

THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

Capella University, Inc.,

Court File No. 06-607 JMR/FLN

Plaintiff,

DEFENDANT'S ANSWER

vs.

Executive Risk Specialty Insurance Company,

Defendant.

TO: PLAINTIFF ABOVE-NAMED AND ITS ATTORNEYS, THOMAS M. STIEBER AND GERALD H. BREN, ESQS., FOLEY & MANSFIELD, PLLP, 250 MARQUETTE AVENUE SOUTH, SUITE 1200, MINNEAPOLIS, MN 55401.

Executive Risk Specialty Insurance Company ("ERSIC"), by its attorneys, hereby answers Plaintiff's Complaint by denying each and every allegation, matter and thing contained in the Complaint except as hereinafter admitted, qualified or otherwise stated, and further answers the Complaint by reference to Plaintiff's enumerated paragraphs in the Complaint and asserts affirmative defenses as follows:

I.

ERSIC admits the allegations of paragraphs 1, 3 and 12.

II.

ERSIC denies the allegations of paragraphs 23, 24, 25, 26, 28, 29, 30, 33, and 34.

III.

ERSIC lacks sufficient knowledge to admit or deny the allegations of paragraphs 11, and 20, and therefore denies these allegations.

IV.

The allegations of paragraphs 4, 5, 6, 15, and 21 state legal conclusions to which no responses are required.

V.

Regarding the allegations of paragraph 2, ERSIC admits the allegations of the first sentence and lacks sufficient knowledge to admit or deny the allegations of the second sentence, and therefore denies the allegations of the second sentence.

VI.

Regarding the allegations of paragraphs 7, 8, 9, 10, and 32, ERSIC admits that it issued a policy of insurance (“the Policy”) to Plaintiff, and affirmatively states that the language of the Policy speaks for itself. Further regarding the allegations of paragraph 32, ERSIC states that these allegations state legal conclusions to which no responses are required.

VII.

Regarding the allegations of paragraphs 13 and 14, ERSIC admits that Jeffrey La Marca (“La Marca”) has filed a complaint against Plaintiff in the United States District Court for the District of Minnesota, and affirmatively states that the content of La Marca’s complaint speaks for itself.

VIII.

Regarding the allegations of paragraph 16, ERSIC admits that Plaintiff sent a letter dated July 20, 2005 to ERSIC, and affirmatively states that the content of this letter speaks for itself.

IX.

Regarding the allegations of paragraph 17, ERSIC admits that it sent letters dated September 19, 2005, November 10, and December 30, 2005 to Plaintiff, and affirmatively states that the content of these letters speaks for itself.

X.

Regarding the allegations of paragraph 18, ERSIC admits that on December 27, 2005, ERSIC received from Plaintiff an undated letter authored by Priscilla McNulty, Plaintiff's Senior Counsel -- Legal and Regulatory Affairs, and affirmatively states that the content of this letter speaks for itself.

XI.

Regarding the allegations of paragraph 19, ERSIC admits that it sent a letter dated December 30, 2005 to Plaintiff, and affirmatively states that the content of this letter speaks for itself.

XII.

Regarding the allegations of paragraphs 22, 27 and 31, see paragraphs I through XI of this Answer.

XIII.

ERSIC denies that Plaintiff is entitled to any relief in this action, including the claims for relief stated in the WHEREFORE clause of Plaintiff's Complaint.

AFFIRMATIVE DEFENSES

XIV.

Plaintiff's Complaint fails to state a claim for which relief may be granted.

XV.

Plaintiff's Claims are barred by its failure to mitigate its damages.

XVI.

Coverage for La Marca's claims against Plaintiff is unavailable under the Policy's Insuring Clause, which provides as follows:

1. The Company shall pay on behalf of an **Insured** all **Loss** which such **Insured** becomes legally obligated to pay on account of any **Claim** first made against such **Insured** during or after the **Policy Period** or, if exercised, during the Extended Reporting Period, for:

- (a) **Wrongful Act;**
- (b) **Educator's Errors or Omissions**; or
- (c) **Employment Practices**

committed, attempted, or allegedly committed or attempted, by such **Insured** before or during the **Policy Period**.

XVII.

Coverage for La Marca's claims against Plaintiff is barred by certain of the Policy's terms and conditions, including, but not limited to, the following:

Exclusion 4.1(a)

The Company shall not be liable for **Loss** on account of any **Claim** based upon, arising from, or in consequence of:

- (a) any circumstance if written notice of such circumstance has been given under any policy of which this policy is a renewal or replacement and if such prior policy affords coverage (or would afford such coverage except for the

exhaustion of its limits of liability) for such **Loss**, in whole or in part, as a result of such notice;

Exclusion 4.1(b)

The Company shall not be liable for **Loss** on account of any **Claim** based upon, arising from, or in consequence of:

* * *

- (b) any demand for monetary damages, suit, formal administrative or regulatory proceeding commenced by the filing of a notice of charges, formal investigatory order or similar document or arbitration proceedings pending, or order, decree or judgment entered against any **Insured** on or prior to the Pending or Prior date set forth in Item 6 of the Declarations, or the same or any substantially similar fact, circumstance or situation underlying or alleged therein;

Exclusion 4.1(k)

The Company shall not be liable for **Loss** on account of any **Claim** based upon, arising from, or in consequence of:

* * *

- (k) mental or emotional distress (except with respect to **Employment Practices**), bodily injury, sickness, disease or death of any person, loss of use of tangible property whether or not it is damaged or destroyed, or damage to or destruction of any tangible property;

Exclusion 4.3(b)

The Company shall not be liable for that part of **Loss**, except for **Defense Costs**, on account of any **Claim**:

* * *

- (b) which constitutes any costs associated with any accommodation required pursuant to the Americans With Disabilities Act, The Civil Rights Act of 1964, rules or regulations promulgated thereunder and amendments

thereto, or similar provisions of any federal, state or local statutory or common law;

Exclusion 4.3(c)

The Company shall not be liable for that part of **Loss**, except for **Defense Costs**, on account of any **Claim**:

* * *

- (c) which constitutes the cost of compliance with any order for, grant of or agreement to provide injunctive or non-pecuniary relief.

XVIII.

ERSIC affirmatively alleges that on or about June 15, 2005, Plaintiff submitted an application for insurance. ERSIC relied on the representations in that application when they agreed to bind coverage for Plaintiff. ERSIC further affirmatively alleges that Plaintiff made misrepresentations of material fact in its application for coverage and that these misrepresentations void coverage for La Marca's claims against Plaintiff under the Policy.

XIX.

ERSIC reserves the right to amend or add any additional Affirmative Defenses as they become known through the course of litigation.

WHEREFORE, ERSIC respectfully requests that this Court deny Plaintiff the relief sought, dismiss the Complaint with prejudice, and grant any other relief as this Court deems just and equitable.

RIDER BENNETT, LLP

By /s Peter Gray _____

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Dated: March 30, 2006