

with the applicable regulations. The bills were submitted by Imagimed on behalf of Timothy J. Greenan, M.D., P.C. (“Greenan”), who performed the medical services and was responsible for all billing compliance issues pursuant to an administrative agreement between Greenan and Imagimed. DOJ contends that Wolf’s liability could be tens of millions of dollars.

3. On December 20, 2012, the DOJ made a “take-it-or-leave-it” settlement offer (which it characterized as its “best and final” offer) to Wolf that would settle all of DOJ’s claims against Wolf for \$1.75 million – a small fraction of the amount to which the DOJ claims it would otherwise be entitled, and an amount substantially less than the remaining limits of the Policy. In its settlement proposal, DOJ indicated that its offer expires on January 31, 2013, at which time DOJ advises that it intends to file suit against Wolf seeking damages far in excess of \$1.75 million as well as civil penalties and statutory treble damages.

4. Since September 2012, Wolf has repeatedly requested authority from Westchester to settle DOJ’s claims for an amount within the Policy limits.

5. While Westchester has acknowledged its duty to defend Wolf against DOJ’s claims, it has disputed its duty to indemnify him via correspondence with Wolf’s counsel, and has refused to consent to DOJ’s December 20, 2012 settlement proposal or agree to indemnify Wolf for a \$1.75 million settlement with DOJ.

6. Westchester’s baseless refusal to authorize a reasonable settlement of DOJ’s claims is a bad faith breach of its obligations under the Policy and Maryland law. Wolf has therefore filed this action, seeking declarations that Westchester is obligated to indemnify Wolf for any settlement of DOJ’s claims within the limits of the Policy, that Westchester’s refusal to authorize a reasonable settlement is a bad faith breach of its obligations under the Policy and that Westchester is responsible for all losses suffered by Wolf as a result of its breach of contract and

its bad faith conduct. Wolf has also sought damages in connection with Westchester's breach of contract and bad faith conduct.

PARTIES

7. Plaintiff Wolf is a resident of the state of Virginia. He was co-chief executive officer of Imagimed at all times relevant to DOJ's contentions.

8. On information and belief, Defendant Westchester has its principal place of business in Pennsylvania and is incorporated in Pennsylvania.

JURISDICTION AND VENUE

9. This claim is based on an actual controversy within the jurisdiction of this Court pursuant to 28 U.S.C. § 1332 in that the matter in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs, and the action is between a citizen of Virginia, on the one hand, and a citizen of Pennsylvania, on the other. The declaratory relief sought in this Complaint is authorized pursuant to 28 U.S.C. § 2201.

10. Venue is proper in this District under 28 U.S.C. § 1391, because the defendant is subject to personal jurisdiction in this District, and because a substantial part of the acts or omissions giving rise to the claim occurred in this District in that the Policy was issued to a company based in this District.

STATEMENT OF FACTS

The Investigation of Wolf

11. DOJ contends that, from October 2005 to June 2008, Wolf, as co-chief executive officer of Imagimed, caused the submission of over 6,000 claims to Medicare by Timothy J. Greenan, M.D., P.C. ("Greenan") for contrast imaging without a doctor present at the time the imaging was done. DOJ contends that such submissions violated the False Claims Act and other

federal laws because they did not comply with applicable regulations requiring a doctor to be present in the office at the time such imaging was done. The claims submitted to Medicare at issue exceed \$5 million.

12. The DOJ further alleges that, if it were to pursue Wolf for his liability for these allegedly false submissions, it would be entitled to recover treble damages and civil penalties for each claim under the False Claims Act. It also alleges that Wolf violated the Stark Law, 42 U.S.C. § 1395nn, and the Anti-Kickback Statute, 42 U.S.C. § 1320a-7b. The DOJ estimates that Wolf's total liability for all of these alleged violations could exceed \$80 million.

The Westchester Policy

13. During the relevant time period, Wolf, as co-chief executive officer of Imagimed, was an insured under the Policy. *See* Exhibit A, "Directors & Officers and Company Coverage Section," ¶ B.4 (definition of "Directors and Officers").

14. The Policy provides, in relevant part, that

The Insurer shall pay the Loss of the Directors and Officers for which the Directors and Officers are not indemnified by the Company and which the Directors and Officers have become legally obligated to pay by reason of a Claim first made against the Directors and Officers during the Policy Period ... and reported to the Insurer pursuant to subsection E.1 herein, for any Wrongful Act taking place prior to the end of the Policy Period.

Id. ¶ A.1.

15. "Loss" is defined as including "damages [and] settlements" in connection with a Wrongful Act. *Id.* ¶ B.7 (definition of "Loss").

16. A "Wrongful Act" is further defined as "any actual or alleged error, omission, misleading statement, misstatement, neglect, breach of duty or act allegedly committed or

attempted by ... any of the Directors and Officers, while acting in their capacity as such” *Id.* ¶ B.9 (definition of “Wrongful Act”).

17. The DOJ has alleged that Wolf committed a Wrongful Act under the terms of the policy, and Westchester has acknowledged its duty to defend Wolf against the DOJ’s allegations pursuant to the terms of the policy.

18. The Policy is subject to a limit of \$3 million for claims by Imagimed and its officers and directors. *Id.*, Declarations ¶ C.1.a (Limit of Liability of Directors & Officers and Company). In addition, if Imagimed’s directors and officers are not indemnified by it, those individuals are entitled to an additional \$1 million limit. *Id.*, Declarations ¶ C.1.b; “Directors & Officers Company Coverage Section,” ¶ D.2.b (“The amount set forth in Item C.1.b. relating to this Coverage Section [\$1 million] shall be an aggregate limit of liability for the payment of Loss under Insuring Clause A.1 in addition to the limit described in subsection a immediately above [\$3 million]....”).

19. Imagimed has not indemnified Wolf for any Loss incurred in connection with the alleged Wrongful Act by Wolf; i.e., DOJ’s claims. *Id.*, ¶ A.1. (“The Insurer shall pay the Loss of the Directors and Officers for which the Directors and Officers are not indemnified by the Company....”).

20. On information and belief, the remaining limits of the Policy available to the individual insureds are approximately \$2.5 million.

21. The Policy provides that “[i]f the amount of any Loss which is otherwise due and owing by the Insurer exceeds the then-remaining Limit of Liability applicable to the Loss, the Insurer shall pay the Loss, subject to such Limit of Liability” to the individual insureds first and only if the Loss “does not exhaust the applicable Limit of Liability” to Imagimed. *Id.*, ¶ H

(“Payment Priority” provision). On information and belief, the Loss arising from DOJ’s claims exceeds the remaining applicable limit of liability of the Policy.

22. The Policy further provides that “[t]he Insureds agree not to settle or offer to settle any claim ... without the prior written consent of the Insurer, such consent not to be unreasonably withheld.” *Id.*, ¶ F (“Settlement and Defense” provision).

Wolf Pursues Settlement Authority

23. On July 25, 2012, DOJ made a settlement demand on Wolf for \$2.3 million. On September 7, 2012, Wolf sought authority from Westchester to settle the Justice Department’s claims against him for \$1.5 million, an amount within the Policy’s limits. The proposed settlement was covered by the Policy because it represented a reasonable settlement of claims for covered Loss arising from an alleged “Wrongful Act.”

24. Westchester waited until October 1, 2012 to respond to Wolf’s request for settlement authority and then asserted that it had “no indemnification or settlement obligation with respect to the government’s settlement proposal.” Westchester’s improper denial of Wolf’s request was based on its incorrect view that any settlement with the Justice Department would not be covered “Loss” because DOJ’s claims are for restitution of payments made by Medicare and include treble damages, which Westchester asserts are not covered by the Policy. Westchester further asserted that Imagimed was required to consent to a settlement by Wolf.

25. Wolf promptly explained to Westchester in a letter dated October 4, 2012 why its denial of the request for settlement authority was baseless. First, the Policy contains no exclusion for damages that are restitutionary in nature. Even if such damages were somehow outside the definition of Loss, DOJ’s claims against Wolf cannot be restitutionary in nature because he did not receive any of the alleged improper claim payments. The payments were

made to Greenan, not Wolf, and DOJ's claims against Wolf therefore cannot be for restitution of any payments made to Wolf.

26. Second, Westchester's assertion that the settlement is not covered Loss because the government seeks treble damages that constitute fines or penalties not covered by the Policy is likewise unfounded. The settlement for which Wolf sought authority was for substantially less than the actual amount of alleged false claims *before* any trebling, and none of the proposed settlement therefore represents treble damages. In any event, treble damages under the False Claims Act are, at least in part, compensatory in nature and are therefore not fines or penalties excluded from coverage. Moreover, DOJ has asserted other claims for which treble damages are not a remedy that would be resolved by the settlement.

27. Finally, as explained in the October 4, 2012 letter, Imagimed's consent to a settlement by an individual insured is required under the Policy only if Westchester settles the claim not when, as here, an individual insured settles the claim. Under Section F.3 of the Policy, when an Insured settles a claim, it is the Insurer's consent, not to be unreasonably withheld, that is required, not the consent of the Parent Company (Imagimed). *See* Exhibit A, ¶ F.3 ("Settlement and Defense" provision).

28. Notwithstanding the lack of any basis for its refusal, Westchester continued to deny Wolf the requested settlement authority.

Westchester's Lack of Response To The Justice Department's Second Settlement Proposal Within The Policy's Limits

29. On December 20, 2012, DOJ made a settlement proposal to Wolf that would resolve all of the allegations against him for \$1.75 million. DOJ described this proposal to Wolf as a "best and final" offer. The proposal represents a reasonable settlement of DOJ's claims

against Wolf, taking into account the risk of liability in an amount far in excess of \$1.75 million and is within the remaining limits of the Policy.

30. Wolf sent the proposal to Westchester on December 21, 2012 and demanded that Westchester authorize settlement on the best terms available up to \$1.75 million. Despite numerous follow-up requests, Westchester did not respond to Wolf until January 16, 2013.

31. On January 16, 2013, Westchester refused to authorize settlement under the terms of the DOJ's "best and final" offer. Westchester has thus unreasonably withheld its consent to settlement on the basis of the DOJ's "best and final" offer.

32. DOJ's proposal expires, by its own terms, on January 31, 2012. The Department has stated that it will thereafter pursue litigation against Wolf. By its estimate, Wolf could be held liable in a total amount exceeding \$80 million.

COUNT I
(Declaratory Judgment)

33. Wolf repeats the allegations in paragraphs 1 through 32 as if fully set forth herein.

34. As a party to a contract with an interest in obtaining relief under that contract, Wolf has brought this complaint seeking to resolve a real and substantive controversy over the rights of the parties to tangible benefits provided by the Policy.

35. Wolf seeks a declaration that Westchester has a duty to indemnify Wolf against the claims asserted by DOJ, including specifically a duty to indemnify him for the \$1.75 million settlement proposed by DOJ and any other settlement of DOJ's claims within the Policy limits. Wolf further seeks a declaration that Westchester has unreasonably withheld its consent to a settlement by Wolf on the terms of DOJ's "best and final" offer.

36. Wolf also seeks a declaration that the \$1,000,000 additional aggregate limit set forth in Item C.1.b of the Coverage Section of the Declarations relating to Directors and Officers and Company Coverage is available to Wolf with respect to the DOJ's claims and to indemnify him for a settlement on the terms of DOJ's "best and final" offer because Imagimed has refused to indemnify Wolf for the DOJ's claims or the settlement proposed by the DOJ.

COUNT II

(Declaratory Judgment in the Alternative)

37. Wolf repeats the allegations in paragraphs 1 through 32 as if fully set forth herein.

38. As a party to a contract with an interest in obtaining relief under that contract, Wolf has brought this complaint seeking to resolve a real and substantive controversy over the rights of the parties to tangible benefits provided by the Policy.

39. Wolf seeks a declaration that, to the extent Westchester fails to indemnify him for the proposed settlement with DOJ, Westchester shall be liable for all of the consequences of its failure, including but not limited to any ultimate judgment against him that exceeds the limits of the Policy and any defense costs he incurs that exceed those limits.

COUNT III

(Declaratory Judgment as to Bad Faith)

40. Wolf repeats the allegations in paragraphs 1 through 32 as if fully set forth herein.

41. As a party to a contract with an interest in obtaining relief under that contract, Wolf has brought this complaint seeking to resolve a real and substantive controversy over the rights of the parties to tangible benefits provided by the Policy.

42. Wolf seeks a declaration that Westchester's: a) failure to grant him authority to settle the allegations against him for an amount within the limits of the Policy; b) failure to promptly respond to a settlement proposal, which included a demand within the limits of the

Policy; and c) conduct that leaves its insured, Wolf facing further litigation and a potentially far greater ultimate liability, has been a bad faith breach of Westchester's contract with Wolf.

COUNT IV
(Breach of Contract)

43. Wolf repeats the allegations in paragraphs 1 through 32 as if fully set forth herein.

44. Westchester has a contractual obligation pursuant to the terms of the Policy to indemnify Wolf for the settlement of DOJ's claims within policy limits.

45. All conditions precedent to Wolf's recovery under the Policy have either been met, are waived by Westchester, are the subject of an estoppel, or have otherwise been satisfied.

46. Westchester has materially breached its contractual obligation by refusing to consent to a settlement with DOJ on the terms of its "best and final" offer and refusing to indemnify Wolf for Loss in connection with an alleged Wrongful Act, as required by the Policy.

47. To the extent that Westchester fails to indemnify Wolf for the settlement with the DOJ, Wolf will incur direct and substantial financial loss arising out of that failure.

48. As a result of Westchester's breach, Westchester is liable to Wolf for an amount yet to be ascertained for all costs Wolf incurs as a result of Westchester's failure to indemnify him, including but not limited to: a) the amount of any ultimate settlement with the DOJ or any judgment the DOJ obtains against Wolf; b) the costs and disbursements of this action; c) Wolf's reasonable attorneys' fees; d) any pre- and post-judgment interest on any judgment against Wolf; and e) any other sums Wolf incurs as a consequence of Westchester's breach.

WHEREFORE, Wolf prays for judgment:

A. Declaring that Westchester is required to indemnify Wolf for any settlement that Wolf is able to reach with DOJ within the limits of the Policy, that Westchester has unreasonably withheld its consent to a settlement with Wolf on the terms of DOJ's "best and final" offer, and

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