



**COZEN
O'CONNOR®**

INSURANCE COVERAGE

Alert!

News Concerning Recent Insurance Coverage Issues

April 7, 2008

www.cozen.com

PRINCIPAL OFFICE:
PHILADELPHIA
(215) 665-2000
(800) 523-2900

NEW YORK MIDTOWN
(212) 509-9400
(800) 437-7040

ATLANTA
(404) 572-2000
(800) 890-1393

NEWARK
(973) 286-1200
(888) 200-9521

CHARLOTTE
(704) 376-3400
(800) 762-3575

SANTA FE
(505) 820-3346
(866) 231-0144

CHERRY HILL
(856) 910-5000
(800) 989-0499

SAN DIEGO
(619) 234-1700
(800) 782-3366

CHICAGO
(312) 382-3100
(877) 992-6036

SAN FRANCISCO
(415) 617-6100
(800) 818-0165

DALLAS
(214) 462-3000
(800) 448-1207

SEATTLE
(206) 340-1000
(800) 423-1950

DENVER
(720) 479-3900
(877) 467-0305

TORONTO
(416) 361-3200
(888) 727-9948

HOUSTON
(832) 214-3900
(800) 448-8502

TRENTON
(609) 989-8620

LONDON
011 44 20 7864
2000

WASHINGTON, D.C.
(202) 912-4800
(800) 540-1355

LOS ANGELES
(213) 892-7900
(800) 563-1027

W. CONSHOHOCKEN
(610) 941-5000
(800) 379-0695

MIAMI
(305) 704-5940
(800) 215-2137

WILMINGTON
(302) 295-2000
(888) 207-2440

NEW YORK DOWNTOWN
(212) 509-9400
(800) 437-7040

500 Attorneys • 23 Offices

**COLORADO SUPREME COURT LEAVES DOOR OPEN
FOR ENFORCEMENT OF PRETRIAL STIPULATED
JUDGMENTS AGAINST LIABILITY INSURERS**

**COURT ALSO REAFFIRMS THAT PREJUDGMENT
INTEREST AWARDED FOR PERSONAL INJURY CLAIMS
REDUCES LIMITS, AND IS NOT A SUPPLEMENTARY PAYMENT**

*By: Joseph F. Bermudez, Esq., Christopher S. Clemenson, Esq.,
Jason D. Melichar, Esq., Suzanne M. Meintzer, Esq.
jbermudez@cozen.com; cclemenson@cozen.com;
jmelichar@cozen.com; smeintzer@cozen.com.*

COZEN O'CONNOR

707 17th Street • Suite 3100 • Denver, CO 80202

Phone: 720.479.3900 • Fax: 720.479.3890

On March 24, 2008, the Colorado Supreme Court left the door open for plaintiffs and insured-defendants to enter into pretrial stipulated judgments, and then to enforce those stipulated judgments against the insured-defendant's liability insurer. Historically, Colorado Courts of Appeals have refused to enforce pretrial stipulated judgments against insurers because of concerns that such judgments may not represent arm's length determinations of the worth of a plaintiff's claim. However, in *Old Republic Ins. Co. v. Ross*, ___ P.3d ___, 2008 WL 755502 (Colo. 2008), the Colorado Supreme Court stated that pretrial stipulated judgments are not *per se* unenforceable against insurers, and may be enforceable in situations where an insurer breaches its duty to defend its insured, acts in bad faith, or otherwise breaches its insurance contract.

The dispute in *Old Republic* arose from an airplane accident in Colorado. The family of the decedent brought suit against the airline charter company. Old Republic, which insured the airline charter company, paid \$200,000 to the plaintiffs under its aviation policy, but denied coverage under its liability policy. The plaintiffs and the insured thereafter entered into a pretrial stipulated judgment of \$4 million, plus \$1.3 million in prejudgment interest. The plaintiffs agreed not to execute the judgment against the insureds in return for an

assignment of all proceeds that might be obtained from Old Republic, up to the judgment amount, plus half of any exemplary damages entered against Old Republic. The trial court approved the stipulation and entered judgment in the amount of \$5.3 million.

In the meantime, *Old Republic* initiated a declaratory judgment action in the United States District Court for the District of Colorado to determine what additional amount, if any, was potentially owed under Old Republic's policies. The declaratory judgment action resulted in a finding that \$1.7 million in coverage was available under Old Republic's policies for the airline crash.¹ Old Republic promptly tendered the \$1.5 million difference in the coverage available and what it had previously paid.

Nevertheless, the plaintiffs instituted a garnishment action against *Old Republic*, seeking to recover post-judgment interest on the stipulated judgment of \$5.3 million. The plaintiffs argued that under Old Republic's policy, Old Republic was obligated to pay interest on the entire judgment entered against its insured until such time as it tendered its policy limits. Thus, the plaintiffs sought interest on \$5.1 million - the stipulated judgment less the initial \$200,000 payment - between the time the stipulated judgment was entered and the time Old Republic tendered its remaining \$1.5 million at the conclusion of the Federal action. The plaintiffs also sought additional statutory interest under C.R.S. § 5-12-102 for interest on sums "wrongfully withheld." After a hearing, the trial court entered a garnishment award of approximately \$2 million in post-judgment interest in favor of the plaintiffs.

The issue before the Colorado Supreme Court on Old Republic's appeal was whether there was a valid judgment upon which to base the garnishment award of post-judgment interest. The Court began by stating that the enforceability of a stipulated pretrial judgment against an insurer was an issue of first impression for the Colorado Supreme Court. The Court then analyzed decisions from a number of jurisdictions, noting that in each case where a pretrial stipulated judgment was held to be enforceable, there was some evidence that the insurer had acted in bad faith, denied coverage, or refused to defend the claim. The Court noted that Old Republic had fully defended its insured against the plaintiffs' claims, and that all of the insured's claims against Old Republic had been voluntarily dismissed, with prejudice, from the Federal action. The Court also noted that Old Republic had "conceded coverage ... disputing only the extent of its liability." Under such circumstances, the Court refused to find the pretrial stipulated judgment to be enforceable, holding:

[W]here the insurer had conceded coverage and defended its insured, and where there has been no finding of bad faith against the insurer, a stipulated judgment entered before trial, to which the insurer is not a party, cannot be enforced against the insurer. Because we affirm the court of appeal's conclusion that the stipulated judgment is unenforceable, the trial court's garnishment order for postjudgment interest on that unenforceable judgment cannot stand.

The Court expressly declined to hold that pretrial stipulated judgments are *per se* unenforceable. Instead, it offered guidance to lower courts regarding the circumstances under which pretrial stipulated judgments might be enforced. Specifically, after first acknowledging the risks of fraud and collusion where judgments are stipulated instead of decided by neutral fact finders, the Court stated that such risks were

acceptable where an insurer refuses to defend, acts in bad faith or otherwise breaches its insurance contract. The Court noted, however, that the determination of whether a pretrial stipulated judgment is enforceable generally will not be known until after the coverage and bad faith issues are litigated. The Court also recognized that pretrial stipulated judgments are still subject to challenges for reasonableness under the circumstances, and for actual fraud or collusion.

As a result of the Court's ruling, insurers are now at risk of having pretrial stipulated judgments enforced against them, but only if the insured or plaintiff can show in a subsequent adversarial proceeding that the insurer breached its duty to defend, acted in bad faith, or otherwise breached its contractual obligation. Consequently, plaintiffs and insureds still face significant risk in entering into pretrial agreements where the insured is being defended.

The second issue before the *Old Republic* court was the treatment of prejudgment interest in personal injury cases. The intermediate appellate court, *sua sponte*, awarded the plaintiffs prejudgment interest on the \$1.5 million that it believed was "wrongfully withheld" during the pendency of the Federal declaratory judgment action. The Colorado Supreme Court reversed the appellate court's award of prejudgment interest, holding that under Colorado law, prejudgment interest is an element of compensatory damages for personal injury claims, and therefore reduces the limits available for such claims. In other words, under Colorado law, prejudgment interest awarded in personal injury cases is not interest on a judgment, but is part of the judgment itself, and therefore not subject to the "additional payments" or "supplementary payments" provisions of an insurance policy.

In light of the *Old Republic* decision, insurers faced with plaintiffs seeking to enforce pretrial stipulated judgments in Colorado must now carefully examine the circumstances to determine the potential enforceability of the judgment. Further, in order to properly reduce limits and to avoid overpaying on claims, insurers should seek to ascertain whether the prejudgment interest awarded against their insureds arises out of personal injury claims or non-personal injury claims.

ENDNOTES

¹. See, *Old Republic Ins. Co. v. Durango Air Serv., Inc.*, 283 F.3d 1222 (10th Cir. 2002).

For further analysis of the Old Republic decision and its impact on liability insurers, please contact Joe Bermudez, Chris Clemenson, Jason Melichar or Suzanne Meintzer of Cozen O'Connor's Denver, Colorado office. Cozen O'Connor is a nationally recognized leader in representing the insurance industry in all coverage areas.