

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

Capella University, Inc.,

Court File No.: 06-CV-607 JMR/FLN

Plaintiff,

vs.

Executive Risk Specialty Insurance
Company, Arthur J. Gallagher & Co.,
and Arthur J. Gallagher Risk
Management Services, Inc.,

Defendants.

**ANSWER OF ARTHUR J.
GALLAGHER RISK
MANAGEMENT SERVICES, INC.
TO PLAINTIFF'S FIRST AMENDED
COMPLAINT AND
CROSS-CLAIM AGAINST
EXECUTIVE RISK SPECIALTY
INSURANCE COMPANY**

DEMAND FOR JURY TRIAL

TO: Plaintiff Capella University, Inc., and its attorneys, Thomas M. Stieber, Foley & Mansfield, P.L.L.P., 250 Marquette Avenue, Suite 1200, Minneapolis, MN 55401, and

Defendant Executive Risk Specialty Insurance Company, and its attorneys, Peter Gray, Rider Bennett LLP, 33 South Sixth Street, Suite 4900, Minneapolis, MN 55402:

Defendant, Arthur J. Gallagher Risk Management Services, Inc. ("Risk Management Services"), hereby respectfully submits the following Answer, and by and through its counsel, states and alleges as follows:

1. Denies generally each and every allegation, matter and thing contained in the First Amended Complaint unless hereinafter specifically admitted, qualified or otherwise stated.

2. Admits the allegations in paragraphs 1, 2, 6, 18, 21, 30, 32, 35, 37-38, and 41-42 of the Plaintiff's First Amended Complaint.

3. Denies the allegations in paragraphs 9, 17, 45-47, 50-51, and 53-55.

4. Lacks sufficient knowledge to admit or deny the allegations in paragraphs 5, 13, 25-29, 33-34, 39, and 43 of Plaintiff's First Amended Complaint.

5. Regarding the allegations of paragraph 3, admits that Arthur J. Gallagher & Co. is a Delaware Corporation with its principal place of business in Chicago, Illinois, but denies the remaining allegations of that paragraph.

6. Regarding the allegations of paragraph 4, admits that Arthur J. Gallagher Risk Management Services, Inc., is organized under the laws of Illinois, has its principal place of business in Chicago, Illinois, and is a wholly-owned subsidiary of Arthur J. Gallagher & Co., but denies the remaining allegations.

7. Regarding the allegations of paragraph 8, admits the allegations with respect to Risk Management Services, denies the allegations with respect to Arthur J. Gallagher & Co., and is without sufficient information to admit or deny the remaining allegations.

8. Regarding the allegations of paragraph 10, admits that Risk Management Services had a business relationship with Capella since approximately June of 2002 that included the provision of brokerage and insurance consulting services for which Risk Management Services was

compensated, but denies all remaining allegations and characterizations in that paragraph.

9. Regarding the allegations of paragraph 11, admits that Mike Baumann is the Vice President of Risk Management Services and was an agent for Risk Management Services for certain purposes, but denies the remaining allegations of that paragraph.

10. Regarding the allegations of paragraph 12, admits that Capella purchased a Miscellaneous Professional Liability policy from Lexington Insurance Company in 2004, but denies the remaining allegations of that paragraph.

11. Regarding the allegations of paragraph 14, admits that Baumann requested a meeting with Capella and that Baumann provided Capella with an Application from Lexington Insurance Company, but denies the remaining allegations in that paragraph.

12. Regarding the allegations of paragraph 15, admits that Baumann provided a proposal to Capella for two options for professional liability coverage and Capella elected to purchase the ERSIC policy, but denies the remaining allegations and characterizations in that paragraph.

13. Regarding the allegations of paragraph 16, admits that ERSIC issued an Educators Professional Liability Policy to Capella, but affirmatively alleges that the terms of the policy speak for itself.

14. Regarding the allegations of paragraph 19 and 20, admits that the ERSIC policy includes the cited provisions, but affirmatively alleges that the ERSIC policy speaks for itself.

15. Regarding the allegations of paragraph 22-24, admits that the La Marca complaint includes such allegations, but affirmatively alleges that the complaint speaks for itself.

16. Regarding the allegations of paragraph 49, admits there was a business relationship between Risk Management Services and Capella, and that Risk Management Services received compensation, but denies the remaining allegations in that paragraph.

AFFIRMATIVE DEFENSES

Risk Management Services asserts the following Affirmative Defenses:

1. Plaintiff's claims fail to state a claim upon which relief may be granted.
2. Plaintiff's claims are barred by its contributory or comparative fault.
3. Plaintiff's claims are barred by its failure to mitigate damages.
4. Plaintiff's claims are barred by the doctrines of waiver and estoppel.
5. Plaintiff's claims are barred by unclean hands.
6. Plaintiff's damages, if any, were caused by the fault or conduct over others whom these answering defendants had no control, including without limitation, Plaintiff's corporate counsel and/or outside counsel.

7. Plaintiff's damages were caused by a superseding or intervening cause.

CROSS-CLAIM AGAINST ERSIC

For its cross-claim against Executive Risk Specialty Insurance Company, Risk Management Services states and alleges as follows:

1. Realleges and incorporates herein by reference paragraphs 1 through 16 of its Answer.

2. Plaintiff has alleged certain claims against Risk Management Services in its First Amended Complaint, including that Risk Management Services failed to procure the insurance coverage requested by Plaintiff and failed to instruct Plaintiff on completing its applications for insurance coverage.

3. Plaintiff has claimed that these failures caused certain damages that Plaintiff seeks to recover from Risk Management Services.

4. Because Plaintiff's claims against Risk Management Services are premised on ERSIC's denial of coverage and ERSIC's claim that Plaintiff made material misrepresentations on its application for coverage, Risk Management Services has standing to challenge the position taken by ERSIC with respect to coverage and the alleged material misrepresentations.

5. An actual controversy exists regarding coverage under the ERSIC policy, and Risk Management Services is an "interested party" to this controversy under 28 U.S.C. § 2201.

6. Pursuant to all the terms and conditions of the ERSIC policy, ERSIC has a duty to defend and indemnify Plaintiff in the La Marca lawsuit under the terms and conditions of its policy, in that the ERSIC policy provides coverage for the loss and none of the exclusions are applicable.

7. In particular, Exclusion 4.1(b) does not apply in that the La Marca DOE complaint described in paragraph 13 of the First Amended Complaint is not a “formal administrative or regulatory proceeding commenced by the filing of a notice of charges.”

8. Even if the DOE complaint could be considered a “formal administrative or regulatory proceeding commenced by the filing of a notice of charges” within the meaning of Exclusion 4.1(b), the ERSIC insurance policy defines the term “claim” to include a “formal administrative or regulatory proceeding commenced by the filing of a notice of charges,” therefore making the DOE complaint and the La Marca lawsuit two separate “claims” within the meaning of the policy language, rendering Exclusion 4.1(b) inapplicable under these facts.

9. Further, even if the DOE complaint could be considered a “formal administrative or regulatory proceeding commenced by the filing of a notice of charges” within the meaning of Exclusion 4.1(b), upon information and belief, such proceeding was not “pending” when the ERSIC policy was issued effective May 9, 2005, rendering Exclusion 4.1(b) inapplicable under these facts.

10. At the very least, Exclusion 4.1(b) is ambiguous in that it is subject to two or more reasonable interpretations, and therefore, such exclusion must be construed against ERSIC, rendering Exclusion 4.1(b) inapplicable under these facts.

11. The other exclusions cited by ERSIC in support of its denial of coverage are either not applicable, only limit the duty to indemnify, or are barred by waiver and estoppel because ERSIC did not raise such denial bases in its denial letters.

12. Plaintiff did not make a material misrepresentation in its application for coverage with ERSIC.

13. Specifically, the DOE complaint described in paragraph 13 of the First Amended Complaint is not an employment-related “administrative proceeding” and, based upon information and belief, did not result in a “loss” within the meaning of the application question. At the very least, the application question at issue is ambiguous and must be construed against ERSIC.

14. In addition, ERSIC did not justifiably rely on the alleged misrepresentation, nor did the alleged misrepresentation increase the risk of loss.

WHEREFORE, Defendant Risk Management Services respectfully requests that the Court:

1. Dismiss Plaintiff's First Amended Complaint against Defendant Risk Management Services in its entirety with prejudice;
2. Declare and adjudge that Executive Risk Specialty Insurance Company must defend and indemnify Plaintiff in the La Marca lawsuit;
3. Award Defendant Risk Management Services its costs and disbursements including reasonable attorneys' fees; and
4. Enter such other relief as it may deem appropriate.

Defendant Risk Management Services hereby demands a jury trial.

Date: November 7, 2006

LARSON - KING, LLP

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