

Judge denies United Health's \$28.2 million claim against Lexington Insurance

BY SHERI QUALTERS

A Boston federal judge's recent denial of a \$28.2 million professional liability insurance claim offers guidance on what courts consider adequate notice of an insurance claim.

In her Feb. 15 ruling in *Lexington Insurance Co. v. United Health Group Inc.*, Judge Nancy Gertner of the District of Massachusetts granted summary judgment in favor of Boston-based Lexington Insurance.

Lexington filed a declaratory judgment action in April 2009 asking the court to rule that it wasn't on the hook for the \$28 million that United Health spent on a South Carolina state court insurance case.

The contract among the parties called for United Health to self-insure each claim up to \$3 million, for a total of \$42.5 million. Lexington's coverage would cover up to an additional \$27 million per claim. Executive Risk Insurance Inc. covered claims of more than \$30 million.

A doctor's group filed the underlying South Carolina state court commercial case against United Health in 2001. The group's legal claims were centered around United Health's alleged breach of contractual and fiduciary duties to the group. During the seven-year dispute, the parties brought the case to that state's supreme court, then into arbitration and mediation. The parties settled on May 5, 2008.

According to the ruling, Lexington Insurance alleged that the first time it heard of the claim was when it received an overnight letter that United Health's vice president of risk management, Marilyn Nevin, sent on April 22, 2008. The letter informed Lexington Insurance that United Health planned to settle the South Carolina case for \$8.5 million and that United Health's legal costs totaled \$19.7 million.

United Health argued that it satisfied the



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policy's broad language by submitting the claim information to Lexington Insurance on regular so-called loss run reports, which listed the claim in question as one line item of thousands.

According to Gertner's ruling however, the data about the South Carolina case was inaccurate or incomplete on multiple reports. Also, United stopped sending reports about the claim to Lexington Insurance between June 2006 and April 2008.

Gertner applied Minnesota law, as required by the policy. United Health is also headquartered in that state.

Gertner concluded that the policy allowed United Health to use the loss run reports to notify Lexington Insurance of the claims.

"As a sophisticated insurer, Lexington had the language tools to include very specific notice requirements into the contract and chose not to do so," Gertner wrote.

But Gertner also found that the errors in the reports and the two-year reporting gap "had extraordinary consequences to Lexington."

"There was no communication about the claim — loss run or otherwise — in the

interim, a clear violation of the ongoing notice requirement of [the policy]," Gertner wrote. "Lexington never had the opportunity to associate in the litigation — the purpose of ongoing notice through loss run reports — until the case was about to be settled."

This ruling highlights the importance of notice provisions in professional liability policies, particularly when the insured self-manages its own claims and the policy includes a significant self-insured retention, said Tamara Smith Holtslag, a Boston partner at Taylor Duane Barton & Gilman and one of Lexington Insurance's lawyers on the case.

Giving notice to an insurer is also critical when the insured knows the claim will exceed the self-insured threshold, she said. "Under these facts, among others, Lexington is not required to 'foot the bill' as Judge Gertner stated, where it had no opportunity to protect its interests."

Holtslag also said Gertner's conclusion that the loss run reports could provide notice of a claim "was very specific to the facts of this particular case and the specific policy between Lexington and United."

"Her analysis is consistent with the way other courts have treated whether loss reports constitute notice of claims...on a case by case basis," Holtslag said.

Anna Engh, a litigation partner at Washington-based Covington & Burling and one of United Health's lawyers on the case, declined to comment. United Health did not return a call about the ruling.

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