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In this week's SWALU, we report to you an Eleventh Circuit Court of Appeals decision finding in favor of a supplemental cancer insurer; and, an Alabama Civil Court of Appeals decision finding that an Alabama Prompt Pay Act claim should have been included within the arbitration proceeding.

**Philadelphia American Life Ins. Co., v. Buckles, No. 09-12533 (11th Cir. Oct. 23, 2009) (Eleventh Circuit determines that the term "actual charges incurred" in an insurance policy is not ambiguous.)** This case involves the interpretation of a provision in a supplemental cancer and specified disease insurance policy (the Policy). Charles Buckles (Buckles) purchased the Policy and the Policy was transferred to Philadelphia American Life Ins. Co. (Philadelphia). The Policy provides supplemental coverage paying benefits directly to Buckles for certain treatments. The Policy pays benefits despite the fact that Buckles' primary health insurance provides for payment of his medical expenses. He may retain all benefits that he receives from the Policy that exceed his medical expenses.

In 1999, Buckles was diagnosed with an incurable disease covered under the Policy. The Policy provides: "[w]e will pay the *actual charges incurred* for the following treatment techniques provided they are used for the purpose of modification or destruction of cancerous tissue." The primary insurer paid a reduced, negotiated amount to the hospital which is less than the amount the hospital actually billed. The hospital accepted the reduced amount as full payment.

A dispute arose between Philadelphia and Buckles regarding the meaning of the term "actual charges incurred." Philadelphia brought a declaratory judgment action and Buckles filed a counterclaim on the issue. The district court, ruling in favor of Philadelphia, held that "actual charges" is the amount billed by the provider, and that "actual charges incurred" is the reduced amount that the hospital accepts from an insurance company as full payment.

The threshold issue before the Eleventh Circuit was whether the Policy provision, "actual charges incurred," is ambiguous. Buckles argued that "actual charges incurred" is synonymous with "actual charges," the amount that the health care provider bills for services, which is generally higher than the amount that the health care provider will accept as full satisfaction of the liability. The Eleventh Circuit was not persuaded by Buckles' argument. Applying Florida substantive law, the Court determined that the term was not ambiguous. The Eleventh Circuit held that the district court correctly ruled that "actual charges incurred" is the "actual amount accepted by a health care provider as full satisfaction of the insured's obligations for treatment."

The Eleventh Circuit refused to determine whether the district court's decision that the term "actual charges" standing alone was unambiguous, because it was unnecessary to determine the issue at hand.

**Herring-Malbis I, LLC, et al v. TEMCO, Inc., \_\_\_ So. 2d \_\_\_ (Ala. Civ. App. 2009) (A party's failure to assert claim under Prompt Payment Act at arbitration precludes party from asserting the claim later in circuit court.)** TEMCO, Inc. (TEMCO) sued Herring-Malbis I, LLC and others (Herring-Malbis) alleging that TEMCO was owed money pursuant to the terms of the contract signed by the parties. Based on an arbitration clause in the contract, the circuit court compelled the matter to arbitration.

Prior to the arbitration proceedings, TEMCO filed a motion to amend its original complaint alleging a claim under the Prompt Pay Act, Section 8-29-1 et seq. of the Alabama Code, for reasonable attorney fees and expenses. The Prompt Payment Act affords contractors and subcontractors special remedies when payments are improperly withheld, including but not limited to attorney fees. TEMCO's motion to amend characterized its claim under the Prompt Payment Act as a claim in the event that the arbitrator entered an award in favor of TEMCO. The arbitration occurred prior to the circuit court's ruling on TEMCO's motion to amend. The arbitrator ruled that TEMCO was owed most of what it claimed and that each party was responsible for its own attorney fees. Pursuant to the arbitration award, Herring-Malbis tendered payment to TEMCO.

Subsequent to the arbitration, the circuit court granted TEMCO's motion to amend the complaint. The circuit court awarded TEMCO attorney fees. Herring-Malbis appealed. The Alabama Court of Civil Appeals held that TEMCO was required by the arbitration agreement, and by law, to submit its Prompt Payment Act claim, including the request for an award of attorney fees, to the arbitrator. The Court of Civil Appeals found that the request for an award of attorney fees was within the ambit of the contract's definition of "claim," and TEMCO was required to submit its Prompt Payment Act claim to the arbitrator, on pain of waiver, in light of the contractual provision stating that parties demanding arbitration "must assert in the demand all claims then known to that party on which arbitration is permitted to be demanded."

The Court reversed the trial court's award of attorney fees, and remanded the case to the trial court for an entry of judgment conforming with the arbitration award.



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