

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

RELIANCE INSURANCE COMPANY,)
)
Plaintiff/Counterclaim)
Defendant,)
)
v.)
)
PLUM CREEK TIMBER COMPANY, L.P.,)
PLUM CREEK TIMBERLANDS, L.P.,)
PLUM CREEK MANAGEMENT)
COMPANY, L.P., P.C. ADVISORY CORP. I,) C.A. No. 99C-11-263 MMJ
P.C. ADVISORY PARTNERS, I, L.P., and)
PLUM CREEK TIMBER COMPANY, INC.,)
)
Defendants/Counterclaim)
Plaintiffs/Third-Party)
Plaintiffs,)
)
v.)
)
WASHINGTON INSURANCE GUARANTY)
ASSOCIATION,)
)
Third-Party Defendant.)
)

Submitted: June 28, 2004
Decided: June 30, 2004

ORDER

*Upon Motion for Certification of Interlocutory Appeal
of Third-Party Defendant
Washington Insurance Guaranty Association*

DENIED

1. By Opinion dated April 15, 2004, the Court granted Third-Party Defendant Washington Insurance Guaranty Association's ("WIGA") Motion for Partial Summary Judgment as to the Plum Creek Defendants' Washington Consumer Protection Act Counterclaim, and dismissed Plum Creek's Washington Consumer Protection Act Counterclaim. Plum Creek's Motion for Partial Summary Judgment on the issue of WIGA's statutory liability encompassing all covered claims tendered by Plum Creek to Reliance was granted. The Court held that WIGA is obligated to make the approximately 65,000 Plum Creek Unitholders whole, in a total amount not exceeding the policy's \$25,000,000 limit, prorated among the individual Unitholders, with no individual Unitholder receiving an amount in excess of the statutory cap of \$299,900. Third-Party Defendant WIGA's Motion for Partial Summary Judgment as to Plum Creek's Bad Faith Counterclaim was granted and Plum Creek's Bad Faith Counterclaim was dismissed.

2. On April 22, 2004, Third-Party Defendant WIGA filed a Motion for Reargument. By Order dated June 10, 2004, the Court held that WIGA had failed to demonstrate that the Court overlooked a precedent or legal principle that would have a controlling effect, or that it misapprehended the law or the facts in a manner affecting the outcome of the decision. The Motion for Reargument of Third-Party Defendant Washington Insurance Guaranty Association was denied.

3. WIGA has moved for an order certifying an interlocutory appeal to the Delaware Supreme Court of this Court's April 15, 2004 summary judgment decision and the June 10, 2004 Order denying WIGA's motion for reargument. Supreme Court Rule 42(b) provides the criteria for determining whether an issue should be certified for interlocutory appeal.¹ To consider whether certification is proper, one of the five criteria set forth in Supreme Court Rule 42(b)(i) - (v) must be satisfied. Under Rule 42(b)(i), the Court may look to the criteria established by Rule 41. The issues raised by WIGA in its motion are: (1) whether the question

¹Supreme Court Rule 42(b)(i)-(v) reads as follows:

(b) *Criteria to be applied in determining certification and acceptance of interlocutory appeals.* No interlocutory appeal will be certified by the trial court or accepted by this Court unless the order of the trial court determines a substantial issue, establishes a legal right and meets 1 or more of the following criteria:

- (i) Same as certified question. Any of the criteria applicable to proceedings for certification of questions of law set forth in Rule 41; or
- (ii) Controverted jurisdiction. The interlocutory order has sustained the controverted jurisdiction of the trial court; or
- (iii) Substantial issue. An order of the trial court has reversed or set aside a prior decision of the court, a jury, or an administrative agency from which an appeal was taken to the trial court which had determined a substantial issue and established a legal right, and a review of the interlocutory order may terminate the litigation, substantially reduce further litigation, or otherwise serve considerations of justice; or
- (iv) Prior judgment opened. The interlocutory order has vacated or opened a judgment of the trial court; or
- (v) Case dispositive issue. A review of the interlocutory order may terminate the litigation or may otherwise serve considerations of justice.

of law resolved by the Court is one of first impression (Rule 42(b)(i), Rule 41(b)(i)); (2) whether the decisions of the trial courts are conflicting upon the question of law (Rule 41(b)(ii)); and (3) whether the interlocutory order may terminate the litigation, substantially reduce further litigation or otherwise serve considerations of justice (Rule 42(b)(v)).

4. The pivotal issue raised by the motions for summary judgment was the *amount* WIGA is obligated to provide as coverage for Plum Creek's outstanding liability to the Unitholders. The parties agreed that, for purposes of this motion, the Court need not resolve the issue of whether coverage by WIGA is available in the first instance. Plum Creek asserts that WIGA must pay each of the approximately 65,000 underlying claims asserted against Plum Creek, up to a maximum amount of \$299,900 per claim. WIGA contends that WIGA's liability to Plum Creek is limited to a total of \$299,900. This dispute presented a legal question, appropriate for resolution by summary judgment. The legal issue was determined primarily by interpreting the Washington Insurance Guaranty Association Act.

5. It is not disputed that the Court's interpretation of the Washington Insurance Guaranty Association Act was a question of law of the first instance in Delaware. Therefore, for purposes of this motion, the Court need not address

whether the standard set forth in Rule 41 (b)(ii) (conflicting decisions) applies to a split among Delaware trial courts or among the trial courts of other jurisdictions.

6. However, by agreement of the parties, the Court did not resolve the issue of whether coverage by WIGA is available in the first place. Therefore, the interlocutory order requested by WIGA would not terminate the litigation. WIGA has suggested that an interlocutory appeal would not delay the proceedings because “WIGA will continue to litigate the issue of coverage under the policy while any interlocutory appeal is pending.” By its own admission, WIGA acknowledges that there is more to be litigated.

7. WIGA has advanced the issue of whether WIGA has sufficient funds to pay Plum Creek’s claims should coverage under the policy be found. In that regard, WIGA has raised the specter that WIGA would be forced to levy an assessment against its member insurers, resulting in an adverse impact “on each and every one of the millions of residents and businesses in the State of Washington which carries insurance, as the member insurers will pass on WIGA’s assessment to their customers in the form of increased premiums.” While it theoretically is possible that such a levy might occur, there can be no danger of adverse results to any State of Washington residents or businesses until all of the issues in this case, including the threshold coverage question, are finally resolved

by settlement, or trial on the merits followed by any appeal. This action has been pending since November 30, 1999. There is no reason why all of the issues presented by this case should not be subject to simultaneous appellate review.

THEREFORE, Third-Party Defendant Washington Insurance Guaranty Association, having failed to demonstrate that Delaware Supreme Court Rule 42(b) criteria apply, the Motion for Certification of Interlocutory Appeal is hereby **DENIED**.

IT IS SO ORDERED.

The Honorable Mary M. Johnston