INSURANCE**LEGAL**NEWS

BILL INTRODUCED IN MICHIGAN SENATE WOULD ASSESS 1% TAX ON HEALTH CARE CLAIMS

On April 27, 2011, SB 348 (which would be known as the Michigan Health Insurance Claims Assessment Act) was introduced in the Michigan Senate and referred to the Committee on Appropriations. If signed into law, SB 348 would replace the current health maintenance organization use tax with a 1% tax on most health care claims paid in Michigan. The proposed legislation, with an effective date of October 1, 2011, places obligations for the monthly filing of returns and payment of the tax on insurance carriers. Those obligations are placed not only on health insurers but also on auto and workers compensation carriers. Claims paid by HMOs, third party administrators, and group health plan sponsors, among others, would be subject to the assessment.

The HMO use tax currently in place, together with federal matching dollars, provides $1.2 billion in funding for the state Medicaid program. The proposed legislation would supplant the HMO use tax and create a new health assessment fund to be used only for the Medicaid program. SB 348 would create a tax on health care claims in Michigan, while SB 347, which is tie-barred to SB 348, would repeal the current HMO use tax. This legislation, as introduced, delays the repeal of the current tax until 90 days after the effective date of the assessment tax, creating a three-month period in which both assessments would apply simultaneously.

No hearings have yet been scheduled on SB 348 and SB 347.

SIXTH CIRCUIT UPHOLDS JURY VERDICT AWARDING $7.7 MILLION FOR INDIRECT LENDING LOSSES COVERED BY A FIDELITY BOND'S "FAITHFUL PERFORMANCE" CLAUSE

by Ryan M. Shannon

In *Michigan First Credit Union v CUMIS Insurance Society, Inc,* 2011 US App LEXIS 10400 (6th Cir, May 24, 2011), the United States Court of Appeals for the Sixth Circuit affirmed a district court's refusal to grant the defendant insurer judgment as a matter of law. The Sixth Circuit found that there was sufficient evidence to support the jury's verdict that the plaintiff credit union's losses were covered under a fidelity bond's faithful performance clause.

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INSURANCE WEB SITES OF INTEREST

National Association of Insurance Commissioners
http://www.naic.org/

Michigan Office of Financial and Insurance Regulation
http://www.michigan.gov/dleg/0,1607,7-154-10555---00.html

The plaintiff, Michigan First Credit Union ("MFCU"), offered indirect loans through automobile dealerships. MFCU's vice president of lending was responsible for monitoring the indirect lending program and, together with staff, adhering to MFCU's eight-factor lending policy. Despite concerns by an internal auditor and other managers, MFCU's vice president made assurances that he was monitoring indirect lending and that everything "looked good." *Id.* at *4. After a further audit, and admission by the vice president that he had not been monitoring indirect lending, MFCU discovered hundreds of loan applications which had been approved in violation of stated policy which resulted in a number of defaulted loans.

Defendant CUMIS Insurance Society, Inc. ("CUMIS") had earlier issued MFCU a fidelity bond that provided coverage for losses caused by an employee's "failure to faithfully perform his/her trust." *Id*. MFCU filed a claim with CUMIS, alleging that the vice president and his staff had caused losses to MFCU by their conscious disregard of MFCU's stated lending policies.

When CUMIS denied the claim, MFCU filed suit in the Eastern District of Michigan. A jury trial determined that MFCU's losses were covered by the fidelity bond, and returned a verdict in the amount of $5,050,000 for damages with an additional $2.7 million interest award. *Id.* When the district court subsequently denied CUMIS's motion for judgment as a matter of law and a new trial, CUMIS appealed.

CUMIS argued on appeal that "the evidence at trial was insufficient to demonstrate coverage under the fidelity bond's faithful-performance clause." *Id.* at *5. The performance clause only covered losses caused by employees "in conscious disregard of … established and enforced … lending policies." *Id.* at *7. CUMIS's contention was that there was insufficient evidence that MFCU's lending policy was either established, enforced, or consciously disregarded by MFCU employees, and moreover, CUMIS claimed that the evidence demonstrated that MFCU had acquiesced in the violations.

In affirming the district court's refusal to grant CUMIS judgment as a matter of law, the Sixth Circuit noted that MFCU's lending policy stated that consideration of "key factors" was mandatory in making indirect loans, and thus the jury's finding that the policy was "established" was supported by evidence. The Sixth Circuit also noted that the jury's determination that the policy was sufficiently "enforced" was supported by evidence that MFCU conducted training on the lending policy and undertook quarterly audits. CUMIS asserted that, because such measures were ineffective at preventing the violations at issue, the lending policy was not "enforced." In rejecting this argument, the court stated that "the language of the faithful-performance clause does not require a certain *level* of enforcement, or perfect enforcement for MFCU to be entitled to coverage." *Id.* at *10 (emphasis in original).

The Sixth Circuit additionally rejected CUMIS's argument that there was insufficient evidence to support the jury's finding that the vice president and staff had "consciously disregarded" the lending policy, in that expert evidence showed that the loans would not have been made "probably in any credit union." *Id.* at *12. Finally, the Sixth Circuit rejected CUMIS's argument that MFCU had acquiesced in the lending policy violations as CUMIS put forth no evidence at the trial stage indicating that the MFCU Board had any knowledge that such violations were occurring.

In affirming the lower court's refusal to grant CUMIS judgment as a matter of law, the Sixth Circuit also affirmed the lower court's refusal to grant CUMIS a new trial, finding there was not a reasonable probability that the verdict had been influenced by inappropriate statements made by MFCU's counsel in closing arguments.

For Further Information

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