

Del. Judge Grants Ex-Xerox Unit New Trial, Scolds AIG Attys

By **Daniel Tay**

Law360 (February 28, 2023, 9:57 PM EST) -- A Delaware judge set aside a verdict finding an ex-Xerox unit that paid Texas a \$236 million Medicaid fraud-related settlement tried to defraud its insurers into providing coverage, citing multiple instances of misconduct by carrier counsel in an opinion unsealed Tuesday.

Counsel for AIG, one of the insurers in the case, inaccurately argued that it never had coverage obligations to Conduent State Healthcare in direct contradiction of a pretrial holding, Delaware Superior Court Judge Mary Johnston said in her opinion, originally decided Feb 14. The carrier's counsel also repeatedly referred to a document "unequivocally deemed inadmissible" and tried to get the jury to draw improper inferences from attorney-client privileged information, the judge said, reversing a jury verdict from February 2022.

"In almost 20 years on this bench, I have never set aside a jury verdict," Judge Johnston said. However, "in order to prevent manifest injustice, exceptional circumstances exist demonstrating that justice would miscarry if the jury's verdicts were allowed to stand," she added.

Judge Johnston held before trial that coverage did exist for Conduent's defense costs in the underlying lawsuit and that the ex-Xerox unit had made a facial showing that it might be entitled to coverage for indemnification. Despite that holding, counsel for AIG repeatedly inferred that it was never obliged to cover Conduent, unduly prejudicing the jury against the company, the judge said.

Conduent was also barred from presenting evidence to the jury of the court's pretrial holding that AIG had breached its duty to defend because the court found it was not relevant to the issues before the jury, the judge said in her opinion.

Robin Cohen, counsel for Conduent, told Law360 she was pleased with the judge's decision.

"You had a situation where AIG was accusing, inappropriately, our client of fraud, yet they were misleading the jury throughout the trial into believing that AIG did not have an obligation to defend the underlying suit when in fact, the judge had already ruled prior to the trial that it did," Cohen said. "So it tainted the whole process."

Counsel for AIG and the other insurers did not respond to requests for comment.

Beyond inappropriately inferring that AIG had no coverage obligations, counsel for AIG also repeatedly

referred to a press release by the Texas attorney general's office after the court ruled it was not admissible due to it being "replete with factual conclusions about issues that were hotly-disputed at trial."

The carrier's attorneys also argued that the jury should look at information from Conduent's privilege log and infer that the company discussed how to manufacture insurance coverage with its counsel, which was improper use of that exhibit, Judge Johnston said. The privilege log was only to be used to confirm facts like the dates of certain meetings and their attendees, the judge said.

The coverage dispute stems from an underlying suit brought in May 2014 by Texas against Conduent, then known as ACS State Healthcare LLC, after the state began investigating the company in 2012. According to the 2014 suit, the company signed off on \$1.1 billion in claims for orthodontic services, a "substantive percentage" of which were allegedly paid in violation of Medicaid policies.

According to the Texas attorney general's office, claims were being approved for kids' braces when, under Texas law, only patients with acute cases posing a health risk receive coverage under Medicaid. The company is alleged to have approved payments for cosmetic orthodontics that were not medically necessary. The lawsuit accused the company of falsely reassuring the state health department that each request for orthodontics was properly reviewed by a qualified person.

Texas and Conduent reached a settlement agreement in 2019 under which the company would pay \$236 million. However, according to the insurers' counsel, Conduent demanded that the state attorney general amend its petition, which originally contained a claim for fraud under the Texas Medicaid Fraud Prevention Act, to include two new claims for breach of contract and negligence as a condition for settling.

The company also demanded that the settlement be allocated to those new claims so that it could "pretend" it was not settling a fraud claim or paying a penalty, which would not be covered under the company's policies, the insurers' counsel said.

Conduent's counsel countered during the trial that it could only settle "on a non-fraud basis" to protect its \$2 billion government contract business. A settlement on a fraud claim or a payment of a penalty for fraud would render the company ineligible for government contracts in many states and leave the company uncompetitive in others, the company's counsel said.

Conduent is grateful for the court's decision, said Sean Collins, spokesman for Conduent. The company's "steadfast position" is that there was no fraud in seeking insurance coverage it was entitled to, Collins said.

"We knew that overturning a jury determination is extremely rare but felt strongly that the jury had been misled and justice was not remotely served a year ago," Collins said.

Conduent is represented by Robin Cohen, Adam Ziffer, Orrie Levy, Cindy Jordano and Keith McKenna of Cohen Ziffer Frenchman & McKenna, Jennifer Wasson, David Seal and Carla Jones of Potter Anderson & Corroon LLP.

The insurers are represented by Maaren Shah and Michael Carlinsky of Quinn Emanuel Urquhart & Sullivan LLP, James Danfor and Robert Harrell of Mayer Brown LLP, Neal Glazer and Izak Weintraub

of London Fischer LLP, Robert Katzenstein and Julie O'Dell of Smith Katzenstein & Jenkins LLP and Peter Kyle and John Reed of DLA Piper LLP.

The case is Conduent State Healthcare LLC v. AIG Specialty Insurance Co. et al., case number N18C-12-074, in the Superior Court for the State of Delaware.

--Editing by Nick Petruncio.

All Content © 2003-2023, Portfolio Media, Inc.