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S.C. SUPREME COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
SPARTANBURG DIVISION

Great American Insurance Company of)
New York, Great American Alliance)
Insurance Company, Great American)
Assurance Company,)

Intervenor Plaintiffs,)

v.)

J M Smith Corporation,)

Defendant.)

J M Smith Corporation,)

Cross Claimant/
Counter Claimant,)

v.)

Great American Insurance Company of)
New York, Great American Alliance)
Insurance Company, Great American)
Assurance Company, Great American)
Insurance Company, North American)
Specialty Insurance Company,)
Westport Insurance Corporation,)

Cross Defendants/
Counter Defendants.)

Westport Insurance Corporation,)
North American Specialty)
Insurance Company,)

Cross Claimants,)

v.)

Case No. 7:23-cv-03993-JDA

ORDER

J M Smith Corporation,)
)
Cross Defendant.¹)
)
_____)

This Court has determined that questions of law of the State of South Carolina may be determinative in this matter but it appears there is no controlling precedent in the decisions of the Supreme Court of South Carolina. Accordingly, pursuant to Rule 244(a) of the South Carolina Appellate Court Rules, the Court certifies a question of law to the Supreme Court.

LEGAL STANDARD

Rule 244(a) of the South Carolina Appellate Court Rules provides:

The Supreme Court in its discretion may answer questions of law certified to it by any federal court of the United States or the highest appellate court or an intermediate appellate court of any other state, when requested by the certifying court if there are involved in any proceeding before that court questions of law of this state which may be determinative of the cause then pending in the certifying court when it appears to the certifying court there is no controlling precedent in the decisions of the Supreme Court.

S.C. App. Ct. R. 244(a). A certification order must “set forth the questions of law to be answered, all findings of fact relevant to the questions certified, and a statement showing fully the nature of the controversy in which the questions arose.” S.C. App. Ct. R. 244(b). “The decision to certify a question of law to the highest court of the state is within the discretion of the Court, and it may be made *sua sponte*.” *Brunty v. NationsBanc Mortg. Corp.*, 955 F. Supp. 47, 48 n.3 (D.S.C. 1997) (internal citation omitted).

¹ This caption represents the current parties in this litigation.

NATURE OF THE CONTROVERSY

This case involves an insurance coverage dispute between J.M. Smith Corporation (“J M Smith”) and Great American Alliance Insurance Company, Great American Assurance Company, Great American Insurance Company, and Great American Insurance Company of New York (collectively, “Great American”), Westport Insurance Corporation (“Westport”), and North American Specialty Insurance Company (“SRCS”)² (collectively with Great American, the “Insurers”).

J M Smith is a privately owned South Carolina wholesale distributor of pharmaceutical drugs to pharmacies. J M Smith has been sued in more than 350 lawsuits relating to the opioid epidemic (the “Underlying Lawsuits”). The Underlying Lawsuits are brought by individuals, hospitals, and various governmental entities seeking to recover damages they suffered due to the opioid epidemic. For purposes of summary judgment motions filed in this Court, the parties selected certain complaints from the Underlying Lawsuits as representative samples (the “Exemplar Complaints”).³ Generally speaking, the Exemplar Complaints allege that the manufacturers of opioids misrepresented the addictive qualities of prescription opioids; distributors like J M Smith failed to block suspicious orders of opioids; and pharmacies should have acted as better gatekeepers to detect suspicious prescriptions. They allege that these acts of negligence combined to allow the diversion of prescription opioids into an underground marketplace, resulting

² North American Specialty Insurance Company is now known as Swiss Re Corporate Solutions America Insurance Corporation.

³ Some of the Underlying Lawsuits involve Smith Drug Company, which is an unincorporated division of J M Smith. The parties agree that claims against Smith Drug Company are entitled to coverage, if any, to the same extent as if the named party were J M Smith.

in a catastrophic addiction crisis involving prescription opioids as well as illegal opioids such as heroin. They further allege that the increase in drug addiction harmed not only the people who became addicted, but also their families, the hospitals, and the governmental entities that provided uncompensated or undercompensated care for those who became addicted to opioids.

This action was originally filed by Westfield National Insurance Company and Westfield Insurance Company (collectively, “Westfield”) against J M Smith, Smith Drug Company, and Liberty Mutual Fire Insurance Company (“Liberty Mutual”), seeking a declaratory judgment that Westfield has no duty to defend J M Smith and Smith Drug Company with respect to allegations in the Underlying Lawsuits. The Court subsequently granted Great American’s motion to intervene, and Great American seeks declaratory judgments that it has no duty to defend or indemnify J M Smith for the Underlying Lawsuits for three reasons: (a) the Underlying Lawsuits do not seek damages “because of” “bodily injury”; (b) the Underlying Lawsuits do not seek damages “because of” “bodily injury” that took place during any Great American policy period; and (c) certain policy provisions exclude coverage. J M Smith then filed a counterclaim/crossclaim against Westfield, Liberty Mutual, Great American, Liberty Insurance Underwriters Inc. (“Liberty Insurance”), The Ohio Casualty Insurance Company (“Ohio Casualty”), SRCS, and Westport, seeking declaratory judgments that they have duties to provide coverage to J M Smith for the Underlying Lawsuits. Finally, Westport and SRCS filed a crossclaim against J M Smith, seeking declaratory judgments that they have no duty to defend or indemnify J M Smith for the Underlying Lawsuits for three reasons: (a) the Underlying Lawsuits do not seek damages “because of” “bodily injury” or “personal injury”; (b) the Underlying Lawsuits do

not seek damages “because of” “bodily injury” or “personal injury” that took place during any Westport or SRCS policy period; and (c) certain policy provisions exclude coverage.

Smith Drug Company, Westfield, Liberty Mutual, Liberty Insurance, Ohio Casualty have since been dismissed from this case. Accordingly, the remaining claims are (1) Great American’s declaratory judgment claims against J M Smith; (2) J M Smith’s declaratory judgment claims against Great American, SRCS, and Westport; and (3) Westport and SRCS’s declaratory judgment claims against J M Smith.

The Insurers issued commercial insurance policies to J M Smith that were in effect from 2000 to 2018 (the “Policies”). J M Smith’s insurance in most of these years included primary, umbrella, and excess policies. The primary liability policies were issued by Liberty Mutual and Westfield (the “Primary Policies”); the umbrella liability policies were issued by Westport and Great American (the “Umbrella Policies”); and the excess liability policies were issued by Ohio Casualty, Liberty Insurance, Great American, and SRCS (the “Excess Policies”) (collectively, the “Policies”). The Primary Policies and Umbrella Policies contain their own terms and conditions of coverage. The Excess Policies generally follow form to the Umbrella Policies. For purposes of summary judgment motions filed in this Court, the parties selected certain Policies as representative samples (the “Exemplar Policies”).

As is relevant to the certified question, the Policies provide as follows:

- The Insurers agree to “pay on behalf of the ‘Insured’ those sums in excess of the ‘Retained Limit’ that the ‘Insured’ becomes legally obligated to pay by reason of liability imposed by law . . . because of ‘bodily injury,’ . . . that takes place during the Policy Period and is caused by an ‘occurrence’ happening anywhere” if “[p]rior to the policy period, no ‘Insured’ knew that the ‘bodily injury’ . . . had occurred.”

- The Insurers have “the right and duty to . . . defend any ‘suit’ seeking damages covered by the terms and conditions of” the Policies if certain conditions are satisfied.
- J M Smith must notify an Insurer “as soon as practicable of an ‘occurrence,’” including, “[t]o the extent possible,” “[h]ow, when and where the ‘occurrence’ took place,” “[t]he names and addresses of any injured person[s] and witnesses,” and “[t]he nature and location of any injury or damage arising out of the ‘occurrence.’”
- The Policies do not apply to “[b]odily injury to . . . an employee of any ‘Insured’” under certain circumstances or to “the spouse, child, parent, brother or sister of that employee.”
- “Bodily injury” is defined as “physical injury, sickness, or disease, including death of a person [and] mental injury, mental anguish, humiliation, or shock if directly resulting from physical injury, sickness, or disease to that person”

The parties agree that the substantive law of South Carolina applies to this case in accordance with S.C. Code § 38-61-10, which provides that “[a]ll contracts of insurance on property, lives, or interests in this State are considered to be made in the State and all contract of insurance the applications for which are taken within the State are considered to have been made within this State and are subject to the laws of this State.”

The Insurers concede that they have a duty to defend in the single Exemplar Complaint that seeks to hold J M Smith liable for damages caused by bodily injuries to a specific identified person. However, in previous summary judgment briefing before this Court, they argued that the Exemplar Policies unambiguously provide that damages “because of bodily injury” include only damages caused by *specific bodily injuries to identifiable individuals*.

CERTIFIED QUESTION OF LAW

Having concluded that there is no controlling precedent in the decisions of the Supreme Court of South Carolina regarding the meaning of damages “because of bodily

injury” in this context, the Court certifies the following question to the Supreme Court of South Carolina:

Does the phrase “those sums . . . the ‘Insured’ becomes legally obligated to pay by reason of liability imposed by law . . . because of ‘bodily injury’” in the applicable commercial insurance policies unambiguously encompass only compensation for bodily injuries to specific, identifiable individuals?

CONCLUSION

Based on the foregoing, the Court CERTIFIES the question identified to the Supreme Court of South Carolina. The Clerk shall forward a copy of this Order to the Supreme Court under the Court’s official seal, together with the Exemplar Complaints [Docs. 118-2–118-11], the Exemplar Policies [Docs. 118-12–118-22], and copies of any portions of the record that the Supreme Court requests.

IT IS SO ORDERED.

s/Jacquelyn D. Austin
United States District Judge

October 13, 2026
Greenville, South Carolina



A TRUE COPY

ATTEST: ROBIN L BLUME, CLERK

BY: 
DEPUTY CLERK