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Retirement Provider's Disgorgement Is Insurable, Judge Says

By **Jeff Sistrunk**

Law360, Los Angeles (November 3, 2016, 11:01 PM EDT) -- A Delaware judge has ruled that a retirement services provider's settlements of class actions seeking disgorgement of alleged profits from delaying clients' transfer and withdrawal requests are insurable under its professional liability policies, while finding that several other insurance coverage issues must proceed to trial.

In a multi-pronged decision made public this week, Judge Jan Jurden of the Delaware Superior Court agreed with TIAA-CREF Individual & Institutional Services LLC's assertion that its settlements resolving a trio of class action suits constitute an insurable loss under New York law.

TIAA-CREF's five insurers had argued that the deals were uninsurable disgorgement and therefore not covered under their policies. But Judge Jurden said that the suits against TIAA-CREF are unlike the New York court cases cited by the insurers, which all involved Securities and Exchange Commission orders definitively tying a company's improperly acquired profits to a government-mandated disgorgement payment.

"The court finds no conclusive link between the settlements in the underlying actions and wrongdoing by TIAA-CREF that would render the settlement agreements uninsurable disgorgement," Judge Jurden wrote.

However, the judge said that a fact-finder must resolve other disputes in the case, including two insurers' claims that TIAA-CREF improperly failed to obtain their consent for the settlements and whether the retirement provider's defense costs in the underlying actions were reasonable.

The nonprofit TIAA-CREF provides retirement accounts, annuities, and life and other insurance to teachers and other employees of nonprofit colleges, universities and research institutions.

Beginning in 2007, TIAA-CREF was hit with three class actions claiming it excessively delayed processing account holders' requests for transfers or withdrawals of funds. The plaintiffs in each suit sought the difference in the value of their accounts between the date a transfer or withdrawal was requested and the date on which the transaction was actually processed.

TIAA-CREF ultimately settled the three suits for tens of millions of dollars without admitting any liability or wrongdoing, while incurring millions more in defense costs, according to court documents.

TIAA-CREF had multi-tiered professional liability insurance coverage "towers" in place for periods spanning from 2007 to 2008 and 2009 to 2010, with Illinois National Insurance Co. providing a primary layer of coverage in each period and St. Paul Mercury Insurance Co., Ace American Insurance Co., Arch Insurance Co. and Zurich American Insurance Co. providing varying layers of excess coverage.

The insurers refused to provide coverage for the underlying settlements, claiming that the deals constituted uninsurable disgorgement pursuant to New York public policy.

Judge Jurden disagreed with the insurance companies' contention. In all of the cases relied upon by the insurers, the judge said, the policyholder's disgorgement payments were conclusively linked to an improper acquisition of funds. TIAA-CREF, on the other hand, denied any liability under the terms of its settlements, and it didn't face any claims of wrongdoing by the SEC or another government agency, Judge Jurden said.

The judge also concluded that the policies' exclusion for claims related to TIAA-CREF's "commingling of funds" doesn't apply to bar coverage, as the retirement provider didn't mix clients' funds with its own. Furthermore, Judge Jurden said that the three suits constitute related claims and implicate coverage under the 2007-2008 policy period, when the first suit was filed.

However, the judge said that more information is needed to determine whether TIAA-CREF was required to seek Arch's and St. Paul's consent to make settlement payments, and whether TIAA-CREF's defense costs were reasonable.

The insurance companies have sought to appeal Judge Jurden's decision that the settlements are an insurable loss, according to court records.

An attorney for TIAA-CREF declined comment, while representatives for Illinois National, Arch, Ace, St. Paul and Zurich did not immediately respond to requests for comment.

TIAA-CREF is represented by Robin L. Cohen, Adam S. Ziffer and Michelle R. Migdon of McKool Smith PC and by Jennifer C. Wasson and Andrew H. Sauder of Potter Anderson & Corroon LLP.

Illinois National is represented by Lawrence J. Bistany, Timothy S. Martin and Celestine M. Montague of White and Williams LLP.

Arch is represented by Michael L. Zigelman and Daniel H. Brody of Kaufman Dolowich & Voluck LLP and Chase T. Brockstedt of Baird Mandalas Brockstedt LLC.

Ace American is represented by James W. Semple of Cooch & Taylor PA and Edward P. Gibbons and Tiffany S. Saltzman-Jones of Walker Wilcox Matousek LLP.

St. Paul is represented by Joseph Boury of Litchfield Cavo LLP and Josiah R. Wolcott of Connolly Gallagher LLP.

Zurich is represented by Ronald P. Schiller and Daniel J. Layden of Hanglely Aronchick Segal Pudlin & Schiller and Bruce W. McCullough of Bodell Bove LLC.

The case is TIAA-CREF Individual & Institutional Services LLC et al. v. Illinois National Insurance Co. et al., case number N14C-05-178 JRJ CCLD, in the Superior Court of the State of Delaware.

--Editing by Philip Shea.
