

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

PROVIDENCE SERVICE)
CORPORATION,)
)
v.)
)
ILLINOIS UNION INSURANCE)
COMPANY.)

C.A. No. N18C-06-114 MMJ CCLD

Submitted: July 29, 2019
Decided: August 7, 2019

ORDER DENYING LEAVE TO APPEAL
FROM INTERLOCUTORY ORDER

(1) Defendant Illinois Union Insurance Company has moved for an order certifying an interlocutory appeal to the Delaware Supreme Court. The determination of whether to certify an interlocutory appeal lies within the discretion of the Court and is analyzed under the criteria set forth in Supreme Court Rule 42(b).¹ An interlocutory appeal will not be certified unless the Court finds that its decision: (1) determines a substantial issue; (2) establishes a legal right; and (3) satisfies one of the five criteria set forth in Rule 42(b)(i)-(v). Under Rule 42(b)(i), the Court may look to the criteria established by Rule 41.

¹See, e.g., *Tortuga Cas. Co. v. Nat'l Fire Ins. Co. of Pittsburgh*, 1991 WL 247813, at *2 (Del.); *State v. Superior Court*, 141 A.2d 468, 471 (Del. 1968).

(2) Plaintiff brought this action for indemnification under an excess insurance policy for the settlement of a class action lawsuit. Plaintiff filed a motion for partial summary judgment, seeking dismissal of the counterclaim and affirmative defense on the Prior Acts or prior Notice Exclusion in the underlying policy. Defendant filed a cross-motion for summary judgment, asserting that it owed no indemnity obligation by virtue of the Prior Acts or Prior Notice Exclusion.

(3) By Opinion dated July 9, 2019, this Court held:

The Court finds that the professional incidents in the *Bell* Action and the *Rodriguez* Action are not “related” for purposes of the Prior Acts or Prior Notice Exclusion. **THEREFORE**, Plaintiff’s Motion for Partial Summary Judgment is **hereby GRANTED**. The Court declares that the Prior Acts or Prior Notice Exclusion does not exclude coverage for the *Rodriguez* Action settlement, and Illinois Union’s Fourth Affirmative Defense and First Counterclaim are **hereby DISMISSED**. Defendant’s Cross-Motion for Summary Judgment is **hereby DENIED**.

(4) Defendant argues that interlocutory appeal pursuant to Supreme Court Rule 42(b) is justified because application of the Prior Acts or Prior Notice Exclusion is the main question of law in this case. Additionally, the criterion of Rule 42(b)(iii)(B) are met because there are conflicting trial court decisions on the question of law addressed. Further, Defendant contends that review may terminate the litigation or otherwise serve considerations of justice pursuant to Rules 42(b)(iii)(G) - (H) and 42(b)(v).

(5) Plaintiff opposes certification of the interlocutory appeal. Plaintiff argues that Delaware decisions are not in conflict. Plaintiff sets out the relevant decisions and asserts that the differences in outcome are the result of factual, as opposed to legal distinctions. Further, Plaintiff contends, should Defendant be unsuccessful in its interlocutory appeal, the litigation will continue. This Court still would have to address issues related to the Fee Disputes Exclusion and the Criminal Violations Exclusion.

(6) The Court finds that the July 9, 2019 Opinion determines a substantial issue and establishes a legal right.² However, the analysis was not based on a choice of application among conflicting decisions. The Opinion addressed relevant legal precedent in the context of the unique facts presented. The Court's decision was based on a detailed comparison of the two underlying lawsuits that were alleged to be "related" for purposes of coverage under the Policy.

(7) The Court finds that interlocutory review in this case may not substantially reduce further litigation and otherwise serve considerations of justice.³ Defendant elected to cross-move for summary judgment on the sole issue of the Prior Acts or Prior Notice Exclusion. By doing so, Defendant took the risk that it would be unsuccessful and face the possibility of proceeding with litigation of the Fee

²Supr. Ct. R. 42(b).

³See Supr. Ct. R. 42(b)(iii).

Disputes Exclusion and the Criminal Violations Exclusion. The Court addressed this strategy and the associated risks with all counsel at the time of oral argument.

THEREFORE, the Court finds that Defendant has failed to demonstrate that any of the five criteria set forth in Delaware Supreme Court Rule 42(b)(i)-(v) require that the Court exercise its discretion to certify interlocutory appeal. The Application for Certification of an Interlocutory Appeal is hereby **DENIED**.

IT IS SO ORDERED.



The Honorable Mary M. Johnston