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FILED

IN THE UNITED STATES DISTRICT COURT FOR  
THE NORTHERN DISTRICT OF ILLINOIS

JUN 29 2007 PD  
Jun. 29, 2007  
MICHAEL W. DOBBINS  
CLERK, U.S. DISTRICT COURT

MEDMARC CASUALTY INSURANCE )  
COMPANY, INC., a Corporation, )  
Plaintiff, )

v. )

ASKOUNIS & BORST, P.C., a )  
Professional Corporation, GULFCOAST )  
WORKSTATION GROUP, INC., an )  
Illinois Corporation, and VINCENT T. )  
BORST, )  
Defendants. )

07CV3666  
JUDGE KENDALL  
MAG. JUDGE COLE

COMPLAINT FOR DECLARATORY JUDGMENT

Comes now plaintiff, MEDMARC CASUALTY INSURANCE COMPANY, INC., and  
for its Complaint against Defendants VINCENT T. BORST and ASKOUNIS & BORST,  
P.C., states as follows:

JURISDICTION AND VENUE

1. This action is brought pursuant to this Court's diversity jurisdiction conferred by 28 U.S.C. §1332.
2. Plaintiff, MEDMARC CASUALTY INSURANCE COMPANY, INC. ("Medmarc") is a Vermont corporation with principal place of business in Chantilly, Virginia, engaged in the business of providing insurance, and duly licensed to engage in that business.
3. Defendant ASKOUNIS & BORST is an Illinois professional corporation engaged in the practice of law, with principal place of business in Chicago, Illinois.
4. Defendant VINCENT T. BORST is an attorney licensed in the state of Illinois, and a citizen of that state.

5. Defendant GULFCOAST WORKSTATION GROUP, INC. (“Gulfcoast”) is an Illinois corporation with principal place of business in Largo, Florida.

6. This is an action for declaratory judgment, seeking to adjudicate rights with respect to a claim under a liability insurance contract, under which Medmarc may become potentially liable for a judgment of \$2,000,000. The amount in controversy thus exceeds the jurisdictional minimum of \$75,000.

7. Venue in the Northern District of Illinois is proper since two of the three defendants are residents of that district.

#### **FACTUAL ALLEGATIONS**

8. On or about June 12, 2003, Medmarc issued to Askounis & Borst a professional liability insurance policy (“the policy”). The policy was and has been renewed annually thereafter. A copy of the 2006-2007 policy is attached to this Complaint as Exhibit 1.

9. Askounis & Borst, by and through its agent Vincent T. Borst, engaged in the representation of Gulfcoast, who was then a defendant in an adversary proceeding before the United States Bankruptcy Court for the Eastern District of Missouri, beginning in March 2001.

10. In that proceeding, the administrator for debtor Bridge Information Systems, Inc. (“Bridge”) alleged that certain transfers, totaling approximately \$2.1 million, from Bridge to Gulfcoast prior to the former’s receivership were preferential transfers within the meaning of 11 U.S.C. §547, and were therefore avoidable.

11. In that proceeding, Gulfcoast, through its attorneys Askounis & Borst, defended on the basis that the transfers were in the ordinary course of business within the meaning of 11 U.S.C. §547(c)(2). This section reads in relevant part:

- (c) The trustee may not avoid under this section a transfer . . .
  - (2) to the extent that such transfer was:
    - (A) in payment of a debt incurred by the debtor in the ordinary course of business or financial affairs of the debtor and the transferee;
    - (B) made in the ordinary course of business or financial affairs of the debtor and the transferee; and
    - (C) made according to ordinary business terms.

12. On or about July 6, 2004, the bankruptcy court ruled, citing 11 U.S.C. §547(c)(2)(C) and cases interpreting that provision, that Gulfcoast had not established the ordinary course of business defense because they had failed to present evidence that the terms of the transfers fell within the general range of terms in the relevant industry (to wit, the industry of computer equipment resale).

13. Applicable and controlling case law interpreting §547(c)(2)(C) holds that in order to establish the ordinary course of business defense, a party must present evidence that the terms of the transfers fall within the general range of terms in the relevant industry.

14. Evidence was available to Askounis & Borst at the time of trial that would have established that the transfers were made according to the general range of terms in the industry.

15. Gulfcoast, through its attorneys Askounis & Borst, appealed the bankruptcy court's decision to the United States District Court for the Eastern District of Missouri.

16. On or about June 13, 2005, the district court affirmed the judgment of the bankruptcy court in all respects.

17. Gulfcoast, through its attorneys Askounis & Borst, appealed the district court's decision to the United States Court of Appeals for the Eighth Circuit.

18. On or about March 17, 2006, the Eighth Circuit affirmed the judgment of the district court in all respects.

19. On or about June 29, 2006, Gulfcoast informed Askounis & Borst that Gulfcoast was considering a legal malpractice action against Askounis & Borst, as well as against Vincent Borst individually.

20. The basis of Gulfcoast's claim is that Askounis & Borst negligently failed to present evidence at trial to prove a necessary element of their defense, namely, that the transfers at issue were made according to the general range of terms in the industry.

21. On or about June 30, 2006, Askounis & Borst notified Medmarc of a potential malpractice claim against them.

22. No notification of this potential claim was given by any means to Medmarc prior to June 30, 2006.

23. Prior to renewal of the policy each year, Askounis & Borst completed a questionnaire regarding its professional liability risks, which it then submitted to Medmarc.

24. In each of the 2004, 2005, and 2006 renewal questionnaires, Askounis & Borst answered "no" to the question, "At this time, does any applicant know of any act, omission, or circumstance that could reasonably give rise to a professional liability claim

against any of the following: the firm, any past or present attorneys in the firm, or any Predecessor Firm?”

25. The language of the policy indicates that acts or omissions prior to the current policy period are covered only if no insured had a basis to believe that their acts or omissions could reasonably be expected to be the basis of a claim. The full policy is attached as Exhibit 1. The relevant portions of the policy are contained at pages 1-2 of Exhibit 1, under the heading “Scope of Coverage,” and read as follows:

The Company shall pay on behalf of the “Insured” all sums in excess of the Deductible which, as a result of a “Claim,” the “Insured” shall become legally obligated to pay as “Damages,” but only if such “Claim” is first made against the “Insured” and reported in writing to the Company during the “Policy Period” or any Extended Reporting Period, and the “Claim” arises from an act or omission in “Professional Services” rendered or that should have been rendered by the “Insured,” or “Personal Injury” arising out of “Professional Services” rendered by the “Insured” or by any person for whom the “Insured” is legally responsible, but only if the “Insured” was acting solely on behalf of the “Named Insured” or “Predecessor Firm(s)” at the time of such act or omission, or such “Personal Injury.” The insurance provided by this Policy will not apply unless such act or omission, or such “Personal Injury,” happens:

1. during the “Policy Period”; or
2. prior to the “Policy Period” and subsequent to the Retroactive Date provided that prior to the effective date of this Policy:
  - (a) the “Insured” did not give notice to any prior insurer of any such act or omission or “Related act or omission” or “Personal Injury”; and
  - (b) no “Insured” had a basis to believe that any such act or omission or “Related act or omission” or “Personal Injury” might reasonably be expected to be the basis of a “Claim”; . . . .

26. The language of the policy contains a discovery clause, but that provision provides that in order for a claim to be valid under this clause, it must have been reported during the policy period that the insured first discovers the claim. The relevant portions of the policy are contained at pages 6-7 of Exhibit 1, under the heading “Discovery Clause,” and read as follows:

If, during the "Policy Period" or any Extended Reporting Period hereunder, an "Insured" first becomes aware that an "Insured" has committed a specific act or omission, or "Personal Injury," arising from "Professional Services" for which coverage is otherwise provided hereunder, and if the "Insured" shall during the "Policy Period" or any Extended Reporting Period hereunder give written notice to the Company of:

1. the specific act or omission, or "Personal Injury," and
2. the injury or damage which has or may result from such act or omission, or "Personal Injury," and
3. the circumstances by which the "Insured" first becomes aware of such act or omission, or "Personal Injury";

then any "Claim" that may subsequently be made against the "Insured" arising out of such act or omission, or "Personal Injury" shall be deemed for the purposes of this insurance to have been made during the "Policy Period" or the Extended Reporting Period hereunder.

27. On receipt of notice of the claim, Medmarc sent a letter to Askounis & Borst, in which they acknowledged receipt of the claim but noted that their undertakings in Askounis & Borst's defense were made under a full reservation of rights, and indicated that no conduct of Medmarc was to be construed as a waiver of any of Medmarc's policy terms.

28. Medmarc has hitherto defended the interests of Askounis & Borst under this reservation of rights.

29. At the time of the bankruptcy court's July 2004 ruling, Askounis & Borst knew or should have known that the Gulfcoast/Bridge matter might reasonably be the subject of a future malpractice claim.

30. At the time of Askounis & Borst's submission of its renewal questionnaire for the 2005-2006 policy period, which Askounis & Borst completed in spring 2005, it

knew or should have known that the Gulfcoast/Bridge matter might reasonably be the subject of a future malpractice claim.

31. By answering “no” to the question as to whether Askounis & Borst were aware of any act, omission, or circumstance that might give rise to a claim, Askounis & Borst supplied incorrect and/or inaccurate information to Medmarc as part of their 2005 renewal application.

32. At the time of Askounis & Borst’s spring 2006 renewal application for the 2006-2007 policy period, the district court and the Eighth Circuit had affirmed the bankruptcy court’s July 2004 ruling.

33. At the time of Askounis & Borst’s submission of its renewal questionnaire for the 2006-2007 policy period, which Askounis & Borst completed in spring 2006, it knew or should have known that the Gulfcoast/Bridge matter might reasonably be the subject of a future malpractice claim.

34. By answering “no” to the question as to whether Askounis & Borst were aware of any act, omission, or circumstance that might give rise to a claim, Askounis & Borst supplied incorrect and/or inaccurate information to Medmarc as part of their 2006 renewal application.

**COUNT I. DECLARATORY JUDGMENT (No duty to indemnify)**

35. Medmarc repeats and realleges the facts and contentions contained in Paragraphs 1-34, above, as if stated in full herein.

36. Medmarc contends that it owes no coverage under the policy to Askounis & Borst, PC, or Vincent Borst individually, and therefore will not be obligated to pay any

damages or other indemnity arising from this claim. This contention is based on the following premises:

a. The defendants knew or should have known, at all times subsequent to July 2004, that this matter could be the basis for a claim.

b. Because the defendants failed to report the potential claim during the 2004-2005 policy period when it was first discovered, the claim is not insurable under the current policy, under the "Discovery Clause" cited in Paragraph 22 above.

c. Because the defendants had reason to know of the potential claim during their 2005 and 2006 renewal applications, but did not disclose the potential claim, the claim is not insurable under the current policy, under the "Scope of Coverage" provisions cited in Paragraph 21 above.

d. Because the defendants knew of the potential claim at the time of their renewal applications, the potential claim thereby became a known risk, and therefore not insurable under Illinois law.

e. Because the defendants provided incomplete, false, or inaccurate information at the time of their renewal applications, the policy is thereby rendered void.

37. The rights and liabilities as between defendants Askounis & Borst, Vincent T. Borst, and Gulfcoast are or may be affected by the determination under this Count

38. An actual controversy exists between the plaintiff and the defendants, and this Court is vested with the authority to declare the rights and obligations of the parties hereto with respect to the policy at issue, and to provide any other relief that it deems just



and necessary. A declaratory judgment will serve a useful purpose in clarifying the various parties' rights and obligations under the policy.

WHEREFORE, plaintiff, Medmarc Casualty Insurance Co., prays that this court determine and adjudicate the rights and obligations of Medmarc and the defendants with respect to the policy attached hereto as Exhibit 1; find and declare that there is no liability coverage under the Policy for any monetary damages or other indemnification that may be awarded or otherwise determined under the legal malpractice claims of Gulfcoast Workstation Group, Inc.; and grant any other relief that is just and proper under the circumstances.

**COUNT II. DECLARATORY JUDGMENT (No duty to defend; costs)**

37. Medmarc repeats and realleges the facts contained in Paragraphs 1-33 above as if stated here in full.

38. Medmarc contends that it owes no continuing duty to defend Askounis & Borst, or Vincent Borst individually, with respect to the legal malpractice claims made against these defendants by Gulfcoast Workstation Group, Inc. This contention is based on the following premises:

- a. For the reasons expressed in paragraph 35 above, no coverage for the claim exists under the policy.
- b. Under the policy, Medmarc has a duty to defend only claims that are covered by the policy. The relevant language is contained on Page 6 of Exhibit 1 under the heading, "Defense."

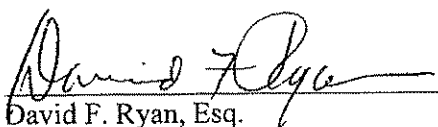
c. The defense of the Gulfoast claims was undertaken under a full reservation of rights, and the defendants were made to understand that no action of the Company was meant to imply that Medmarc waived the right to deny coverage under the policy.

39. To date Medmarc has defended Askounis & Borst under the claims made against them by Gulfoast Workstation Group, Ltd., and has incurred costs therein. Those costs are ongoing.

40. An actual controversy exists between the plaintiff and the defendants, and this Court is vested with the authority to declare the rights and obligations of the parties hereto with respect to the policy at issue, and to provide any other relief that it deems just and necessary. A declaratory judgment will serve a useful purpose in clarifying the various parties' rights and obligations under the policy.

WHEREFORE, plaintiff, Medmarc Casualty Insurance Co., prays that this court determine and adjudicate the rights and obligations of Medmarc and the defendants with respect to the policy attached hereto as Exhibit 1, and to find and declare that there is no continuing duty under the policy for Medmarc to provide a defense to Askounis & Borst, PC, or Vincent Borst individually, for the legal malpractice claims of Gulfoast Workstation Group, Inc. Plaintiff further prays for an finding that Medmarc is entitled to reimbursement from the defendants for the defense costs Medmarc has hitherto incurred on their behalf, and that this court grant any other relief that is just and proper under the circumstances.

MEDMARC CASUALTY INSURANCE CO.

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