts" as "the same, related or continuous...which arise from a common nucleus of facts or legal causes of action...."

The Court finds that the policy provisions controlling the Excess Insurers' obligations are not the same as those governing QBE. Unlike QBE, the Excess Insurers' policy language does not contain the terms "arising out of, directly or indirectly resulting from, in consequence of, or in any way involving" a prior investigation. The term "Related Acts" is not used in connection with any of the definitions governing Excess Insurers' coverage obligations in this case.

Therefore, the Court clarifies its ruling by holding that the Court cannot find, as a matter of law, that Excess Insurers owe no coverage to Conduent as a Subsidiary. However, there simply is not sufficient record evidence at this stage to make a conclusive finding that the events after February 8, 2010 constitute separate Wrongful Acts resulting in distinct and severable Losses mandating coverage.

"Wrongful Act" is defined as any "negligent act, error or omission, misstatement or misleading statement...." The Court previously found that the events after February 8, 2010 arose out of an alleged scheme of "Wrongful Acts"

which occurred before the acquisition. Evidence relating to the course of conduct that continued after 2010 may be relevant to future consideration of whether acts after February 8, 2010 constitute separate Wrongful Acts.

ACE AND ENDORSEMENT 34

Conduent's request for reconsideration that Endorsement 34 is not binding on ACE is actually a motion for reargument under Rule 59(e). The purpose of moving for reargument is to seek reconsideration of findings of fact, conclusions of law, or judgment of law.[2] Reargument usually will be denied unless the moving party demonstrates that the Court overlooked a precedent or legal principle that would have a controlling effect, or that it has misapprehended the law or the facts in a manner affecting the outcome of the decision.[3] "A motion for reargument should not be used merely to rehash the arguments already decided by the court."[4] To the extent any party asserted issues that were not raised in the submissions in support of its motion, new arguments may not be presented for the first time in a motion for reargument.[5] A court cannot "re-weigh" evidence on a motion for reargument.[6]

The Court finds that it did not overlook a controlling precedent or legal

2 *Hessler, Inc. v. Farrell*, 260 A.2d 701, 702 (Del. 1969).
3 *Ferguson v. Vakili*, 2005 WL 628026, at *1 (Del. Super.).
4 *Wilmington Trust Co. v. Nix*, 2002 WL 356371, at *1 (Del. Super.).
5 *Oliver v. Boston University*, 2006 WL 4782232, at *1 (Del. Ch.).
6 *Manichaean Capital, LLC v. Soucehov Holdings, Inc.*, 2020 WL 1166067, at *3 (Del. Ch.).

principle, or misapprehend the law or the facts in a manner affecting the outcome of the decision.

BEST MOTION PRACTICES

It is axiomatic that framing the issues is the first, and perhaps most important, step to success on the merits. Thoughtful framing is what expert litigators do. As a corollary, it is not helpful to the Court when briefing involves several cross motions, filed by numerous parties - all of which present questions differently and do not carefully craft specific requests for relief. The Court is left to mine the briefs and oral argument to glean the legal issues and to determine how resolution of those issues will apply to relief granted or denied. It is particularly frustrating when the parties do not join issue, as happened to some extent with the motions addressed in the June 23, 2021 Opinion.

Ideally, the Court should be able to review the parties' requests for relief (most helpfully in the conclusion section of motions and briefs, and in a list of questions presented) in order to determine whether the draft opinion has covered everything. All too often, it is apparent that the conclusion section of a brief is an afterthought, added when the writer is running short on word count, time, and energy. The conclusion, however, is perhaps the most important section of a brief or motion.

An effective advocate should never lose an opportunity to be persuasive.

Counsel are advised to write the conclusion, questions presented, and introduction, before the body of the brief. Everything in the brief should funnel the facts and legal arguments inexorably to the specific relief requested in the conclusion. "For the foregoing reasons" is not persuasive.

In turn, motions for clarification are not a good use of anyone's time and resources. Obviously, if a decision needs clarification, so be it. However, there can be no disagreement that a clear roadmap for the Court in the first instance saves time and effort in the long run for all concerned.

In the same manner, CCLD litigants (in particular) are urged to begin case strategy by drafting a verdict form or questionnaire. In jury cases, this helps counsel devise discovery plans that focus on precisely what they wish for the trier of fact to find. Facts that lead irresistibly to the desired ultimate result should be the focus of discovery. "Favorable" facts are not necessarily helpful, or even relevant. Less is more. Keep it simple. Tell the story and prune the distractions. This is absolutely essential in a jury trial. A concise and compelling presentation will almost always win the case. (If a skilled attorney is unable to pare the case to a meaningful, but efficient trial, perhaps the suit is unlikely to succeed and settlement should be considered seriously.)

Once the factual issues are parsed from the legal issues, the need for and

efficacy of motions will become more apparent. Motions to dismiss should be limited to issues that are devoid of any factual disputes (or for which perhaps very limited discovery is required) - such as limitations periods, standing, sufficiency of process, indispensable parties, venue, and jurisdiction (subject matter or personal). Sequential motions for partial summary judgment, or summary judgment, are disfavored. Only when discovery can be ***substantially*** curtailed, parties dismissed, or issues narrowed in a way that ***materially*** reduces trial time, should such motions be filed prior to a single summary judgment motion or cross motions.

CONCLUSION

Plaintiff Conduent State Healthcare LLC's Motion for Clarification and Reconsideration Regarding the Court's Ruling on Excess Insurers' Motion for Summary Judgment as to Endorsement 34 is hereby **GRANTED IN PART AND DENIED IN PART.**

IT IS SO ORDERED.

/s/ Mary M. Johnston
The Honorable Mary M. Johnston