IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

HLTH CORPORATION and EMDEON PRACTICE SERVICES, INC., Plaintiffs,	)	C.A. No. 07C-09-102 RRC
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 National Union et al. Leave to Appeal the "Prior Acts" Opinion of August 31, 2009

COOCH, J.

This 30th day of September, 2009, defendants National Union et al. having made application pursuant to Rule 42 of the Supreme Court for an Order certifying

an appeal from the Memorandum Opinion ("Opinion") denying 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 Acts Order" (because on August 31, 2009 the Court issued a related opinion referred to as the "Prior Notice 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 Acts Exclusion contained within the D&O policies did not bar advancement of defense costs because defendant insurers have "failed to meet [their] burden of establishing that the Prior Acts Exclusion acts as a "clear and unambiguous" bar to [Plaintiffs'] claims for coverage because, bearing the burden,

[1] Dkt 267

[2] Dkt 268

[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").

[defendant insurers have] failed to satisfactorily reconcile the conflicting terms of the Prior Acts Exclusion and Endorsement 13."[4]

2. Pursuant to Supreme Court Rule 42(b)(v), considerations of justice would be served by interlocutory review because of the following:[5]

(a) All movants moved for summary judgment pursuant to Superior Court Rule 56(h) and represented that all issues raised in the Motion for Summary Judgment were ripe for final adjudication. Therefore, resolution by the Supreme Court of whether the Prior Acts Exclusion acts as a "clear and unambiguous" bar to coverage will significantly affect the subsequent phases of litigation and has potential to terminate further litigation completely because a resolution in favor of defendant insurers would bar coverage for Plaintiffs' claims.[6]

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[4] *HLTH Corp. v. Clarendon Nat'l Ins. Co*., 2009 WL 2849777, at *23 (Del. Super. Aug. 31, 2009).

[5] Although defendant insurers' "interests of justice" arguments for certification to this Court of the Prior Acts Order are somewhat less compelling than the arguments of plaintiffs HLTH Corp. and Emdeon Practice Services, Inc. for Certification of Interlocutory Appeal of the Prior Notice Order, the Court notes that Plaintiffs do not affirmatively oppose certification of defendant insurers' interlocutory appeal, stating in the first paragraph of their response to Certification of Interlocutory Appeal that "Plaintiffs have no objection to the Court granting Defendants' Prior Acts Application if the Court also grants Plaintiffs' Application for Certification of an Interlocutory Appeal . . . ." *See* Plaintiffs Response To Cert. of Interlocutory Appeal.

[6] The Court notes that defendant insurers advance relatively few arguments on behalf of certifying this interlocutory appeal. Not all the criteria for certification discussed in the Court's accompanying certification of the Prior Notice Order apply to defendant insurers because defendant insurers do not need access to the funds to present a meritorious defense and pursuant to the D&O policies at issue, defendant insurers may recover the funds advanced to Plaintiffs if it is later found that the directors and officers charged with criminal offenses in South Carolina were not entitled to the funds. *See HLTH Corp. v. Clarendon Nat'l Ins. Co*., 2009 WL 2849779, at *9 (Del. Super. Aug. 31, 2009) ("Such advance payments by the **Insurer** shall be repaid to the Insurer by each and every **Insured** or **Organization,** severally according to their respective interests, in the event and to the extent that any such **Insured** or **Organization** shall not be entitled under this

(b) If the Delaware Supreme Court grants interlocutory review of the Prior Notice Order, review also by the Supreme Court of the Prior Acts Order will resolve two disputes involving related coverage issues.

(b) 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.[7]

For the foregoing reasons, IT IS ORDERED that the Court's Prior Acts Order of August 31, 2009 (Dkt 267) is hereby certified to the Supreme Court of the State of Delaware for disposition in accordance with Rule 42 of that Court.[8]

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Richard R. Cooch

oc: Prothonotary

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policy to payment of such **Loss.**"); *see also Sun-Times Media Group, Inc. v. Royal & Sunalliance Ins. Co. of Canada*, 2007 WL 1811265, at *12 (Del. Super. Jun. 20, 2007) (stating that even if exclusions were shown to apply at a later date, the future finding does not prevent present advancement of defense costs).

[7] *See, e.g.*, *Sun-Times*, 2007 WL 1811265, at *10 (resolving on summary judgment an issue involving advancement of defense costs). The advancement of defense costs 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 v. Homestore, Inc.*, 2005 Del. Ch. LEXIS 77, at *8 (Del. Ch. May 26, 2005) (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).

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