

Court Prevents Insurer From Having Its Cake And Eating It Too

By Lee M. Epstein

May 2010

Insurers that breach their duty to defend argue frequently that they nonetheless have no duty to indemnify. These insurers contend that while the breach of the duty to defend may subject insurers to liability for the costs incurred in defending the underlying actions, it does not subject insurers to liability for the amounts paid to resolve such actions. In so arguing, insurers seek to both breach their insurance policies, by breaching their duty to defend, and then rely on provisions of those breached insurance policies in disclaiming any duty to indemnify.

In an important victory for policyholders, generally, and Fried & Epstein's client, Tate & Lyle North American Sugars, Inc., specifically, the Louisiana Court of Appeals prevented an insurer that was behaving in this manner from having its cake and eating it too. *See Arceneaux v. Amstar Corp., et al.*, No. 2009-CA-0980 (La. Ct. App. 4th Cir. May 14, 2010). The *Arceneaux* Court held that an insurer could not avoid its duty to indemnify by enforcing the terms of its insurance policies that were breached when the insurer wrongfully refused to defend its policyholder.

The insurer, Continental Casualty Company had previously breached its duty to defend and had paid the substantial costs incurred by Tate & Lyle in defending against hundreds of underlying hearing loss claims. Continental argued nevertheless that its duty to indemnify was severely limited due to the application of certain policy provisions. In response, Fried & Epstein argued on behalf of Tate and Lyle that Continental could not enforce the terms of the very insurance policies that were breached when Continental wrongfully refused to defend.

In affirming the trial court's grant of summary judgment to Tate & Lyle, the Court of Appeals found no error in the trial court's conclusion that "Continental's breach of the duty to defend Tate & Lyle is so grievous, mean spirited and designed to cause financial harm to [its] insured Tate & Lyle, [that] justice demands and [the court] must fashion a remedy for the redress of that breach which is commensurate with the breach of the duty to defend under [this] particular set of facts."

[Editor's Note: Lee Epstein is a Partner at the Philadelphia office of Fried & Epstein LLP, which regularly represents policyholders in insurance coverage disputes. He is a frequent speaker and author on the subject of insurance coverage law and practice. Information concerning Fried & Epstein's Insurance Coverage Practice Group may be obtained by visiting the firms' website at www.fried-epstein.com. Responses to this article are welcome. Copyright 2010 Lee M. Epstein.]