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**RICO CLAIMS AND EXTRATERRITORIALITY ISSUES IN GEORGIA HEALTH INSURANCE CONTRACT
RESCISSION**

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The Georgia Court of Appeals is expected to rule soon on the rights of an individual insured to pursue a health insurance contract dispute as a tort claim under the Georgia Racketeer Influenced and Caught Organizations Act (The Georgia Rico Law).⁽¹⁾

In the case of *Clark v. Security Life Insurance Company*⁽²⁾, tried last year in the Superior Court of Early County, Georgia, a judgment was rendered against Security Life Insurance Company (Security). The jury's verdict included \$4,010,000 for the loss of insurance coverage (\$2,010,000 for Mr. Clark and \$2,000,000 for Ms. Clark), \$31,500 each for their mental suffering, and \$792,902.08 for attorneys' fees and expenses of litigation. This amount (except for the attorneys' fees) was trebled under the Georgia Rico Law for a total of \$12,219,000. Additionally, the jury awarded \$1.5 million in punitive damages. The plaintiffs asserted claims for violation of the Georgia Rico Law, as well as for fraud and deceit, wrongful interference with contractual relations, breach of covenants of good faith and fair dealing, breach of insurance contract and negligence. The breach of contract claim was later dismissed as plaintiffs elected to take judgment on their Rico claims.

The case arose out of Security's rescission of a health insurance policy issued to the Clarks with maximum lifetime benefits of \$2,000,000 coverage for each, plus a \$10,000 death benefit for Mr. Clark. The Clarks were issued a certificate of coverage in Georgia under a master policy approved by the Mississippi Insurance Department and issued to the Multiple Unit Security Trust 11 (MUST 11), a trust domesticated in Mississippi. Neither the master policy nor the certificate were filed with or approved by the Georgia Insurance Department. Following Mr. Clark's submission of a claim for medical expenses, Security reviewed his medical history which disclosed material discrepancies between the representations on his application for coverage and his true medical history of severe cardiovascular problems. Security rescinded the Clarks' coverage and mailed them a refund check for \$2,856.14 which was not negotiated.

Evidence presented at the trial revealed that Security's agent visited the Clarks in Damascus, Georgia, and sold them medical coverage under Security's Insight Answer Plan, convincing them to terminate their existing health insurance coverage with National Health Insurance Company. The Clarks signed an application responding to the medical questions and disclosing Mr. Clark's history of treatment for arteriosclerosis. This signed application was not submitted to Security and instead an application containing no health problems was forged by Security's agent and submitted to Security, upon which coverage was issued. After confirming in discovery that the Clarks had not been involved in submitting false medical information, Security offered to pay Mr. Clark's past medical bills and reinstate the policy under a reservation of rights. The Clarks rejected the offer, choosing instead to litigate tort and Rico claims.

O.C.G.A. 16-4-4 of the Georgia Rico Law provides:

(a) It is unlawful for any person, through a pattern of racketeering activity or proceeds derived therefrom, to acquire or maintain, directly or indirectly, any interest in or control of any enterprise, real property, or personal property of any nature, including money.

(b) It is unlawful for any person employed by or associated with any enterprise to conduct or participate in, directly or

(b) It is unlawful for any person employed by or associated with any enterprise to conduct or participate in, directly or indirectly, such enterprise through a pattern of racketeering activity.

(c) It is unlawful for any person to conspire or endeavor to violate any of the provisions of subsection (a) or (b) of this Code section. (Code 1933, 26-3403, enacted by Ga. L. 1980, p. 405, 1; Ga. L. 1982, p. 1385, 3, 9; Ga. L. 1984, p. 22, 16.)

O.C.G.A. 16-14-3 provides in part as follows:

(6) "Enterprise" means any person, sole proprietorship, partnership, corporation, business trust, union chartered under the laws of this state, or other legal entity; or any unchartered union, association, or group of individuals associated in fact although not a legal entity; and it includes illicit as well as licit enterprises and governmental as well as other entities.

(8) "Pattern of racketeering activity" means engaging in at least two incidents of racketeering activity that have the same or similar intents, results, accomplices, victims, or methods of commission or otherwise are interrelated by distinguishing characteristics and are not isolated incidents, provided at least one of such incidents occurred after July 1, 1980, and that the last of such incidents occurred within four years, excluding any periods of imprisonment, after the commission of a prior incident of racketeering activity.

(9) (A) "Racketeering activity" means to commit, to attempt to commit, or to solicit, coerce, or intimidate another person to commit any crime which is chargeable by indictment under the following laws of this state:

(viii) Code Section 16-9-1, relating to forgery in the first degree;

(ix) Article 1 of Chapter 8 of this title, relating to theft;

(xxix) Any conduct defined as "racketeering activity" under 18 U.S.C. Section 1961 (1)(A), (B), (C), and (D);

Plaintiffs alleged a pattern of racketeering activity committed by Security by unlawfully appropriating Plaintiffs' property with intent to deprive them of their property in violation of Georgia criminal statutes O.C.G.A. 16-8-2 (theft by taking), O.C.G.A. 16-183 (theft by deception), O.C.G.A. 16-19-1 (forgery in the first degree) and 18 U.S.C. 1341 (mail fraud). Specifically, plaintiffs contend that Security sold Insight Answer to plaintiffs illegally, since it was not approved by the Georgia Insurance Department, and used the mails and interstate wires to steal plaintiffs' premiums. Rejecting the arguments that there was no evidence Security had the "general criminal intent" for these offenses, the court held that the criminal conduct and intent of Security's agent who forged the application could be implied to Security and so instructed the jury.

Security argued that O.C.G.A. 33-4-6 provides the exclusive remedy for wrongful rescission claims. This statute provides for payment of claims, plus a penalty of 25% of the loss, plus attorneys' fees if an insurer refuses to pay a loss within 60 days after demand and a finding is made that such refusal was in bad faith.

The Court directed a verdict of "yes" to the following questions on the jury's verdict form:

1. Do you find by a preponderance of the evidence that the defendant wrongfully rescinded the plaintiffs' insurance coverage?

2. Do you find by a preponderance of the evidence that the plaintiffs were injured or damaged as a result of such wrongful rescission?

The jury then proceeded to find that the defendant committed a fraud on the plaintiffs, acted in bad faith, and had been stubbornly litigious or put the plaintiffs to unnecessary trouble and expense.

On the Rico predicate offenses, the jury found that the crimes of theft by taking, theft by deception, forgery in the first degree, false statements, perjury, mail fraud and wire fraud had been established.

The jury further found that the defendant violated the Rico Law by acquiring and marketing an interest in or control over two enterprises, Multiple Unit Security Trust 11 and Insurers Administrative Corporation, through a pattern of racketeering activity. Insurers Administrative Corporation was the third party administrator for the Insight Answer plan in Georgia and also a co-defendant who settled with plaintiffs prior to trial.

On the question of extraterritorial jurisdiction, Security argued that Georgia had no extraterritorial jurisdiction which required that the Mississippi group policy or the certificates to be issued thereunder be filed and approved in Georgia. O.C.G.A. 33-24-9(a) provides in part:

No basic insurance policy or annuity contract form or application form where a written application is required and is to be made a part of the policy or contract or printed rider or endorsement form or form of renewal certificate shall be delivered or issued for delivery in this state unless the form has been filed and approved by the Commissioner....

"Policy" is defined as ". . . the written contract of or written agreement for or effecting insurance. The term includes all clauses, riders, endorsements, and papers attached or issued and delivered for attachment to the contract or agreement and made a part of the contract or agreement."⁽³⁾

Security contends that no policy was issued in Georgia, only a certificate; and, therefore, the foregoing provisions do not apply, arguing that a certificate issued in this state under a group policy issued to a policyholder outside Georgia does not come within the definition of a "policy."

Georgia Insurance Department regulations exempt from the filing requirements all group accident and health policies except as provided in O.C.G.A. 33-30-1(5) at the discretion of the Commissioner.⁽⁴⁾ O.C.G.A. Sect. 33-3-1(5) authorizes a group health insurance policy to be issued to cover a group which is substantially similar to the groups enumerated in the statute and which, in the discretion of the Commissioner, may be subject to the issuance of a group accident and sickness policy or contract.

Security's Insight Answer plan would be considered a discretionary group plan since its sales were directed at individuals and families who normally were not eligible for group coverage under any of the groups enumerated in O.C.G.A. 33-30-1. Any such group policy issued to a master policyholder in Georgia would not be exempt under the foregoing regulation and would require the approval of the Commissioner. The question remains, however, as to whether approval is required for such a master policy issued to a policyholder outside the state of Georgia under which certificates of insurance are issued to Georgia residents.

On October 6, 1988, then Georgia Insurance Commissioner Warren Evans issued Bulletin 88-E-1 entitled "Extraterritorial Jurisdiction" as follows:

It is the position of the Georgia Department of Insurance that it has extraterritorial jurisdiction over all group health policies that are issued to trusts situated outside the State of Georgia covering insureds within the State of Georgia, unless such plans are subject to the exclusive jurisdiction of the federal government.

Historically, the Bulletin has not been the basis for requiring out-of-state group health insurance policies to be filed and approved in Georgia. It has, however, been the basis for requiring that any insurance sold through out-of-state trusts to insureds in Georgia contain all the mandated benefits under Georgia laws and that its rates comply with Georgia's standards and requirements for rating of small groups of 50 or fewer "employees, members, or enrollees."⁽⁵⁾ It is interesting to note that the 1997 session of the Georgia legislature added a new provision which, effective July 1, 1997, extends the provisions of O.C.G.A. Chapter 30, pertaining to group health insurance, to certificates of coverage issued or delivered in Georgia.⁽⁶⁾ This change clarified Bulletin 88-E-1 with respect to required *content* of coverage sold in Georgia. No legislative changes were made in Code provisions relating to filing and approval of forms.

Ruling on Security's motion for summary judgment, the trial court held that there was ample evidence supporting plaintiffs' fraud and deceit claims since it was undisputed that its Insight Answer plan was not filed with or approved by the Georgia Insurance Commissioner. The court found that Security permitted its agents to solicit applications for this medical insurance plan, in violation of Georgia law, knowing that the plan did not comply with the requirements of the Georgia Insurance Code. Rejecting Security's argument that Georgia does not have extraterritorial jurisdiction over the Insight Answer policy, the court ruled that Insight Answer was in all respects like individual insurance and that since Georgia laws and regulations

court ruled that Insight Answer was in all respects like individual insurance and that since Georgia laws and regulations require that individual policies be filed with the Georgia Insurance Department and approved before they may be lawfully sold in Georgia, the sale of Insight Answer in Georgia was not lawful.

In its rulings the court found that a Maryland case, *Guardian Life Insurance Company v. Commissioner*,⁽⁷⁾ was persuasive. In *Guardian*, the only reported case on the point, it was held that the public policy does not permit the law of a foreign state to govern a health insurance contract sold in Maryland by employing the subterfuge of delivering a master group policy to an illusory out-of-state trust established by the insurer to avoid compliance with Maryland law.

Plaintiffs alleged that Security could not legally underwrite individual applicants under a group insurance plan. Ultimately, the Court ruled that such underwriting was illegal and so instructed the jury. The argument was that underwriting is permitted only on individual health insurance policies. No Georgia statute or regulation prohibits insurers from underwriting individual insureds under group policies, although the *amounts of* insurance under a policy issued to an entity providing a multiple welfare arrangement must be based upon some plan precluding individual selection either by the employees, employers, or trustee.⁽⁸⁾

Georgia's small group pooling law specifically permits substandard rating in accordance with recognized underwriting practices⁽⁹⁾ and provides for waivers for named impairments for members and eligible dependents and issuance of coverage at substandard rates for those not qualifying at standard rates.⁽¹⁰⁾ If, according to recognized underwriting practices, a waiver may not be offered, coverage may be declined if the balance of the small group is accepted.⁽¹¹⁾

Georgia's group health insurance policies are required to contain a provision that in the absence of fraud all statements made by the policyholder or insured person shall be deemed representations and not warranties and that no statement made for the purpose of effecting insurance shall void the insurance or reduce the benefits unless contained in a written instrument signed by the policyholder or insured person.⁽¹²⁾ An individual application shall not be required, however, for a person to be covered under a blanket accident and sickness insurance policy.⁽¹³⁾ These provisions clearly indicate that the underwriting of individual insureds is contemplated and that insurers may accept or reject individuals on medical grounds under group health insurance policies as distinguished from blanket health insurance policies. In its supplemental brief filed with the Georgia Court of Appeals, Security made the point that the contention that Georgia law does not permit individual underwriting is the lynchpin of plaintiffs' tort and Rico claims; that the contention is baseless and without support in Georgia law; and that the tort and Rico claims, therefore, fail as a matter of law.

Conclusion

The appellate court decision in this case could impact the resolution of insurance contract rescission issues in several other pending Georgia cases in both state and federal courts. Hopefully, some clarity will result from the court's decision with respect to the application of the Rico laws and the parameters of the Insurance Commissioner's extraterritorial jurisdiction relating to the regulation of insurance sold in Georgia through out-of-state group health insurance plans.

Endnotes

1. O.C.G.A. 16-14-1, *et seq.*
2. Civil Action No. 95-V-261.
3. O.C.G.A. 33-24-1 (a).
4. GID Reg. 120-2-25-.05(3)(a).
5. O.C.G.A. 33-30-12.
6. O.C.G.A. 33-30-1.1.

7. 446 A.2d 114 (Md. App. 1982).

8. O.C.G.A. 33-30-1(6)(B).

9. O.C.G.A. 33-30-12(d).

10. O.C.G.A. 33-30-12(e)(1).

11. O.C.G.A. 33-30-12(e)(2).

12. O.C.G.A. 33-30-4(l).

13. O.C.G.A. 33-30-8.