IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

HLTH CORPORATION and	)	
EMDEON PRACTICE SERVICES, INC.,	)	
	)	C.A. No. 07C-09-102 RRC
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	
AXIS REINSURANCE COMPANY	)	
CERTAIN UNDERWRITERS AT LLOYD'S,	)	
LONDON	)	
FEDERAL INSURANCE COMPANY,	)	
FIREMAN'S FUND INSURANCE	)	
COMPANY,	)	
NATIONAL UNION FIRE INSURANCE	)	
COMPANY OF PITTSBURGH, PA,	)	
NEW HAMSPHIRE INSURANCE	)	
COMPANY,	)	
OLD REPUBLIC INSURANCE COMPANY,	)	
RSUI INDEMNITY COMPANY	)	
SAFECO COMPANY OF AMERICA,	)	
and	)	
ZURICH AMERICAN	)	
INSURANCE COMPANY,	)	
	)	
Defendants.	)	
	)	

Submitted: September 20, 2009
Decided: September 30, 2009

Order Granting HLTH Corp. et al. Leave to Appeal the "Prior Notice" Opinion of August 31, 2009

COOCH, J.

This 30th day of September, 2009, plaintiffs HLTH Corporation ("HLTH") and Emdeon Practice Services, Inc. (collectively, "Plaintiffs") having made

application pursuant to Rule 42 of the Supreme Court for an Order certifying an appeal from the Memorandum Opinion ("Opinion") granting summary judgment to multiple defendants, dated August 31, 2009, the Court makes the following findings:

1. The Opinion,[1] which the parties and the Court now refer to as the "Prior Notice Order" (because on August 31, 2009 the Court issued a related opinion referred to as the "Prior Acts Order"[2]), determines a substantial issue and establishes a legal right in that it determines the rights of multiple defendant insurers to deny coverage for the advancement of ongoing, substantial defense costs under the Directors and Officers ("D&O") insurance policies, and the right of the directors and officers to coverage under those same policies.[3] The Opinion held that a Prior Notice Exclusion contained within the D&O policies barred advancement of defense costs because:

> [1] the notice of claims Plaintiffs gave to the 2005-2006 Emdeon Tower insurers arose out of the same facts as the notice of claims Plaintiffs gave to the MMC Tower insurers, and the Emdeon 2005-2006 Tower succeeded the MMC Tower in time and did not provide concurrent

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[1] Dkt 268

[2] Dkt 267

[3] *See, e.g., State Farm Mut. Auto. Ins. Co. v. Abramowicz*, 386 A.2d 670, 671 (Del. 1978) (holding pursuant to Supreme Court Rule 42 that a summary judgment decision that had determined the validity of a contract provision essential to the position of parties a "substantial issue" and the legal right of the insured to recover damages pursuant to the policy); *AT&T Corp. v. Clarendon Am. Ins. Co.*, 2006 WL 1360934, at *1 (Del. Super. May 18, 2006) (stating pursuant to Supreme Court Rule 42 that a denial of coverage under D&O policies establishes both a substantial issue and a legal right meriting an interlocutory appeal under Supreme Court Rule 42); *Monsanto Co. v. Aetna Cas. & Sur. Co.*, Del. Super., C.A. No. 88-JA-118, slip op. at ¶ 1 (Feb. 10, 1994) (finding under Supreme Court Rule 42 that where the issue "bears directly upon the existence of insurance coverage as a matter of law" it therefore determines "a substantial issue").

coverage; 2) when reading the Emdeon 2005-2006 Tower as a whole, the application of the Prior Notice Exclusion does not render any terms unclear or ambiguous, and Endorsement 13 does not contradict the Prior Notice Exclusion; and 3) Defendants were not aware that notice was given to the MMC Tower insurers when they entered the Emdeon 2005-2006 Tower so they have not waived, or are not estopped, from applying the Prior Notice Exclusion.[4]

2. Pursuant to Supreme Court Rule 42(b)(v), considerations of justice would be served by interlocutory review because of the following:

(a) The D&O insurance policy at issue involves large sums of money that will serve to fund litigation associated with a criminal matter pending in South Carolina,[5] and any ability of Plaintiffs to fund the litigation without the insurance coverage is immaterial as to whether defendant insurers must advance defense costs.[6]

(b) The ability of the directors and officers charged with criminal offenses in South Carolina to access the funds provided by the D&O insurance policy at issue could have an impact on the legal strategies employed and the ability of the directors and officers to set forth potentially meritorious defenses to the Underlying Action.[7]

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[4] *HLTH Corp. v. Clarendon Nat'l Ins. Co.*, 2009 WL 2849779, at *23 (Del. Super. Aug. 31, 2009).

[5] *AT&T Corp.*, 2006 WL 1360934, at *1 (stating that the amount of money at issue is a factor in determining whether to certify an interlocutory appeal in the interests of justice).

[6] Although Fireman's Fund's Response to Certification of Interlocutory Appeal states that Plaintiffs must first exhaust the underlying policies and can then "dip into [their] ample cash reserves[,]" the money available to Plaintiffs to fund a defense is immaterial to certification of this appeal, which involves the duty of defendant insurers to advance costs and not Plaintiffs' potential ability to fund the litigation.

[7] *See Tafeen v. Homestore, Inc.*, 2005 Del. Ch. LEXIS 77, at *8 (Del. Ch. May 26, 2005) (stating that the failure to advance defense costs affects litigation strategy because the director will choose an affordable strategy over a potential alternative). Additionally,

(c) While interlocutory review at this point may not completely terminate the litigation, all parties moved for summary judgment or joined with other parties moving for summary judgment pursuant to Superior Court Rule 56(h) and represented that all issues raised in all motions for summary judgment were ripe for final adjudication on the merits. Therefore, a final resolution by the Supreme Court of whether the D&O policy at issue was a "renewal, replacement or successor in time" to a previous insurance policy and whether the Prior Notice Exclusion is applicable to bar advancement of defense costs will significantly affect the subsequent phases of litigation, the scope of discovery, the length and complexity of a potential trial, and it will conserve judicial resources by providing a framework for potential settlement discussions. [8]

(d) Finally, and although not directly related to the interests of justice exception under Supreme Court Rule 42(b)(v), Delaware courts recognize a public policy in favor of promptly resolving issues relating to advancement of defense costs.[9]

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even though Fireman's Fund's Response to Certification of Interlocutory Appeal states that Plaintiffs must first exhaust the underlying policies before its duty to advance costs arises, this argument is immaterial because Plaintiffs have a right to know how much money is available under the collective policies, so they can assess potential litigation strategies.

[8] In a similar case involving a D&O insurance policy, the Court considered remarkably similar factors to the ones discussed in this opinion and interlocutory review was ultimately granted by the Delaware Supreme Court. *See AT&T Corp.*, 2006 WL 1360934, at *1, *cert. granted*, *AT&T Corp. v. Faraday Capital Ltd.*, 918 A.2d 1104 (Del. 2007).

[9] *See, e.g.*, *Sun-Times Media Group, Inc. v. Royal & SunAlliance Ins. Co. of Canada*, 2007 WL 1811265, at *10 (Del. Super. Jun. 20, 2007) (resolving on summary judgment an issue involving advancement of defense costs). The advancement of defense costs

For the foregoing reasons, IT IS ORDERED that the Court's Prior Notice Order of August 31, 2009 (Dkt 268) is hereby certified to the Supreme Court of the State of Delaware for disposition in accordance with Rule 42 of that Court.[10]

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Richard R. Cooch

oc: Prothonotary

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under a D&O insurance policy appears analogous to advancement of defense costs under 8 *Del. C.* § 145, which also recognizes the necessity of prompt and efficient adjudication of the duty to advance defense costs. *See Tafeen*, 2005 Del. Ch. LEXIS 77, at *8 (discussing that necessity of resolving advancement of defense costs quickly); *see also Lipson v. Supercuts, Inc.*, 1996 Del. Ch. LEXIS 108 (Del. Ch. Sept. 10, 1996) (same).

[10] In a companion decision issued on September 30, 2009, the Court has also certified the Prior Acts Order for review by the Supreme Court of Delaware