IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

CONDUENT STATE HEALTHCARE, LLC, f/k/a/ XEROX STATE HEALTHCARE, LLC, f/k/a ACS STATE HEALTHCARE, LLC,	)	
Plaintiff,	)	
v.	)	C.A. No. N18C-12-074 MMJ CCLD
AIG SPECIALTY INSURANCE COMPANY, f/k/a CHARTIS SPECIALTY INSURANCE COMPANY, *et. al.*,	)	
Defendants.	)	

Submitted: November 21, 2022
Decided: February 14, 2023

On Plaintiff's Renewed Motion for Judgment as a Matter of Law
Pursuant to Rule 50,
To Set Aside/Amend/Alter the Judgment
Under Rule 59(d),
and/or for a New Trial Under Rule 59(a)

OPINION

Adam S. Ziffer, Esq., (Argued), Robin L. Cohen, Esq., Keith McKenna, Esq., Cohen Ziffer Frenchman & McKenna LLP, New York, New York; Jennifer C. Wasson, Esq., David A. Seal, Esq., Carla M. Jones, Esq., Potter Anderson & Corroon LLP, Wilmington, Delaware; Alanna G. Clair, Esq., Craig M. Giometti, Esq., Shari L. Klevens, Esq., Dentons US, LLP; *Attorneys for Plaintiff*

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Brown; Peter H. Kyle, Esq., John L. Reed, Esq., DLA Piper LLP (US); *Attorneys for Defendants*

JOHNSTON, J.

In almost 20 years on this bench, I have never set aside a jury verdict.[1] Jury verdicts are entitled to great deference. Altering a jury's decision should only be done under circumstances in which justice otherwise would be denied.[2]

STANDARDS OF REVIEW

Rule 50 - Judgment as a Matter of Law

Rule 50 provides:

> (a) *Judgment as a matter of law.*
>
> (1) If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the Court may determine the issue against the party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.
>
> (2) Motions for judgment as a matter of law may be made at any time before submission of the case to the jury. Such a motion shall specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment.
>
> (b) *Renewal of motion for judgment after trial; alternative motion for new trial.* Whenever a motion for a judgment as a matter of law made at the close of all the evidence is

[1] I have, however, granted *additur* in one case and *remittitur* in another.
[2] *Young v. Frase*, 702 A.2d 1234, 1236–37 (Del. 1997).

> denied or for any reason is not granted, the Court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion . . . . If a verdict was returned, the Court may, in disposing of the renewed motion, allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as a matter of law.

A renewed motion for judgment as a matter of law only may be made on grounds raised in a Rule 50(a) motion.[3]

Rule 59—New Trial, Alter or Amend Judgment

Rule 59 provides:

> (a) *Grounds.* A new trial may be granted as to all or any of the parties and on all or part of the issues in an action in which there has been a trial for any of the reasons for which a new trials have heretofore been granted in the Superior Court. . . .
>
> . . . .
>
> (d) *Motion to alter or amend a judgment.* A motion to alter or amend the judgment shall be served and filed not later than 10 days after entry of the judgment.

To prevail on the Rule 59(d) motion in this case, plaintiff Conduent must show "the need to correct clear error of law or to prevent manifest injustice."[4]

A jury verdict will not be upset "unless the evidence preponderates so heavily against the jury verdict that a reasonable jury could not have reached the

[3] *Dickens v. Costello*, 2004 WL 1731143, at *1–2 (Del. Super.).
[4] *Monzo v. Nationwide Prop. & Cas. Ins. Co.*, 2020 WL 2467074, at *2 (Del. Super.), *aff'd*, 249 A.2d 106 (Del. 2021). No argument has been made by Conduent that there has been an intervening change in controlling law or that new evidence is available.

result."[5] The Court will not substitute its opinion for that of the jury "where any margin for reasonable difference of opinion exists."[6] A verdict should be set aside only for "exceptional circumstances . . . when the verdict is manifestly and palpably against the weight of the evidence, or for some reason, justice would miscarry if the verdict were allowed to stand."[7]

ANALYSIS

Pretrial Opinions Narrowed Issues for the Jury

In the course of this litigation, the Court considered numerous substantive and procedural motions. In addition to multiple bench rulings, the Court has issued six written opinions. By Opinion dated June 24, 2019, the Court found that the Texas Attorney General's investigation triggered the duty to pay defense costs under the relevant insurance policies.[8] On summary judgment motions, the Court held that Defendants had a duty to defend against the Medicaid-Related Claims; and that Conduent had established a *prima facie* case that Defendants have a duty to indemnify.[9]

[5] *Caldwell v. White*, 2005 WL 1950902, at *3 (Del. Super.).
[6] *Storey v. Castner*, 314 A.2d 187, 193 (Del. 1973).
[7] *Mumford v. Paris*, 2003 WL 231611, at *2 (Del Super.).
[8] *Conduent State Healthcare, LLC v. AIG Specialty Ins. Co.*, 2019 WL 2612829, at *5–6 (Del. Super.).
[9] *Conduent State Healthcare, LLC v. AIG Specialty Ins. Co.*, 2021 WL 2660679, at *4–5 (Del. Super.).

However, there were certain factual questions that remained for the jury. The purpose of the trial was to resolve those questions of fact. The first factual issue related to whether Conduent breached its duty to cooperate with Defendants and to seek consent for purposes of settlement with the Texas Attorney General.[10] The jury also was asked to determine what the settlement actually was for. The jury considered the question of whether Conduent and the Attorney General conspired to misrepresent the terms of the settlement for the sole purpose of enabling Conduent to obtain insurance coverage, coverage that otherwise would not have existed. If the parties did not conspire, the next issue was whether Conduent tricked or otherwise convinced the Attorney General to misrepresent terms of the settlement for the sole purpose of obtaining otherwise-unavailable insurance coverage.

The Settlement Agreement and Release ("Settlement Agreement") was executed in February 2019.

The Jury's Factual Findings

The trial lasted six days. The jury heard the testimony of eight witnesses. In excess of one hundred exhibits were presented and admitted—many over and over again to several witnesses.

The jury answered ten specific questions.

[10] *Id.* at *8.

VERDICT FORM

Duty to Cooperate

1. Conduent had a duty to cooperate with and help the Insurers in connection with the State Action Settlement. Did Conduent prove by a preponderance of the evidence that the duty to cooperate and help was relieved because cooperation would have been pointless or futile?

   YES: _____ NO: __X__

2. Have the Insurers proved by a preponderance of the evidence that Conduent breached the duty to cooperate with and help any of the Insurers in connection with the State Action Settlement?

   YES: __X__ NO: _____

3. If you answered "YES" to Question 2, check each Insurer who proved by a preponderance of the evidence that Conduent breached the duty to cooperate with and help in connection with the State Action Settlement.

   __X__AIG Specialty Insurance Company

   __X__AIG American Insurance Company

   __X__Lexington Insurance Company

Duty to Seek Consent

4. Conduent had a duty to seek the Insurers' prior written consent in connection with the State Action Settlement. Did Conduent prove by a preponderance of the evidence that seeking the Insurers' prior written consent would have been futile?

   YES: _____ NO: __X__

5. Did Conduent prove by a preponderance of the evidence that Conduent took reasonable steps to seek to obtain the Insurers' written consent in connection with the State Action Settlement?

   YES: _____ NO: __X__

6. Did Conduent prove by a preponderance of the evidence that any of the Insurers' failure to provide written consent was unjustifiable or in bad faith?

YES: _____ NO: __X__

7. If you answered "YES" to Question 6, check each Insurer who Conduent proved by a preponderance of the evidence failed to provide written consent in connection with the State Action Settlement unjustifiably or in bad faith.

_____AIG Specialty Insurance Company

_____AIG American Insurance Company

_____Lexington Insurance Company

Fraud

7. Have the Insurers proved by clear and convincing evidence that Conduent engaged in fraud in connection with the State Action Settlement?

YES: __X__ NO: _____

Collusion

8. Have the Insurers proved by a preponderance of the evidence that Conduent engaged in collusion in connection with the State Action Settlement?

YES: _____ NO: __X__

Good Faith

9. Have the Insurers proved by a preponderance of the evidence that Conduent did not settle with the State of Texas in good faith?

YES: __X__ NO: _____

Reasonableness

10. Have the Insurers proved by a preponderance of the evidence that Conduent's settlement with the State of Texas was not reasonable?

YES: _____ NO: __X__

The Winter Submission

The first problem with the trial involved an unusual document. The Office of the Texas Attorney General declined to provide any witness for deposition (or to otherwise cooperate in any manner) in this case. After much negotiation, the parties agreed to put certain written questions to Raymond Winter ("Winter"), as the lone representative of the Texas Attorney General's Office.[11]

The Winter Submission clearly is inadmissible hearsay, indeed double and triple hearsay. Winter was not subject to cross-examination. The trial was replete with testimony from other witnesses about Winter's credibility and alleged bias. Nevertheless, the parties had agreed before trial that this document could be used at trial. Against my better judgment, I acquiesced to the parties' agreement. This is the generally-accepted practice in Superior Court civil cases. If the parties agree to admissibility, the Court will not interpose its own judgment. However, the red flags were there. From my many years of experience, I suspected that this document could create a ripple effect of thorny evidentiary issues, for the very reasons that the hearsay rule is designed to prevent. In short order, Winter's credibility became a centerpiece of the trial. And there was no way the jury could

[11] Raymond Winter, Individually and as Representative of the Office of the Attorney General of the State of Texas - Objections and Answers to Deposition on Written Questions ("Winter Submission").

adequately evaluate the validity of the Winter Submission in the absence of the declarant or Winter's out-of-court testimony, subject to cross examination.

AIG argued that certain language in the Settlement Agreement was drafted for the sole purpose of obtaining insurance coverage that otherwise would not have existed. The meeting, between Conduent and the Texas Attorney General's Office, that was the most crucial to AIG's argument occurred on December 14, 2018. Winter was not present at that meeting. Winter wrote: "The Texas OAG does not recall what may have been discussed on December 14, 2018 regarding how settlement funds would be allocated or characterized." Nevertheless, Winter stated his opinion, in response to several questions about what the Texas Attorney General and Conduent agreed concerning whether the settlement was for breach of contract and tort claims, or only for Medicaid Fraud claims. In addition to Winter lacking any personal knowledge of what was agreed at the meeting, Winter's written answers are directly contradictory of the explicit terms of the Settlement Agreement.

The Settlement Agreement stated that the "Settlement Amount is allocated to reimburse . . . the STATE for monetary losses claimed to have resulted from alleged failures to comply with obligations by Conduent Healthcare . . . under the 2003 Contract and 2010 Contract . . . ." Further: "No portion of the Settlement Amount shall be allocated or attributed to the payment of fines, penalties, or other

punitive assessments, or to disgorgement of revenues." It is undisputed that the Settlement Agreement by its terms expressly allocated payment on the basis of contractual claims, and not to any penalties or fraud claims.

The Settlement Agreement also provided: "Prior to entering into and reaching this Agreement, the STATE advised DEFENDANTS that it was prepared to amend the State Action to add causes of action for breach of contract of the 2003 Contract and 2010 Contract, including the claimed contractual breaches discussed in the Audit reports and in the notice of Termination, and negligence in the performance of contractual services for HHSC." In response to written questions, Winter stated that this "statement was not a true statement." Winter gave no explanation why the Deputy Attorney General for Civil Litigation Office of the Attorney General of Texas nevertheless signed the Settlement Agreement on February 15, 2019. Nor did Winter offer any reasons why he viewed the statement as untrue as of the time the Settlement Agreement was executed.

The jury found that Conduent and the State of Texas did not engage in collusion in connection with the State Action Settlement. The jury found that Conduent was solely responsible for fraud, by finding no collusion on the part of the State of Texas. The Deputy Attorney General's signature on the Settlement Agreement is inconsistent with those verdicts. If the settlement was in fact for fraud or penalties (not covered by insurance), instead of for breach of contract

damages (covered by insurance), the Settlement Agreement is a misrepresentation. If, as Winter wrote, the statement was false, it appears that the Texas signatory colluded with Conduent.

References to Attorney-Client Privileged Information

AIG sought to introduce information contained in Conduent's privilege logs. During the weekend before trial began, the Court issued the following letter ruling:

PRIVILEGE LOGS

> To clarify my ruling, and for avoidance of doubt, I did not "permit Defendants to introduce into evidence Conduent's privilege logs, redaction logs, and defense counsel's invoices [or permit] testimony regarding Conduent's and Conduent's defense counsel's discussions on particular dates…."
>
> The privilege logs themselves are not subject to the attorney-client privilege. However, the content of any conversations with counsel listed in the logs is privileged. The fact that meetings took place, the dates of those meetings, the general subject matter, and who attended those meetings may be relevant. I suggested that the parties meet and confer to agree to a demonstrative exhibit that listed the dates, attendees and general subject matter of the meetings.
>
> Defendants' proposal is not appropriate for 2 reasons: (1) the proposed stipulation is overly broad in that it appears to permit counsel to use the exhibit for any purpose and prevents any objection to any argument to be made about the import of the Exhibit; and (2) the Court anticipated a demonstrative, not trial, exhibit. In other words, absent agreement, any exhibit will not go back to the jury room during deliberations.

> As counsel are aware, a party waives the attorney-client privilege by placing the content of conversations with counsel at issue. For example, if the party wishes to assert that they took certain actions in reliance upon the advice of counsel, the privilege is waived and the opponent may pose questions as to the content of the attorney advice. However, it is not proper for an opponent to force waiver of the attorney-client privilege by placing a matter at issue. For example, a party cannot argue that attorneys must have advised their opponent to take certain positions, and then force the opponent to provide testimony as to what took place during meetings with attorneys.
>
> These issues are much more complicated to handle in a jury trial, but that is where we are. Since the parties apparently cannot agree, I find that the information contained in the privilege log may be put in a demonstrative exhibit and shown to the jury. Defendants may refer to the information. However, Defendants may not use the privilege log as the basis for arguing that Conduent's attorneys must have advised Conduent in a certain way. Such an argument would improperly place the content of attorney advice at issue, forcing a waiver of the privilege.
>
> This resolution is consistent with the Rules of Evidence and case law governing privileged communications. Nevertheless, this points up the difficulty of presenting nuanced evidence and arguments to a jury.

The parties were strictly instructed that information contained in the logs could be used for the sole and very limited purpose of demonstrating, for example, that a meeting took place on a certain date, who attended the meeting, and the general topic of the meeting. Under no circumstances would counsel be permitted

to draw any inferences from those facts.[12] Specifically, counsel were admonished that they could not argue to the jury that insurance coverage must have been discussed at the meeting because certain persons were included.

Conduent repeated its written and oral objections to AIG's attempted references to privileged communications before and throughout trial. These objections were deemed by the Court to be preserved.

Although Conduent's counsel did not object during closing argument (as is typical in civil trials in Delaware), the Court finds that Conduent's objections to this argument were not waived. This issue repeatedly had been addressed by counsel and by the Court. All objections to use of privileged material, as well as to inferences to be drawn from those materials, were preserved.

Before AIG's opening statement, the Court cautioned counsel about the inappropriate argumentative use of the privilege log demonstrative exhibit. Nevertheless, AIG's opening statement contained the following argument:

> ***Trial Transcript, February 14, 2022, Page 155***
>
> And I would like to leave you with one last point. You are going to see at trial and you're going to hear evidence about a list that we got from Conduent in this litigation showing communications that Conduent was having during this critical period from October 2018 to February, 2019 at the same time that it was negotiating finalizing this settlement with Texas. And that lists looks something like this. And I'm going to show it to you. I'm going to use this

[12] D.R.E. 512(a) (no inference may be drawn from claim of privilege).

device for the first time ever called and we'll get there. It looks something like this. The real list goes on for pages and pages and I will show you that in a minute. The real list shows more 100 entries. And what you will hear in evidence is that what this shows is the pattern of what Conduent was talking about when, during that fateful critical period right before it settled this case.

And what I want you to look at and what the evidence will show is that every single description on this list mentions two things together in the same sentence. It mentions settlement of the State lawsuit and insurance coverage. This isn't our list. This is Conduent's list. Every single description refers to two things in the same sentence hand-in-hand, settlement and insurance coverage.

And I want you to notice what it doesn't say. And you will see this more in evidence. You will have access to it. I know you can't see it very well right now. But I want you to look for an entry where you see it say settlement and government contracting business. Look for a single entry where the list describes what Conduent was talking about as settlement and its contracting business, that Conduent now says would be destroyed if it settled in any other way.

And when you hear Conduent's witnesses testify about what was forefront in their minds when they were doing what they were doing in that back room with Texas when they were manipulating the settlement agreement to include two new claims that had never before been prosecuted. When they were convincing the Texas government to file these two claims that Texas didn't even want to file. All so it could say to the insurers, look, we paid every penny of this settlement for a contract claim, not fraud. I want you to remember this list and I want you to think about what it shows was in the forefront of Conduent's mind. One hundred entries. Sometimes there were several a day. Sometimes there were many over several days. Every single one, two things together, settlement and insurance.

> And if you will forgive me, I'm going to try to use the Elmo so I can show you a little bit what I'm talking about.
>
> THE COURT: I think we are really getting into extreme argument at this point.[13]

In closing, counsel for AIG argued that the jury should infer that manufacturing insurance coverage was discussed with counsel, including during the key pre-settlement meeting.

> ***Trial Transcript, February 21, 2022, Pages 230–33***
>
> Well, you will recall, we saw on these boards lots of entries. And, in fact, I know it's small, so that's why I asked Mr. Peffer who had the opportunity to look at them. And I said, do you see the highlighted in red each one of the descriptions of the communications or whatever the document exchange between you, Mr. Ciaglo, your lawyers references coverage?
>
> Yes, that board suggests there was a communication, a written communication about coverage.
>
> I said, in fact, many communications about coverage?
> Yes. And I'm surprised there may not be more.
> Then I asked him: These are communications regarding the Texas action; right?
>
> Yes. Right.
>
> Settlement of the Texas action? And in the same subject matter line coverage related issues?
>
> Answer: Yes. Yeah, that's right.

[13] The Delaware custom and practice is clear and well-established. An opening statement is just that—a statement of the facts the party anticipates presenting. Argument is prohibited, and is reserved for closing arguments.

> And then he offered, I think as I added them up, there were over 90, about 90 over a four-month -- four-and-a-half month period.
>
> So in the key time period where they are working on trying to come up with a basis to trigger coverage with the insurers, to ask the State AG, put a claim in, a contract claim so now we can say, insurers we've got coverage. We have all of these communications going on between the lawyers dealing with the State and coverage counsel.
>
> And this is an example -- again, these are from Mr. Nichols' time records, more instances where there are conversations about coverage and with coverage counsel. And this is, again, in the critical timeframe. You remember this: This is an E-mail -- or a scheduling E-mail, scheduling a call, with the people on the ground in Texas who are fighting the fight with Texas, Mr. Walters, Mr. Nichols, ahead of the December 14th meeting. The meeting where Nichols -- I'm sorry, where Mr. Walters is going to go in and say, we demand you add contract claims. We demand you add contract claims. And look who's on the call before he goes in. Coverage counsel, Mr. McKenna, Ms. Cohen, lawyers from their firm.
>
> After -- this is another one on February 9th before the settlement is finalized. They are still in negotiation. Remember Mr. McCarty says, we are really not comfortable putting in an amendment. Who are they talking to? The lawyers on the ground are having discussions about what? The proposed Conduent settlements.

Because of the Court's prior ruling prohibiting inference and argument based on information contained in the privileged log, Conduent was limited during trial in its ability to refute unanticipated improper negative inferences, in closing

argument, of fraud or the alleged bad faith manufacturing of coverage that otherwise did not exist.

Presentation to the jury of these issues was complicated. Experienced and sophisticated counsel were required to closely adhere to the specific and often necessarily-nuanced evidentiary rulings. The Court had ruled in decisions on pre-trial motions that coverage did exist for defense costs and that Conduent had demonstrated a *prima facie* case of coverage for indemnification. Because the Court found it not relevant to the narrow issues before the jury, Conduent was prohibited during the trial from presenting any evidence to the jury that the Court already had held that AIG had breached its duty to provide coverage for defense costs to Conduent. Thus, the Court ruled that AIG was prohibited from "gilding the lily" by encouraging the jury to conclude that Conduent knew that there was no coverage available under any circumstances, in the absence of fraud on the part of Conduent. By repeatedly inferring that AIG never had ***any*** coverage obligation, AIG's arguments were not only inaccurate, but unduly prejudicial to Conduent.

Revealing Excluded Exhibit to the Jury

After the Settlement Agreement with the Texas Attorney General was executed, the Attorney General's Office issued the following Press Release:

AG Paxton Recovers Record $236 Million for Texas in Medicaid Fraud Settlement

Attorney General Ken Paxton today announced that Xerox Corporation and several of its former subsidiaries – including Conduent, Inc. – agreed to a $235.9 million settlement with the State of Texas to resolve a lawsuit brought under the Texas Medicaid Fraud Prevention Act (TMFPA) and other grounds regarding the processing of prior authorization requests by dentists to deliver orthodontic services to Medicaid patients.

The announced settlement represents the largest single resolution in a case filed by the attorney general's office for Medicaid-related claims.

Xerox and its companies were responsible for reviewing and approving or denying requests by Medicaid providers to deliver orthodontic services between January 2004 and March 2012. Under Texas law, only those requests that meet strict Medicaid program requirements are allowable. The Medicaid program does not pay for braces for cosmetic purposes.

The attorney general's office determined that employees of Xerox, Conduent and related companies rubber-stamped orthodontic prior authorization requests without assuring the required review of each request by qualified clinical personnel, which violated its responsibilities. As a result, expensive, taxpayer-funded orthodontic work was performed on thousands of children who either didn't meet the Medicaid standard for braces or didn't require treatment.

"Misconduct by employees of Xerox and its related companies compromised the integrity of the Medicaid program – the very program Texas hired the Xerox defendants to safeguard through the administration of a proper prior authorization review," Attorney General Paxton said. "We're proud of this recovery of taxpayer

> money. My office is committed to ensuring that Medicaid dollars are preserved for those who need it most."
>
> Attorney General Paxton credited the close cooperation, support and assistance of the Texas Health and Human Services Commission – which runs the state Medicaid program – for helping his office achieve a final settlement.
>
> The settlement is the culmination of investigative work and litigation by Attorney General Paxton's Civil Medicaid Fraud Division. In April 2012, it launched a formal investigation into Xerox. In May 2014, the attorney general's office filed a lawsuit against the Xerox defendants. Last year, the Texas Supreme Court ruled that Xerox was responsible for its conduct and could not deflect its liability by blaming the dentists who submitted the prior authorization requests in the first place.
>
> Though the settlement with the Xerox defendants is final, Attorney General Paxton's office still has pending litigation against dental and orthodontic providers who allegedly committed unlawful acts under the TMFPA in connection with their requests for reimbursement for delivering orthodontic services.
>
> Since 2000, the Civil Medicaid Fraud Division of the attorney general's office has recovered more than $2 billion for taxpayers under the Texas Medicaid Fraud Prevention Act.

The Press Release is replete with factual conclusions about issues that were hotly-disputed at trial. The bolded title of the Press Release directly contradicts the agreed-to language in the Settlement Agreement. Further, the Press Release contains information previously ruled inadmissible for the trial.

After considering vigorous argument, the Court ruled that the Press Release was not admissible. Two days before trial, the Court issued the following letter ruling:

PRESS RELEASE - TRIAL EXHIBIT NO. 335

> I find that this document is inadmissible hearsay. I am not persuaded that any of the cited evidentiary exceptions apply. Therefore, the Press Release shall not be used in opening statements or in Defendants' case in chief. However, circumstances may arise in which the Press Release may be used for impeachment. The post-Petition characterization by the State of Texas, of the nature of the action underlying the settlement, is relevant, to the extent it appears to contradict the Third Amended Petition. The fact that the Texas OAG referred to a "Medicaid fraud settlement," after the Third Amended Petition was filed, is relevant.
>
> So, for example, on cross-examination a Conduent witness might be asked: "Isn't it true that the OAG referred to the settlement as one for Medicaid fraud after the Third Amended Petition was filed?" If the answer is "no," then the Press Release might be used initially to refresh the witness' recollection (without publication to the jury). If the witness's recollection is not refreshed, the Press Release might be admitted. If the Conduent witness upon examination acknowledges that the Texas OAG made the reference to Medicaid fraud in a press release, after the Third Amended Petition, then the document itself cannot be used for impeachment or refreshing recollection.
>
> Be aware, however, that once this line of questioning is started, the Court will of necessity allow leeway for each party to elicit witness testimony as to why such a reference was made, and why it is or is not accurate. Without the ability to cross-examine the declarant as to content, timing and motivation, these issues can only be fleshed out

> through speculation. It would be far cleaner for the Press Release to be excluded in its entirety, but if Conduent's witnesses testify that the issue of Medicaid fraud was unequivocally terminated by the Third Amended Petition, the document becomes relevant impeachment.

The Press Release was unquestionably hearsay, had indicia of a lack of credibility and political motivation, there was no date of creation, no author was identified, no cross-examination was possible, and the language directly contradicted the stated terms of the Settlement Agreement. In short, the Press Release had the potential to be unduly prejudicial.

In disregard of the Court's unambiguous ruling, AIG repeatedly referred to and the Press Release in the presence of the jury.[14] The following are exemplary excerpts from the trial transcript.

> ***Trial Transcript, February 15, 2022, Page 105***
>
> Q [by AIG Counsel]. And, sir, do you recall that the day after the settlement agreement was signed -- the day after the settlement agreement was signed, the Texas Attorney General's Office issued a press release announcing –
>
> MR. MCKENNA: Your Honor - -
>
> THE COURT: I'm sorry. Yes.
>
> MR. MCKENNA: I think we addressed this already. I would like a sidebar, Your Honor.

[14] Ultimately, the Court found that Conduent had opened the door to presenting the Press Release to the jury. However in hindsight, Conduent was faced with a Hobson's Choice—ignore the Press Release altogether and risk the consequences of improper publication, or open the door in an attempt to rebut the jury's impressions of a document that cannot be erased.

THE COURT: All right. Let’s take a recess.

Trial Transcript, February 15, 2022, Pages 6–12

THE COURT: Do we need for the witness to leave the room?

MR. MCKENNA: Yes, Your Honor. - - - -

THE COURT: All right. What is the objection?

MR. MCKENNA: Your Honor has ruled on this exact issue. You said on cross examination a witness might be asked, Isn't it true the OAG referred to the settlement as one for Medicaid fraud when the petition was filed. If the answer is no, then maybe the press release comes in.

He literally just testified now to the existence of a press release that Your Honor said shouldn't be mentioned; that it was complete hearsay.

MR. CARLINSKY: Your Honor, do you want the ruling? That is not what Your Honor ruled.

THE COURT: Oh, I remember very well what I ruled. Repeat the question from the Court Reporter, please.

- - - - (Question read) - - - -

THE COURT: I believe I have my letter ruling someplace in this file.

MR. MCKENNA: I can hand it up to Your Honor.

THE COURT: I am not going to read the whole thing, but I did suggest that before the press release could even be mentioned it had to be used to refresh the recollection. And then I said if Conduent's witnesses testify that the issue of Medicare fraud was unequivocally terminated by the Third

Amended Petition, the document becomes relevant impeachment.

MR. CARLINSKY: Thank you. That is exactly what we have had.

THE COURT: What did he say that was –

MR. CARLINSKY: He has testified his lawyers in opening said we did not settle a fraud claim. Period. The settlement agreement does not settle a fraud claim. They submitted RFAs that said we didn't settle a fraud claim.

THE COURT: That is not what I meant by my ruling. I am very sorry if it was not clear. What I meant was that if you said to him: “Did the State ever mention Medicaid fraud after the third petition was filed” and he said no, the words were never uttered again, then you could impeach. I never at any point said you can state in the course of a question that there was a press release issued without even giving the witness a chance to talk about whether or not that term was ever used after the Third Amended Petition.

MR. CARLINSKY: Your Honor, the document itself, Your Honor has ruled it is hearsay. We are trying to use it, first of all, for non-hearsay purpose. It impeaches the very testimony that this witness has given to the Jury about the reason why they were so insistent on getting rid of a fraud claim. It was all about our government –

THE COURT: If you want to use your time to continue to reargue my rulings, go ahead. But I have already told you what my ruling is, and I put it in writing. And at no point did I contemplate that the "press release" would simply be waved around in the courtroom without a proper foundation. Now if I didn't make myself clear, that's on me.

MR. CARLINSKY: Okay. Then I will -- how about if I start with the Court's first suggested example question.

Isn't it true that the Office of Attorney General referred to the settlement as one for Medicaid fraud after the Third Amended Petition was filed. I will ask that exact question that Your Honor suggests. If he says no, then you say I can use it to refresh his recollection. If it is still not refreshed, the press release might be admitted.

THE COURT: Now I want to be clear, because clearly I wasn't before. Refreshing recollection does not mean asking him, I have this document called a press release, does that refresh your recollection? Refreshing recollection -- and you are an experienced trial attorney, I just want to be clear -- means you show it to the witness and say to the witness, Does this document refresh your recollection? And you don't tell the Jury what the document is, or what the document says.

MR. CARLINSKY: Could my follow-up question then be what it was that the press release announced?

THE COURT: No. Your follow-up question then can be, Does this refresh your recollection as to whether or not the Office of the Attorney General referred to the settlement as one for Medicaid fraud after the third amended petition was filed.

MR. CARLINSKY: And then he says whatever he says.

THE COURT: If he says yes, it does, they did refer to it, then that is the end.

MR. CARLINSKY: Well, can I ask that -- I mean, it is also relevant, Your Honor -- the Jury has no sense of what means. The Texas A.G. is saying it was a –

THE COURT: It would be relevant if it weren't inadmissible hearsay. Just because something is relevant doesn't mean it comes in.

Trial Transcript, February 15, 2022, Pages 75–76

MR. CARLINSKY: Your Honor, I believe the testimony that was elicited from the witness on redirect opens the door to that press release. I tried to write it down but we didn't have Livenote working. He testified with regard to the settlement so they could hold it up. So "they" meaning the public could hold it up and see they settled the contract and negligence. They didn't settle fraud. Now that should allow me to say let's talk about what else in the public, because that is what they just testified to. I would like to publish the press release to the Jury in light of that testimony.

MR. MCKENNA: That is not the testimony. I asked him whether he could say it's not what they paid. That's a different question. Of course they settled it.

THE COURT: It is denied anyway. It doesn't open the door.

(End of sidebar conference)

Trial Transcript, February 16, 2022, Pages 70–74

Q [by AIG Counsel]. And, by the way, while you were with the Attorney General's Office, in connection with large cases and as the number two in charge, did you ever see press releases?

A. I saw a few, yes.

Q. Did you –

A. Both before and after lawsuits.

Q. Yeah. And so was it like a common practice for the Attorney General's Office after they got like a big win to issue a press release?

MR. LEVY: Your Honor, I'm going to object. I think I'd like to proffer on this because of the sensitivities that we had discussed yesterday.

THE COURT: All right. Do you want to discuss it privately or do you want to come to sidebar?

MR. LEVY: I'd be happy to step out just for one minute and get a sense from Mr. Harrell of where he's going and see if this is worth objecting to. I'm concerned with where the line of questioning is going.

THE COURT: Come to sidebar.

(The following sidebar conference was held.)

MR. HARRELL: So, Mr. Peffer yesterday, when we asked him the questions that the Court said we could ask, volunteered there was a press release, and he used the words "press release." And all I want to establish is that press releases are a common practice, that they're vetted all the way up the top, and before a press release goes out, the people in the management level of the Attorney General's Office responds to them or are aware of them; that press releases are approved at the very top of the Attorney General's Office, and ordinarily they're shown to the other side like the defendant before they are published.

THE COURT: And you're saying that was opened because the witnesses sua sponte mentioned the words "press release."

MR. HARRELL: Yes, Your Honor.

MR. LEVY: My objection is still based on relevance to the extent the actual press release that they wanted to get into evidence was excluded, and this is only relevant to the extent there's an actual press release in evidence that they're going to use. My concern is that we're dancing

around this issue in such a way that they will have the effect of being able to introduce the hearsay in the press release, even though they're not allowed to do so. And I think this is a very dangerous line of questioning from that perspective in addition to the lack of real evidence.

MR. HARRELL: I don't intend to go into any of the content, but we've already heard now that Ray Winter, according to Mr. Peffer, was a rogue lawyer. I want to make it clear that the practice of press releases is those are vetted at the top, and that's not something that he could have done just by himself.

THE COURT: So I understand what your position is. What are you going to use it for in argument?

MR. HARRELL: That when the press release went out saying that it was a $236 million Medicaid fraud settlement, that this was not something that somebody just did; it was the position of the Attorney General's Office.

THE COURT: All right. I'm not going to allow this. The fact that the witness yesterday blurted out "press release" doesn't open the whole field to now once again vet this document that I've repeatedly said is not going to be admitted. At this point since he's said it, since the witness said it, you can argue that this is what was said in a press release, because the witness put that in there. But I'm not going to allow you then to talk about whether or not the press release is credible, because, again, we are talking about -- the only way we're going to be able to demonstrate that is if we can go into the credibility of the declarant on this particular press release. And I'm not having a trial within a trial as to whether the Texas practice of issuing press releases was vetted, because we have no way of knowing under this circumstance whether that procedure was followed.

Trial Transcript, February 17, 2022, Pages 186–87

MR. CARLINSKY: What I would like to be to do is to say, sir, are you aware that the Texas AG issued a press release –

THE COURT: No. I have ruled on this many times.

MR. CARLINSKY: That's the question, Your Honor, that you said –

THE COURT: Many times. I am through with this issue.

MR. CARLINSKY: Can I ask what Your Honor already authorized?

MS. COHEN: Oh, my God.

MR. CARLINSKY: Your Honor already authorized it in the ruling. I'd like to -- there is no reason why I can't –

THE COURT: I don't know how – I don't know how much more clear in a letter that I wrote two days before trial I could have been. I said, you may ask, are you aware that there was a reference by the State to this as a settlement of a Medicaid –

MR. CARLINSKY: Public reference Your Honor said.

THE COURT: Public reference. And if the answer to that is yes, you're done. That's the impeachment.

Trial Transcript, February 17, 2022, Pages 228–29

THE COURT: My ruling is -- nothing has been altered. My ruling about the press release stands. We have spent way too much trial time arguing about this. Any further mention of this press release must be done in writing. I'm not going to take any more time in open court.

> MR. CARLINSKY: Got it.
>
> THE COURT: Anyone who violates that order and mentions the press release had better be prepared for their second chair to try the case. All right? Bring in the jury.

Cooperation and Consent; Futility; Repudiation

An issue at the center of the case was whether Conduent was relieved of its obligation to seek AIG's cooperation and consent to enter into the Settlement Agreement on the basis of futility. That question involved credibility determinations. Specifically, the jury considered the testimony of AIG witnesses Ash and Kennedy.

Conduent's case can be summarized by the argument that AIG determined to deny coverage, regardless of any information submitted. AIG relied on the proposition that, although AIG previously had denied coverage, the Third Amended Petition permitted a renewed evaluation of coverage (a "reset") and that there was no subsequent denial after that pleading was filed. Conduent countered that no "reset" was appropriate to trigger a renewed duty to cooperate and to seek consent because AIG did not dispute that the Third Amended Petition contained materially identical factual allegations.[15]

[15] *See Zurich Am. Ins. Co. v. XL Ins. Co.*, 547 F.Supp.3d 381, 404 (S.D.N.Y. 2021) (asserting that an insurer's duty to defend arises after an insured files an amended pleading alleging a covered claim that was not contained in the original pleading).

The jury's verdict indicates that it found Ash and Kennedy credible.[16] Futility is a question of fact. Futility negates the duty to seek consent and to cooperate. As demonstrated by the completed Verdict Form (set forth in full above), the jury found that cooperation ***would not have been futile.***

At this procedural juncture in the case, the facts relating to repudiation essentially are undisputed. Thus, whether denial ***repudiates*** coverage and eliminates the duty to seek consent and cooperate, is a legal issue.[17] If the jury had found futility, the Court would not have needed to address repudiation. The jury found no futility. Therefore, the Court will now consider repudiation, as was contemplated prior to trial.

Repudiation

AIG has conceded that, under New York law (applicable here), whether denial of coverage releases the insured from the duty to cooperate and seek consent

[16] The testimony fairly can be interpreted in a manner that a reasonable juror could have found the witnesses not credible, in that AIG never would have changed its coverage decision under any circumstances. However, that is not the standard for altering a jury verdict.

[17] *See Isadore Rosen & Sons, Inc. v. Sec. Mut. Ins. Co. of New York*, 291 N.E.2d 380, 383 (1972) ("[A] 'denial of liability' relieves the insured from the obligation not to settle." (citing *Otteman v. Interstate Fire & Cas. Co*., 111 N.W.2d 97, 101 (Neb. 1961))); *J.P. Morgan Sec. Inc. v. Vigilant Ins. Co*., 39 N.Y.S.3d 864, 869–71 (N.Y. Sup. Ct. 2016), *aff'd*, 58 N.Y.S.3d 38 (N.Y. Sup. Ct. 2017) (concluding on partial summary judgment that "under prevailing case law, Bear Stearns was excused from the obligation to obtain the insurers' consent prior to settle, and [Bear Stearns] was entitled to enter into a reasonable settlement based upon the terms of the policies themselves"); *Am. Ref-Fuel Co. of Hempstead v. Res. Recycling, Inc*., 722 N.Y.S.2d 570, 571 (N.Y. App. Div. 2001) (affirming the lower court's ruling granting a cross motion for summary judgment because a letter served as repudiation of liability).

to settle, is a legal issue.[18] Whether coverage denial repudiates coverage is a question of law.[19]

In *Isadore Rosen & Sons, Inc. v. Security Mutual Insurance Company of New York*,[20] the New York Court of Appeals ruled:

> The New York rule is that where an insurer unjustifiably refuses to defend a suit, the insured may make a reasonable settlement or compromise of the injured party's claim, and is then entitled to reimbursement from the insurer, even though the policy purports to avoid liability for settlements made without the insurer's consent.[21]

An insurer's "non-final" coverage determination subject to a reservation of rights is a disclaimer of coverage and repudiation of liability,[22] both of which release the insured from its duties to cooperate and to seek consent.[23]

AIG was provided with the information contained in the Third Amended Petition before the Settlement Agreement was executed. AIG informed Conduent:

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[18] *See J.P. Morgan*, 39 N.Y.S.3d at 869–71.
[19] *See id.*; *Isadore*, 291 N.E.2d at 382–83 ("[W]here an insurer unjustifiably refuses to defend a suit, the insured may make a reasonable settlement or compromise of the injured party's claim . . . . [A] 'denial of liability' relieves the insured from the obligation not to settle.").
[20] 291 N.E.2d 380 (N.Y. 1972).
[21] *Id.* at 382.
[22] *J.P.Morgan*, 39 N.Y.S.3d at 870 ("[N]otwithstanding that the letters contained boilerplate 'reservation of rights' language, the Insurers' other statements left no doubt that they were disclaiming coverage on the grounds that Bear Stearns did not notice a claim, and that even if there was a claim, it was uninsurable as a matter of law."); *American Ref-Fuel Co of Hempstead*, 722 N.Y.S.2d at 571 ("'[O]nce an insurer repudiates liability the [in]sured is excused from any of its obligations under the policy" (quoting *Ocean-Clear, Inc. v. Cont'l Cas. Co*., 462 N.Y.S.2d 251, 252 (N.Y. App. Div. 1983))).
[23] *Isadore*, 291 N.E.2d at 382–83 ("[W]here an insurer unjustifiably refuses to defend a suit, the insured may make a reasonable settlement or compromise of the injured party's claim . . . . [A] 'denial of liability' relieves the insured from the obligation not to settle."); *J.P. Morgan*, 39 N.Y.S.3d at 869–71.

"As we have discussed in prior communications, [AIG] has denied coverage based on the information available to it. . . . You have not provided us with any additional information that would change our view."

The Court previously ruled that AIG breached its contractual duty to pay defense costs under the relevant insurance policies. This breach is an unjustifiable refusal to defend, for purposes of repudiation. The Court now finds, as a matter of law, that AIG's initial denial of coverage, and continued repudiation of coverage obligations, relieved Conduent of any duty to cooperate or to seek consent with regard to settlement with the Texas Attorney General.

Fraud and Bad Faith

Under New York law, fraud must be proved by clear and convincing evidence.[24] In a common law claim for fraud, AIG would have been required to prove that: (1) Conduent made a material misrepresentation or omission of fact; (2) Conduent made the misrepresentation "with knowledge of its falsity"; (3) Conduent intended to commit fraud; (4) AIG reasonably relied on the misrepresentation or omission; and (5) AIG suffered damages.[25] However, in the context of an insurance coverage dispute, to establish fraud by Conduent, AIG was only required to show the first three elements, that: (1) Conduent made a material

[24] *E.g.*, *Meda AB v. 3M Co.*, 969 F. Supp. 2d 360, 385 (S.D.N.Y. 2013).
[25] *E.g.*, *id.*; *Bank of Am., N.A. v. Bear Stearns Asset Mgmt.*, 969 F. Supp. 2d 339, 351 (S.D.N.Y. 2013).

misrepresentation or omission of fact; (2) Conduent knowingly made the misrepresentation; and (3) Conduent intended to commit fraud.[26]

AIG witnesses testified that Conduent failed to inform AIG that "it was Conduent's idea that it propose to the State of Texas to amend the complaint and add new contract . . . claims . . . ." AIG would have questioned provisions in the Settlement Agreement that "allocated to breach of contract when that had never been part of this claim before and why it specifically said no part of this is allocated to penalties which is precisely what was sought for the entire litigation." Additionally, AIG argued that drafts of the Settlement Agreement and drafts of the Third Amended Petition might have been considered for the purpose of determining whether to change AIG's coverage position.

The jury found that AIG failed to prove "that Conduent's settlement with the

[26] *See Scott v. AIG Prop. Cas. Co.*, 417 F. Supp. 3d 329, 347 (S.D.N.Y. 2019) ("To void a policy for concealment, misrepresentation, or fraud by the insured . . ., an insurer must show that the statements in question were (1) false, (2) willfully made, and (3) material to the insurer's investigation of the claim." (quoting *Mon Chong Loong Trading Corp. v. Travelers Excess & Surplus Lines Co.*, 2014 WL 406542, at *1 (S.D.N.Y.))); *Domagalski v. Springfield Fire & Marine Ins. Co.*, 218 A.D. 187, 189–90 (N.Y. App. Div. 1926) ("When the insurance company establishes that the statements made were relevant, material and intentionally false it has established its defense. It is not required to assume the burden of convincing a jury that it has been injured by such statements."); *see also Ruggerio v. Harleysville Preferred Ins. Co.*, 278 F. Supp. 3d 536, 554 (D. Conn. 2017) ("[An insurance company] must prove only that the insured willfully concealed or misrepresented a material fact with the intention of deceiving the insurer. Unlike a party asserting a cause of action for common law fraud, an insurer who raises the special defense of concealment or misrepresentation does not have to prove that the insurer actually relied on the concealment or misrepresentation or that the insurer suffered injury. . . . [I]n the case of an insurance contract, the consequence of the alleged concealment or misrepresentation is the forfeiture of a contractual benefit . . . ." (quoting *Rego v. Conn. Ins. Placement Facility*, 346–47, 593 A.2d 491 (Conn. 1991))).

State of Texas was not reasonable." Further, the jury found that Conduent had not "engaged in collusion in connection with the State Action Settlement."

In contrast, the jury found that Conduent "engaged in fraud in connection with the State Action Settlement." Further, the jury found that "Conduent did not settle with the State of Texas in good faith."

These jury verdicts can be viewed as contradictory. Of even greater concern to the Court, improper inferences and improper use of evidence previously ruled inadmissible may very well have confused the jury and tainted the jury's verdicts.

CONCLUSION

The Court finds that there are four principal reasons compelling retrial.

The Court acknowledges that, in hindsight, the Winter Submission was so replete with evidentiary problems (hearsay, double or triple hearsay, inability to cross-examine the declarant, admitted lack of knowledge by the declarant), that it never should have been admitted—despite the agreement of the parties. As the trial progressed, that document, and speculative evidence about the bias and credibility of the absent witness, became a central focus.

Contrary to several explicit written and bench rulings of the Court, AIG's counsel repeatedly referred to the jury a Press Release that had been unequivocally deemed inadmissible.

Despite repeated admonishments by the Court, AIG's closing argument was intended to persuade the jury to draw improper inferences from information set forth in privilege logs.

AIG further inaccurately and improperly argued that AIG never had any coverage obligation to Conduent. This argument is directly in violation of the Court's pretrial holding that AIG breached its contractual duty to pay defense costs.

The Court finds that, in order to prevent manifest injustice, exceptional circumstances exist demonstrating that justice would miscarry if the jury's verdicts were allowed to stand. **THEREFORE,** Plaintiff's Motion to Set Aside the Judgment Under Rule 59(d) and for a New Trial Under Rule 59(a) is hereby **GRANTED.**

FURTHER THEREFORE, Plaintiff's Motion for Judgment as a Matter of Law pursuant to Rule 50 is hereby **GRANTED IN PART.** The Court finds, as a matter of law, that AIG's initial denial of coverage, and continued repudiation of coverage obligations, relieved Conduent of any duty to cooperate or to seek consent with regard to settlement with the Texas Attorney General.

IT IS SO ORDERED.

Plaintiff's Application to Maintain Sealing is hereby **GRANTED**.

Defendants' Notice of Objection to the Continued Restriction on Public Access to Conduent's Omnibus Brief in Support of Its Post-Trial Motions is hereby **REJECTED**.

IT IS SO ORDERED.

/s/ Mary M. Johnston
The Honorable Mary M. Johnston