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Bermuda Form Mock Arbitration - Materials

09 June 2015

IN THE MATTER OF A BERMUDA FORM ARBITRATION

BETWEEN

WELLBEING HOSPITAL INC.

Claimant

-and-

FAIRPLAY INSURANCE CO. LTD.

Respondent

INDEX TO DOCUMENTS

1	Scenario
2	Wellbeing procedural hearing skeleton
3	Fairplay procedural hearing skeleton
4	Wellbeing substantive hearing skeleton
5	Fairplay substantive hearing skeleton
6	Bermuda Form policy (relevant clauses)
7	Witness statement of Ann Kramer (for Wellbeing)
8	Witness statement of Erica Kerstein (for Fairplay)
9	Letter from Fairplay to Wellbeing dated 11 Jan 2011
10	Settlement demand from US claimants dated 27 Oct 2011
11	Extract of meeting of Board of Wellbeing on 25 Nov 2011

TAB 1

IN THE MATTER OF A BERMUDA FORM ARBITRATION

BETWEEN

WELLBEING HOSPITAL INC.

Claimant

-and-

FAIRPLAY INSURANCE CO. LTD.

Respondent

SCENARIO

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(1) The underlying litigation

Wellbeing Hospital Inc., which operates a hospital in New York, is sued in New York by 500 former patients who claim to have had unnecessary operations performed by Dr. House and his colleague Dr. Kildare. They allege that the hospital negligently permitted Drs. House and Kildare to carry out unnecessary surgery at the hospital. They also allege that their diagnoses were fraudulent, and the result of collusion between him and the hospital authorities in order to increase the hospital profits. The patients seek damages for the trauma of the unnecessary operations, the pain following the operations, lost earnings, and mental distress when they discovered that the operations need not have been carried out.

The hospital denies liability, and strenuously denies being party to any fraud.

(2) The policy and Fairplay's initial investigation

Wellbeing has a Bermuda Form policy from Fairplay Insurance Co. covering US$ 50 million excess of US$ 50 million (relevant extracts at Tab 6). It has the standard Bermuda Form provisions relating to co-operation and consent to settlements.

Wellbeing gives notice of the underlying litigation to Fairplay in a notice of occurrence served in December 2009, and states that if its losses exceed the attachment point, it will make a claim under the policy.

In response to Wellbeing's notice, Fairplay seeks access to all privileged and non-privileged documents relating to the litigation. Wellbeing is only prepared to show Fairplay its non-privileged documents. Fairplay examines these documents in detail and then sends a letter on 11 January 2011 setting out its coverage position. Its letter (Tab 9) identifies 10 "potential" defences to a claim under the policy, including misrepresentation, that claims against

different surgeons cannot be aggregated, late notice, and the fraud exclusion. It reserves its rights fully.

Correspondence follows in which Wellbeing say that none of Fairplay's points has any substance, and it requests confirmation that there is coverage. Fairplay responds:

> "In view of the issues identified in our previous letter, we are not in a position to confirm coverage at the present time. We reserve all of our rights to deny coverage if and when a formal claim is made against us".

(3) The settlements

Despite its denials in the litigation, Wellbeing begins to settle the claims for sums varying (depending on the strength of the evidence as to whether the operation was unnecessary) between nothing and US$ 1 million per patient. A handful of patients hold out for higher sums, and three of these patients receive settlements of US$ 4 million each.

As the overall payments for indemnity and defence costs approach the attachment point, the hospital requests Fairplay to consent to its settlements. Fairplay says that it should have been asked to consent to all previous settlements below the attachment point. It also says:

> "In order to be able to consider whether each settlement is reasonable, and in particular whether monies are being paid for (excluded) fraud claims, we need to see all the legal advice which Wellbeing is receiving from its legal advisers. Without such information, and also in view of our full reservation of rights, we are in no position to consent to any settlement. We reserve the right also to contend that the settlements are unreasonable".

Wellbeing says that it cannot provide its legal advice, which is privileged; that if it were to produce privileged documents to Fairplay, it might amount to a waiver so that they would have to be produced to the plaintiffs in the underlying cases; that the settlements are obviously reasonable; and that Fairplay should consent, and argue about allocation and other defences later. Fairplay refuses to consent.

After this correspondence, Wellbeing asks for consent for a number of further settlements, and Fairplay refuses. It sends letters repeating the position previously adopted, reserving all its rights and saying that it needs to see the legal advice. After that, Wellbeing simply settles, without asking for further consent. All but one of the remaining 100 cases were settled for a total of US$ 40 million at a successful mediation in late 2011. Prior to the mediation, the plaintiffs' settlement demands were set out in a letter dated 27 October 2011 (Tab 10). This relied on (amongst other things) their fraud allegations. The relevant extract from Wellbeing's board minutes (Tab 11) shows that these allegations were considered to be without foundation, but that settlement of the claims was desirable "if reasonable figures can be agreed".

One plaintiff refuses to settle, and Wellbeing fight the case before a jury. The jury throws out the claim. The verdict form indicates that it considered that the operation was necessary, and that there was no collusion between the doctors and the hospital.

(4) The arbitration claim

Wellbeing demands payment from Fairplay under the policy. In response, Fairplay denies liability on the basis of all of the defences set out in its reservation of rights letter.

Wellbeing brings a Bermuda Form claim against Fairplay, contending that the settlements were reasonable settlements of covered claims. Fairplay contends that its consent was not obtained to any of the settlements; and that the settlements were as high as they were because of the excluded fraud claim, and were not reasonable settlements of negligence claims.

Scenario 1: Interlocutory hearing.

Fairplay applies for discovery of the legal advice which was given in connection with the settlements. Wellbeing resists discovery on the basis of privilege.

Fairplay applies for permission to call independent expert evidence as to the reasonableness of the settlements. Wellbeing opposes the application.

Skeleton arguments at Tabs 2 and 3.

Scenario 2: The substantive hearing.

During the course of the substantive hearing, Fairplay indicates that it is not pursuing any defence except for (i) lack of consent to the settlements, and (ii) unreasonableness of the settlements. It accepts that it cannot substantiate a case that there was actual fraud by the hospital. However, it maintains that the settlements were only as high as they were because of the allegations of fraud.

Ms. Kramer, Wellbeing's in-house lawyer, gives evidence (witness statement at Tab 7) as to why the cases were settled; and why privilege could not be waived in the legal advices.

Mr. Kerstein, the senior director of Fairplay's claims department gives evidence (witness statement at Tab 8) as to why the insurance company did not consent.

Counsel, who had previously submitted written openings (extracts herewith at Tabs 4 & 5) cross-examine the witnesses and make their closing arguments.

TAB 2

IN THE MATTER OF A BERMUDA FORM ARBITRATION

BETWEEN

WELLBEING HOSPITAL INC.

Claimant

-and-

FAIRPLAY INSURANCE CO. LTD.

Respondent

SKELETON ARGUMENT FOR WELLBEING
Interlocutory hearing: 24 September 2014

Discovery and privilege

1. Fairplay is not entitled to disclosure of Wellbeing's privileged documents. Wellbeing has a substantive right to withhold privileged documents from production which Fairplay cannot abrogate.

2. It is anticipated that Fairplay will assert that English law applies to issues of legal professional privilege because this is a London arbitration. This is a parochial approach to international dispute resolution.

3. The obvious starting point is US law (and in particular New York law), since that law governs the relationship between Wellbeing and its US attorneys. At the time when the lawyers were giving their advice to Wellbeing, all concerned would have understood that it was privileged. Fairplay would not have been able to assert "common interest privilege" under US law, since the doctrine only applies "*where an attorney represents both the insured and the insurer with respect to a common goal*" (see *International Ins Co v Newmont Mining Co* 800 F. Supp 1195, 1196-7 (SDNY 1992).

4. Further, privilege is a substantive right (and described as such by both New York law and English law). It is common ground that the parties' substantive rights are governed by the Law of Construction and Interpretation Clause, *viz.*, New York law.

5. Wellbeing's substantive right to claim privilege is not lost by the fact that the arbitration (which is an international arbitration) takes place in London. Geography should not determine issues of privilege.

6. Even if English law were relevant, there is no common interest. The insurers have never accepted that they have any common interest with Wellbeing in relation to its liabilities to these plaintiffs. From the outset, they have reserved their position

on myriad grounds, and they have now made clear what was obvious throughout; that they were denying liability. The decision of Aikens J. (as he then was) in *Winterthur* does not establish that a common interest exists in all cases as between an insurer and insured. That depends upon the particular circumstances of the case, including whether the terms of the policy give a right to such documents.

7. The policy here gives no right to see privileged documents. It would take clear and express words to waive a substantive right to privilege. No such language is found in the cooperation clause.

8. It was (and remains) critical for Wellbeing to maintain its claim for privilege. Any waiver may result in the documents being available to the plaintiffs in the underlying litigation. Although it seems that all cases have now been settled, it is possible that other plaintiffs will seek to sue in the future.

9. In any event, disclosure is governed by s. 34 Arbitration Act 1996. The Tribunal is asked to exercise its discretion to uphold Wellbeing's claims to privilege, irrespective of the position under English law.

Expert evidence

10. Wellbeing should be permitted to call expert evidence as to the reasonableness of the settlement. The Tribunal may be assisted by such evidence, and it is fair to Wellbeing to allow such evidence to be called; not least because it is not in a position to waive privilege.

John Ellison
Rich Lewis
Reed Smith LLP,
New York

Mark Connoley
Reed Smith LLP,
London

22 Sept 2014

TAB 3

IN THE MATTER OF A BERMUDA FORM ARBITRATION

BETWEEN

WELLBEING HOSPITAL INC.

Claimant

-and-

FAIRPLAY INSURANCE CO. LTD.

Respondent

SKELETON ARGUMENT FOR FAIRPLAY

Interlocutory hearing: 24 September 2014

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1. *Document production issues.* Wellbeing should produce all of its legal advice concerning its settlements with underlying plaintiffs. It is obvious that such documents are central to evaluating the issues as to (i) whether the settlements overall were reasonable, and (ii) whether Wellbeing only paid out these amounts in consequence of the allegations of fraud (for which there was no coverage).

2. In particular, the issue as to reasonableness of settlements involves looking at all the information known to the policyholder at the time of settlement, and this must include otherwise privileged material.

3. Since this is a London arbitration, the issue is whether Wellbeing is entitled to claim privilege as a matter of English law, since that is the law of the seat of the arbitration. Even if the legal advice would be privileged under New York law, or the law of some other US state, this is irrelevant.

4. Under English law, there is a common interest between insured and insurer: see (among many other cases) *Winterthur Swiss Insurance v AG (Manchester) Ltd* [2006] EWHC 839 (Comm) (Aikens J).

> "[80] … Amongst the types of relationship that can give rise to a "common interest" are those of insured and insurer and insurer/ reinsured and reinsurer. The cases have refused to be prescriptive about the circumstances in which the two parties will have a sufficient "common interest" in the particular communications concerned. The issue has to be decided on the facts of the individual case".

5. Moreover, under Section D (2) of the Policy, Wellbeing had a duty to cooperate with Fairplay in the defence of the claims, and a duty to provide "all information

reasonably requested". This gives Fairplay a clear right to the documents regardless of the whether or not a common interest exists.

6. But in any event, the documents in question were created at a time when there was a common interest, before any denial of coverage, and at a time when there were obligations to cooperate.

7. Fairplay should not be prejudiced in this arbitration by Wellbeing's failure to provide full and proper information at the time. As a matter of English law and under the Policy, these important documents should be disclosed.

8. *Expert evidence* is unnecessary. If Wellbeing discloses its legal advice, the full facts relating to the settlements will be known. But even if they do not, the Tribunal will not be assisted by an "expert" opining on whether the settlements were reasonable. The Tribunal has more than enough experience in this sort of question, and does not need the assistance of any further experts to opine on bread-and-butter questions about the risks posed by straightforward law suits.

9. Expert evidence will just prolong and complicate the hearing and increase the costs, without materially assisting the Tribunal in reaching the right result.

David Scorey QC
Essex Court Chambers,
London

Paul Koepff
Clyde and Co
New York

22 Sept 2014

TAB 4

IN THE MATTER OF A BERMUDA FORM ARBITRATION

BETWEEN

WELLBEING HOSPITAL INC.

Claimant

-and-

FAIRPLAY INSURANCE CO. LTD.

Respondent

OPENING SUBMISSIONS FOR WELLBEING

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1. Fairplay refuses to indemnify Wellbeing on two distinct grounds:

    a. First, it alleges that Wellbeing failed to obtain Fairplay's consent to settlement.

    b. Secondly, Fairplay alleges that the settlements were unreasonably high, and are only (possibly) reasonable because of the need to settle excluded fraud allegations; and that an allocation is necessary.

Consent to settle

2. The obligation to seek consent to settlements under the Loss Payable clause applies only to claims covered by the policy, i.e. in respect of amounts for which an indemnity is sought. It does not apply to the settlement of amounts below Fairplay's attachment point. Accordingly, *Vigilant Ins Co v Bear Stearns Co* 855 NYS 2d 45 (2008) is not engaged.

3. There is no obligation to seek consent in respect of settlements prior to reaching the attachment point of the policy. The Loss Payable clause only applies to settlements of claims covered by the policy, and claims below the attachment point are not covered.

4. Once claims approached the attachment point, consent was indeed sought. However, Fairplay refused to provide its consent. Instead, it repeatedly asked for further information and reserved its rights on myriad grounds. This was a *de facto* denial of liability; alternatively, it was a *de facto* refusal of consent.

5. While not having a duty to defend, Fairplay did have the right under the Policy to associate in the defence, and take control of any action likely to involve the Policy, rights they never exercised.

6. It is well established under New York law that an effective denial of liability enables the policyholder to settle without obtaining consent. An express denial is not necessary. As the NY Court of Appeals (New York's highest court) said in *Isidore Rosen & Sons Inc. v Security Mutual Insurance Company* 31 N.Y.2d 342 (NY 1972):

> "*the insurer's obligation to act in good faith for the insured's interests may be breached in other ways than by refusing or neglecting to defend a suit. It may be breached by neglect and failure to act protectively when the insured is compelled to make settlement at his peril and unreasonable delay by the insurer, in dealing with a claim, may be one form of refusal to perform which could justify settlement by the insured*".

7. Further, to the extent consent to settlement is required, Wellbeing can obtain that consent at any time so long as the settlement is reasonable. Unlike may policies in commercial use, Fairplay's policy does not require "prior written consent."

8. Finally, Fairplay has waived any right to seek an effective forfeiture of coverage where it had fair notice of the settlements and the opportunity to participate in the settlement process, but opted not to voice any position at all on the substance of those agreements' terms. Any construction to the contrary would not be an "evenhanded" one as mandated by the Policy's internal rules of construction.

Reasonableness of settlements

9. The settlements were, on the facts, clearly reasonable. Where coverage is denied or consent refused, a policyholder can recover in respect of reasonable settlements of its liability – judged by what was known at the time of the settlement: see *Luria Bros & Co v Alliance Assurance* 780 2d 1082 (2d Cir 1986).

10. Wellbeing's settlements of the negligence claims against it were plainly reasonable.

11. There was no payment in respect of the allegations of fraud. These allegations had no substance, as demonstrated by (i) the result of the jury trial, and (ii) Fairplay's failure to adduce any evidence of actual fraud in this arbitration. Ms. Kramer, Wellbeing's in-house legal counsel, will give evidence on this, and the Tribunal will be invited to accept her evidence. Thus, the only potential liability faced by Wellbeing was for negligence, and that is what the settlements resolve. See also *Stonewall Ins. Co. v. Asbestos Claims Mgmt. Corp., 73 F.3d 1178 (2d Cir. 1995).*

12. Fairplay bears the burden of any allocation: see *PepsiCo v Continental Casualty* 640 F Supp 656 (SDNY 1986). It cannot do so because there is no evidence of any threat of liability for fraud or any monies paid in respect of those baseless allegations. Accordingly, under New York's relative exposure test, there is no basis to ascribe any portion of the settlements to payments for anything other than negligence such that they are fully covered by the Fairplay Policy.

John Ellison
Rich Lewis
Reed Smith LLP,
New York

Mark Connoley
Reed Smith LLP
London

2 June 2015

TAB 5

IN THE MATTER OF A BERMUDA FORM ARBITRATION

BETWEEN

WELLBEING HOSPITAL INC.

Claimant

-and-

FAIRPLAY INSURANCE CO. LTD.

Respondent

OUTLINE SUBMISSIONS FOR FAIRPLAY

Consent to settlements

1. **No liability for settlements for which consent was not sought.** Under the Loss Payable Clause, Wellbeing only has coverage for settlement is they have been approved in writing by Fairplay. Under New York law, if the policyholder has not sought consent, then there is no coverage, whether or not the settlement was reasonable. The New York Court of Appeals so held in *Vigilant Ins Co v. Bear Stearns Co,* 855 NYS 2d 45 (2008), where the policyholder did not obtain the insurer's consent prior to a settlement, the court said:

   > *As a sophisticated business entity, Bear Stearns expressly agreed that the insurers would 'not be liable' for any settlement in excess of $5 million entered into without their consent. Aware of this contingency in the policies, Bear Stearns nevertheless elected to finalize all outstanding settlement issues and executed a consent agreement before informing its carriers of the terms of the settlement. Bear Stearns therefore may not recover the settlement proceeds from the insurers.*

2. ***Isidore Rosen* has no application**. Fairplay did not delay in responding to the claim. Nor did it deny liability, whether expressly or by implication. It withheld its consent to the settlement because it did not have all the relevant information: see the evidence of Erica Kerstein, Fairplay's claims director. In seeking further information (which, under the Policy, Wellbeing was obliged to provide), Fairplay was not denying its contractual obligations but insisting upon its contractual rights.

3. Accordingly, settlements for which Wellbeing did not seek Fairplay's consent are not covered. The question whether they are reasonable or not does not arise.

Reasonableness of settlements

4. **No indemnity for unreasonable settlements.** This issue arises only: (a) in relation to settlements where consent was sought but was refused or withheld or (b) if, contrary to the submission made above, the Tribunal holds that Wellbeing was entitled to settle without consent. In either case, Fairplay is only obliged to indemnify Wellbeing for reasonable settlements. The question of reasonableness is to be judged by considering whether the settlement is reasonably correlated to the risk posed by the lawsuits, as reasonably understood at the time the settlement was concluded: see *Luria Bros & Co, Inc v. Alliance Assurance Co Ltd,* 780 F 2d 1082 (2d Cir 1986).

5. **Settlements not justified by risk of liability in negligence.** Wellbeing say that everything was paid for the negligence claims. If so, the settlements were unreasonably high. The reason that so much money was paid was because of the fraud allegations. But there is a separate fraud exclusion which operates. It does not matter whether Wellbeing was in fact fraudulent: what matters is what claims were settled and what allegations and risks supported that settlement. Substantial payments were made for (excluded) fraud, which could not have been justified on the basis of (covered) negligence.

6. In those circumstances, the Tribunal should either:

    a. Conclude that the settlements were not reasonable, in which case they are not covered; or

    b. conduct an allocation exercise to determine what part of the settlements properly relate to covered claims, considering the relative exposure posed by the different allegations: *PepsiCo Inc v. Continental Casualty Co*, 640 F Supp 656 (SDNY 1986) . Even if the fraud allegations presented a relatively low probability of being lost, they were going to be very expensive indeed if lost, and looked at in the round were therefore extremely risky.

David Scorey QC
Essex Court Chambers,
London

Paul Koepff
Clyde & Co.
New York

2 June 2015

TAB 6

FAIRPLAY INSURANCE CO.

We play fair

5, College Road East
Buffalo, NY 14201

IN RETURN FOR THE PAYMENT OF THE PREMIUM, AND SUBJECT TO ALL OF THE TERMS OF THIS POLICY, WE AGREE WITH YOU TO PROVIDE THE INSURANCE STATED IN THIS POLICY

EXCESS LIABILITY INSURANCE

DECLARATIONS

POLICY NO.	**01A2FR005**	
ITEM 1: (a)	**Named Insured:**	**Wellbeing Hospital Inc**
(b)	**Address of Named Insured**	**Wellbeing Medical Center Plaza Westbury New York NY 11568**
ITEM 2:	**LIMIT OF LIABILITY**	
(a)	**Limit in respect of each occurrence**	**US$ 50 million**
(b)	**Aggregate for all covered occurrences**	**US$ 50 million**
(c)	**Per occurrence retention amount**	**US$ 50 million**
ITEM 3:	**POLICY INCEPTION DATE**	**January 1, 2009**
ITEM 4:	**POLICY EXPIRATION DATE**	**December 31, 2009 (both days inclusive)**
ITEM 5:	**RETROACTIVE COVERAGE DATE**	**January 1, 2000**
ITEM 6:	**Representative of Named Insured**	**Maon Risk Services, 121 East 46th St, New York**
ITEM 7:	**Notice**	**Fairplay Insurance Co. 5, College Road East Buffalo, NY 14201**
ITEM 8:	**CURRENCY**	**US Dollars**
ITEM 9:	**PREMIUM**	**US$ 4,325,000**

This insurance is subject to the provisions, stipulations, exclusions and conditions contained in this form and the Representations and warranties of the Named Insured contained in the Named Insured's initial and extension Applications for this Policy of Insurance, which are hereby made a part of said insurance, together with other provisions, stipulations, exclusions and conditions as may be endorsed on said Policy or added thereto as therein provided (collectively, hereinafter referred to as the "Policy").

In witness whereof, the Company issuing this policy has caused this policy to be signed by its authorized officers.

Pete Campbell ..... (Secretary)

David Draper ..... (President)

THIS IS A STAND-ALONE INDEMNITY POLICY WHICH IS NOT SUBJECT TO THE TERMS AND CONDITIONS OF ANY OTHER INSURANCE AND CONTAINS PROVISIONS WHICH MAY BE DIFFERENT FROM THOSE OF ANY OTHER INSURANCE. IT SHOULD BE READ CAREFULLY BY THE INSURED.

COVERAGE APPLIES, SUBJECT TO THE TERMS, CONDITIONS AND EXCLUSIONS OF THE POLICY, ONLY IF NOTICE OF OCCURRENCE IS FIRST GIVEN TO THE COMPANY DURING THE POLICY PERIOD OR, IF PURCHASED, THE DISCOVERY PERIOD. THE DATE SUCH NOTICE IS FIRST GIVEN IS THE DATE FOR DETERMINATION OF THE APPLICABLE LIMITS, RETENTIONS, TERMS, CONDITIONS AND EXCLUSIONS OF THE POLICY.

THE COMPANY DOES NOT HAVE ANY DUTY TO DEFEND. DEFENCE COSTS COVERED BY THIS POLICY ARE INCLUDED WITHIN AND ARE NOT IN ADDITION TO THE LIMITS OF LIABILITY OF THIS POLICY.

THIS POLICY (INCLUDING ANY ENDORSEMENTS) IS ISSUED IN CONSIDERATION OF THE PAYMENT OF THE PREMIUM SET FORTH IN ITEM 7. OF THE DECLARATIONS.

INSURING AGREEMENTS

I. COVERAGE

Fairplay Insurance Company ("Underwriters") shall, subject to the limitations, terms, conditions and exclusions below, indemnify the **Insured** for **Ultimate Net Loss** the **Insured** pays by reason of liability:

(a) imposed by law, or
(b) of a person or party who is not an **Insured** assumed by the **Insured** under contract or agreement,

for **Damages** on account of:

(i) **Personal Injury**
(ii) **Property Damage**
(iii) **Advertising Liability**

encompassed by an **Occurrence**, provided:

COVERAGE A: notice of the **Occurrence** shall have been first given by the **Insured** in an **Annual Period** during the **Policy Period** in accordance with Article V. of this Policy,

or

COVERAGE B: notice of the **Occurrence** shall have been first given during the **Discovery Period** in accordance with Article V. of this Policy, but only if the **Discovery Period** option has been elected in accordance with the provisions of this Policy.

IV. EXCLUSIONS

This Policy does not apply to actual or alleged:

P. **SECURITIES, ANTITRUST, ETC.**

Liability arising under any statute, law, ordinance, rule or regulation, whether established pursuant to legislative, administrative, judicial, executive or other authority, of any nation or federal, state, local or other governmental or political body or subdivision thereof relating to:

...

(2) antitrust or the prohibition of monopolies, activities in restraint of trade, unfair methods of competition or deceptive acts and practices in trade and commerce including, without limitation, the Sherman Act, the Clayton Act, the Robinson-Patman Act, the Federal Trade Commission Act, the Lanham Act and the Hart-Scott-Rodino Antitrust Improvements Act;

(3) fraud or breach of fiduciary duty;

...

VI. CONDITIONS

D. ASSISTANCE AND COOPERATION

(1) Underwriters shall not be called upon to assume charge of the settlement or defence of any **Claim** made or suit brought or proceeding instituted against an **Insured**, but Underwriters shall have the right and shall be given the opportunity to associate with the **Insured** or the **Insured's** underlying insurers or both in the defence and control of any **Claim**, suit or proceeding relative to any **Occurrence** where the **Claim** or suit involves, or appears reasonably likely to involve, Underwriters, in which event the **Insured** and Underwriters shall cooperate in all things in the defence of such **Claim**.

(2) The **Insured** shall furnish promptly all information reasonably requested by Underwriters with respect to any **Occurrence**, both with respect to any **Claim** against the **Insured** and pertaining to coverage under this Policy.

(3) If liabilities, losses, costs and/or expenses are in part covered by this Policy and in part not covered by this Policy, the **Insured** and Underwriters shall use their best efforts to agree upon a fair and proper allocation thereof between covered and uncovered amounts, and the **Insured** shall cooperate with such efforts by providing all pertinent information with respect thereto.

(4) Those expenses incurred by Underwriters on their own behalf in connection with claims representation pursuant to this Condition D shall be at their own expense and shall not be part of **Ultimate Net Loss.**

F. LOSS PAYABLE

Liability under this Policy with respect to any **Occurrence** shall not attach unless and until:

(1) the **Insured's** underlying insurer(s) or the **Insured** shall have paid the greater of the amount of any applicable underlying limits or the applicable retentions set forth in Item 2.(a) of the Declarations; and

(2) the **Insured's** liability covered hereunder shall have been fixed and rendered certain either by final judgment against the **Insured** after actual trial or by settlement approved in writing by Underwriters, and the **Insured** shall have paid such liability.

Any consideration paid by the **Insured** or the **Insured's** underlying insurers other than in legal currency shall be valued at the lower of cost or market, and any element of the **Insured's** profit or other benefit to the **Insured** shall be deducted in determining the value of such consideration. Underwriters may examine the underlying facts giving rise to a judgment against or settlement by the **Insured** to determine if, and to what extent, the basis for the **Insured's** liability under such judgment or settlement is covered by this Policy.

...

N. ARBITRATION

(1) Any dispute, controversy or claim arising out of or relating to this Policy or the breach, termination or invalidity thereof shall be finally and fully determined in London, England under the provisions of the Arbitration Acts of 1950, 1975 and 1979 and/or any statutory modifications or amendments thereto, for the time being in force, by a Board composed of three arbitrators to be selected for each controversy as follows:

...

O. LAW OF CONSTRUCTION AND INTERPRETATION

This Policy, and any dispute, controversy or claim arising out of or relating to this Policy, shall be governed by and construed in accordance with the internal laws of the State of New York, except insofar as such laws:

(1) may prohibit payment in respect of punitive damages hereunder;

(2) pertain to regulation under the New York Insurance Law, or regulations issued by the Insurance Department of the State of New York pursuant thereto, applying to insurers doing insurance business, or issuance, delivery or procurement of policies of insurance, within the State of New York or as respects risks or insureds situated in the State of New York; or

(3) are inconsistent with any provision of this Policy;

provided, however, that the provisions, stipulations, exclusions and conditions of this Policy are to be construed in an evenhanded fashion as between the **Insured** and Underwriters; without limitation, where the language of this Policy is deemed to be ambiguous or otherwise unclear, the issue shall be resolved in the manner most consistent with the relevant provisions, stipulations, exclusions and conditions (without regard to authorship of the language, without any presumption or arbitrary interpretation or construction in favour of either the **Insured** or Underwriters or reference to the "reasonable expectations" of either thereof or to contra proferentem and without reference to parol or other extrinsic evidence). To the extent that New York law is inapplicable by virtue of any exception or proviso enumerated above or otherwise, and as respects arbitration procedure pursuant to Condition O, the internal laws of England and Wales shall apply.

TAB 7

IN THE MATTER OF A BERMUDA FORM ARBITRATION

BETWEEN

WELLBEING HOSPITAL INC.

Claimant

-and-

FAIRPLAY INSURANCE CO. LTD.

Respondent

WITNESS STATEMENT OF ANN KRAMER

---

1. I am employed by Wellbeing Hospital Inc. as legal counsel, and had primary responsibility for settling the claims made by the plaintiffs in the California litigation.

2. Although the plaintiffs generally alleged that there had been fraud and collusion by Wellbeing in relation to the operations carried out by Dr. House and Dr. Kildare, I considered that there no evidence to support the allegation. The allegation was based on statements made by a "whistleblower" (Dr. Jones), whom Wellbeing had previously dismissed for false expenses claims. But Dr. Jones, who had a serious cocaine addiction problem, was in my view never going to be believed on a trial. On the one case that went to trial, he was "crucified" in the witness box, and our jury polling after the trial showed that the entire jury thought that he was totally untrustworthy. The only other "evidence" of fraud comprised a handful of emails in which management had called for "creative" ideas to increase hospital profits. But these were the sorts of emails that exist in any business, and there was nothing to suggest that anyone had in mind the performance of unnecessary operations.

3. So when I was settling the cases, I told the plaintiffs that I was giving no value for the fraud claims. The independent mediator who assisted on many of the settlements also told the plaintiffs that he thought that there was no substance in the fraud claims.

4. We wanted to settle cases because litigation in the US is so hazardous, and there were a number of very sympathetic plaintiffs, including children who were alleged to have been given unnecessary operations. But we examined each case separately, and there were 200 of the 500 plaintiffs to whom we paid nothing. Unfortunately, many of the other plaintiffs appeared to have

good claims for negligence, and our settlements and defence costs have exceeded the attachment point and indeed the policy limits.

5. The fact that we eventually took a case to trial and prevailed does not mean that our previous settlements were unreasonable. The case that we fought involved a very unmeritorious claim. The plaintiff in that case clearly needed the operation which was performed. But the result of that case does demonstrate that there was no substance to the fraud allegations.

6. I did ask for Fairplay's consent to the settlements on many occasions. It was obvious to me from all their conduct that they were not interested in assisting on these claims. I felt that Wellbeing was on its own, and had to act as a prudent uninsured. Fairplay knew that there were good reasons why we could not give them our privileged documents. They had access to all the non-privileged documents in the case, including everything disclosed in the underlying litigation as well as the depositions of our fact and expert witnesses. They had, in my view, more than enough material to decide whether or not the settlements were reasonable. My personal view is that the only reason that they did not consent was that they wanted to add to the defences that they could use in order to avoid paying us.

The facts set out in this witness statement are true to the best of my knowledge and belief.

A Kramer ..... (Ann Kramer)

TAB 8

IN THE MATTER OF A BERMUDA FORM ARBITRATION

BETWEEN

WELLBEING HOSPITAL INC.

Claimant

-and-

FAIRPLAY INSURANCE CO. LTD.

Respondent

WITNESS STATEMENT OF ERICA KERSTEIN

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1. Since 2002, I have been the director of the claims department of Fairplay, and have served on its board. Prior to that, I was in private practice as a trial lawyer, acting principally for insurance companies (including Fairplay) on coverage disputes. I also acted for the defence (again engaged by insurance companies) in a large number of medical malpractice suits, and so I am familiar with claims being made against doctors and hospitals. I was responsible for responding to the claim made by Wellbeing, and responding to the correspondence relating to it.

2. I did not believe that I had sufficient information to enable Fairplay to consent to any of Wellbeing's settlements. The plaintiffs were alleging fraud, and there was a clear fraud exclusion in the policy. Wellbeing refused to allow us to see any of the advice that it was receiving about the strength of this claim, or about what was motivating the payments that it was making. We offered to sign a confidentiality agreement, but the discussions got nowhere because Wellbeing's position was that we should be precluded from subsequently relying on the advice.

3. Based on my own extensive experience both as trial counsel and as director of the claims department of Fairplay, I considered that the settlement sums that Wellbeing was paying might possibly have been reasonable as settlements of the fraud allegations. But I could not come to any clear conclusion about whether they were reasonable if one took those fraud allegations out of the picture. I needed Wellbeing's legal advice if I was to be able to come to any conclusion on that.

4. I understood that the policy wording was clear; that settlements required our consent. Without full information about the settlements from Wellbeing, including access to the legal advice, Fairplay was not in a

position to consent to any of the settlements. I felt that Fairplay was fully entitled to take the position that it was not prepared to consent. We did not delay in responding to any of the correspondence that we were sent, and we did carry out a prompt examination of the non-privileged documents provided to us. Our position simply meant that if Wellbeing was not willing to share all relevant information with us, it would have to take one or more cases to trial, and we could then see what transpired. After receiving a jury verdict in a few cases, I would be in a much better position to see if the claims were well-founded and whether the settlements were reasonable.

5. But that did not happen because Wellbeing settled everything, until eventually they had to fight a case which they won. This shows, admittedly with the benefit of hindsight, that the decisions to settle for substantial sums were unreasonable.

The facts set out in this witness statement are true to the best of my knowledge and belief.

ERICA KERSTEIN

TAB 9

FAIRPLAY INSURANCE CO.

We play fair

5, College Road East

Buffalo, NY 14201

January 11, 2011

Ms. Ann Kramer
Wellbeing Hospital Inc.

By e-mail.

Re: Insured: Wellbeing Hospital Inc.
Policy No: 01A2FR005
Policy Period: 1/1/2009 to 12/31/2009
Date of Notice of Occurrence: 12/21/2009
Claimants: Enriquez and various others

Dear Ms. Kramer,

I write this letter on behalf of Fairplay Insurance Company with respect to the above-referenced matter.

We have now examined the various documents which you provided to us in the course of last year, following notice of occurrence served at the end of the 2009 policy year, relating to the claims which have been made against your company ("the hospital"). Fairplay initially acknowledged and reserved its rights regarding this notice on March 31, 2010. The purpose of this letter is to supplement the coverage position of Fairplay by identifying certain potential issues or defenses to coverage that appear to us at this time, and to identify certain information which we will require if the hospital determines to take this matter further.

I THE FAIRPLAY POLICY

Fairplay issued an excess liability insurance policy to Fairplay for the period 1/1/2009 to 12/31/2009. The policy provides a limit of liability of $ 50 million excess of per occurrence retention amounts of $50 million.

II POTENTIAL COVERAGE ISSUES

We have examined the application form for the insurance proposal dated October 23, 2008, and note the negative answer to the question: "Does the insured know of any facts or circumstances which are likely to give rise to a claim in excess of $10 million". If the allegations

of the plaintiffs in the underlying litigation are correct, the hospital was party to fraudulent and collusive conduct as far back as 2006. We reserve the right to rescind the policy, and/or deny the claim, on the basis of misrepresentation in the proposal and therefore fraud in the procurement of the policy.

Without prejudice to the right to rescind, we have identified the following 9 potential coverage defenses which indicate to us that, if Wellbeing were ever to make a claim under the policy, it is most unlikely that the policy would respond. Since the attachment point has not yet been exceeded, this letter simply identifies these defenses so that you can understand Fairplay's likely position in the future, and we do not go into detail about the evidence. Of course, we should make it clear that our investigations are not complete, and we do not believe that we have seen all material documents, and so our position may change in the future.

(I) Your Notice of Integrated Occurrence purports to aggregate claims made against different surgeons, Dr. House and Dr. Kildare. They carried out different operations on different patients at different times, and we can see no basis for treating their separate acts of negligence as a single occurrence which can be aggregated under the policy. On the present information, it would appear that since there were at least two occurrences rather than one, the attachment point is unlikely ever to be exceeded by payments made for claims of ordinary negligence (as distinct from excluded fraud allegations). It has certainly not been exceeded now.

(2) The definition of "Occurrence" in the policy (III.V.(2)) provides that "any actual or alleged Personal Injury ... which is Expected or Intended by any Insured shall not be included in any Occurrence". If the plaintiffs' allegations are correct, the hospital abandoned its vetting procedures relating to operations which were to be carried out by these doctors. It also colluded with them to have unnecessary operations carried out in order to boost the hospital's profits. Either or both of these matters would mean that the hospital failed to prove an Occurrence, by virtue of the "expected or intended" provision.

(3) On any view, the surgeons who carried out the unnecessary operations "expected or intended" injury to their patients, and this is sufficient to preclude an occurrence.

(4) The first claims against the hospital were made in March 2009. It must have been obvious within a short space of time that Fairplay's policy might be implicated, but the hospital gave no notice until December 2009. Fairplay therefore has a clear late notice defense, and as you are aware, there is no requirement under New York law that Fairplay needs to have been prejudiced by the late notice.

(5) Known loss. Under New York law, insurance is dependent upon the happening of a fortuitous event, and an insured may not obtain insurance to cover a loss that is known before the Policy takes effect. Fairplay reserves its rights to deny coverage on the basis of known loss.

(6) The policy contains an exclusion (IV.P (3)) for "fraud or breach of fiduciary duty". We have been most impressed by the strength of the plaintiffs claim in relation to fraud, and accordingly this exclusion is implicated.

(7) The policy also contains an exclusion (IV.P (2)) for "deceptive acts and practices in trade and commerce". This exclusion is also potentially implicated.

(8) The policy contains an "assistance and cooperation" clause (VI.D) and specifically requires Wellbeing promptly to furnish all information reasonably requested by Fairplay with respect to any Occurrence. To the extent that this obligation has been or will be breached, Fairplay has a defense to the claim.

(9) The Loss Payable clause (VI.F) requires that Fairplay's consent to settlements should be obtained. Any settlement to which we do not consent will not be covered. Should this matter be pursued further by you, we give notice that we shall require sight of further documentation including all legal advice which Wellbeing has received, and will receive, from its lawyers in connection with the claims.

Fairplay reserves, without limitation, all of its rights, remedies and defenses in connection with this matter, including, but not limited to, those specifically identified in this letter. Our identification of issues or defenses to coverage herein shall not serve to waive any rights, remedies, or defenses that Fairplay may now have or obtain in the future in connection with this matter.

Should you have any questions or wish to discuss this matter further, please do not hesitate to contact me.

Very truly yours,

Erica Kerstein
Director of Claims

TAB 10

FORREST, GUMP LLP
Attorneys at Law

Suite 14B
1385 South Shore Drive
Massapequa
NEW YORK, NY 11758
Telephone: (516) 728-3100
Facsimile: (516) 728-3200

Jim Wellington
Jwellington@fglaw.com

October 27, 2011

Via e-mail
John Carter, Allen & Carey LLP
Ann Kramer, Wellbeing Hospital Inc.

Re: Cause No. 2010-17510: Enriquez and others v Wellbeing Hospital Inc.

RULE 408 SETTLEMENT DEMAND

Dear John and Ann,

In preparation for the upcoming mediation, our clients have authorized us to convey the below settlement demand to Wellbeing Hospital Inc.

Wellbeing's liability in this case is well documented. Dr. House and Dr. Kildare carried out numerous unnecessary operations, including on all of our clients. Wellbeing had no proper procedures in place to verify whether surgery was necessary. You are fully aware of all our allegations in that respect, and you have no answer to them. The documents and depositions contain clear admissions by your employees as to the shameful state of the hospital's procedures. Our clients' collective pain and suffering is monumental and can scarcely be described with ordinary words.

But these operations were not the result of ordinary negligence. There was clear and obvious collusion between Wellbeing's senior officers and Dr. House and Dr. Kildare. We genuinely look forward to the jury's examination of the e-mails in this case, to their hearing the testimony of Dr. Jones, and to the reports of these matters in the local and national press. This is one of the strongest cases of fraud which my firm has been privileged to see. Again, we struggle to find ordinary words to describe Wellbeing's fraud and collusion.

My clients can expect to receive in excess of $100 million as compensatory damages for Wellbeing's acts, omissions, collusion, fraud, misrepresentation and breach of contract. Our clients will also be entitled to recover exemplary and punitive damages which are many multiples of this amount.

The main case is set for trial on January 3, 2012. In the interests of settlement, our clients collectively offer to settle all claims against Wellbeing for the total sum of US$150 million. In exchange for payment of that amount, Wellbeing will be unconditionally released from any and all claims arising from the events giving rise to this lawsuit. Any sums paid in settlement will be an "inventory" settlement, and our clients and this firm collectively will determine the distribution of the settlement amounts and will not be bound by any figures per individual which may be discussed our agreed as part of the settlement process.

If you have any questions about the above demand, please feel free to contact my office.

Very truly yours,

Jim Wellington

JRW//brr

TAB 11

Meeting of Board of Directors of Wellbeing Hospital

Friday November 25, 2011

In attendance: Judith Giroux, Dr. Aaron Ramsey III, Dr. Lou Wilshere, Dr. George Cazorla, Richard Walcott, Cynthia Welbeck, Ann Kramer (part only)

REDACTED

The board considered the settlement proposal from Forrest, Gump LLP, and received a report from Ms. Kramer.

REDACTED

All members of the board felt that continuing litigation was time-consuming and damaging to the company's reputation and should be avoided if possible. Attempts should be made to settle meritorious claims at the mediation if reasonable figures can be agreed. The board is satisfied that the allegations of fraud are without foundation, and this must be conveyed to plaintiffs in clearest terms and no payments should be made for the fraud allegations.

REDACTED