IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
LEWIS T. BABCOCK, CHIEF JUDGE

Civil Case No. 05-cv-01870-LTB-BNB

AMERICAN ECONOMY INSURANCE COMPANY, an Indiana corporation,

Plaintiff,

v.

WILLIAM SCHOOLCRAFT, M.D., P.C., d/b/a COLORADO CENTER FOR REPRODUCTIVE MEDICINE, P.C., a Colorado corporation,
WILLIAM B. SCHOOLCRAFT, M.D., individually,
LANCE J. GOFF, individually, and as a parent and next friend of M.G., a minor,
ELIZABETH S. TAYLOR, individually and as parent and next friend of M.G., a minor; and
DOES 1 through 5,

Defendants.

AMENDED MEMORANDUM OPINION AND ORDER

Babcock, C.J.

This matter is before me on the following motions seeking summary judgment filed by Plaintiff, American Economy Insurance Company ("American Economy"): 1) American Economy's Motion for Summary Judgment **[Doc # 158]**; and 2) American Economy's Motion for Partial Summary Judgment **[Doc # 155]**. In addition, before me is a Motion for Partial Summary Judgment **[Doc # 126]** filed by Defendants Lance J. Goff and Elizabeth S. Taylor, individually, and as a parents and next friend of M.G. ("Goff and Taylor"), which has been joined by Defendants William Schoolcraft, M.D., P.C., d/b/a Colorado Center for Reproductive Medicine, P.C. ("CCRM") and William B. Schoolcraft, M.D. ("Dr. Schoolcraft"). Oral argument would not materially assist me in my determination. After consideration of these related motions, as well as the attached exhibits, I GRANT American Economy's Motion for Summary Judgment, I DENY

Goff's and Taylor's Motion for Partial Summary Judgment, and I DENY AS MOOT American Economy's Motion for Partial Summary Judgment.

I. BACKGROUND

CCRM and Dr. Schoolcraft maintain that American Economy owes them a defense, and indemnification up to the limits of their insurance policy, regarding a lawsuit filed in state court by Goff and Taylor for damages related to *in-vitro* fertilization services provided by CCRM and Dr. Schoolcraft. American Economy subsequently filed this lawsuit – pursuant to Fed. R. Civ. P. 57 and 28 U.S.C. § 2201, *et. seq*. – seeking a declaration that it had no duty to provide a defense or indemnification to CCRM and Dr. Schoolcraft related to the underlying litigation.

CCRM and Dr. Schoolcraft deny that American Economy is entitled to the declaratory relief it seeks and raise various affirmative defenses in response. In addition, CCRM and Dr. Schoolcraft assert assigned counterclaims against American Economy for equitable subrogation, unjust enrichment, and contribution. Goff and Taylor likewise deny that American Economy is entitled to declaratory relief, and seek damages on assigned counterclaims for breach of contract, bad faith breach of insurance contract, and violations of the Colorado Consumer Protection Act, § 6-1-101, *et. seq.*, as well as an added claim for exemplary/punitive damages pursuant to Colo. Rev. Stat.§ 13-21-102(1.5)(a). Subject matter jurisdiction for this case is based on diversity of citizenship under 28 U.S.C. § 1332, and supplemental jurisdiction under 28 U.S.C. § 1367(a).

II. UNDISPUTED FACTS

In January of 2001, Goff and Taylor sought reproductive assistance and counseling from CCRM and Dr. Schoolcraft regarding their attempts to conceive a child. After determining that Ms. Taylor's eggs were apparently not viable, CCRM and Dr. Schoolcraft suggested that Goff

and Taylor use donor eggs in order to conceive. In March 2002, Ms. Taylor was implanted with embryos from donor eggs that had been fertilized with Mr. Goff's sperm. After implantation, Goff and Taylor were informed that the egg donor carried the cystic fibrosis gene. Mr. Goff subsequently tested positive for the cystic fibrosis gene as well. Ms. Taylor ultimately gave birth to fraternal twins, a girl and a boy, on November 5, 2002. After birth, the female twin, M.G., was diagnosed with cystic fibrosis.

As a result, Goff and Taylor, individually and on behalf of M.G., filed a lawsuit in state court against CCRM and Dr. Schoolcraft, as well as other doctors affiliated with CCRM, on September 15, 2004 (the "underlying lawsuit"). In that lawsuit, Goff and Taylor asserted the following eleven claims for relief: 1) Professional Negligence; 2) Negligent Misrepresentation; 3) Violation of the Consumer Protection Act; 4) Uninformed Consent; 5) Products Liability; 6) Breach of Implied Warranties; 7) Products Liability for Negligence/Duty to Warn; 8) Strict Products Liability for Misrepresentation; 9) Nondisclosure; 10) Respondeat Superior; and 11) Joint Liability.

During the relevant time period, CCRM and Dr. Schoolcraft were insured under a professional liability policy issued by COPIC Insurance Company. In October of 2004, COPIC acknowledged potential coverage under its policy on the claims it deemed "sounded in professional misconduct" and further agreed to provided a defense on the remaining claims under a reservation of rights.

Also during this time, CCRM and Dr. Schoolcraft were insured under a commercial general liability policy (the "CGL" policy) issued by American Economy (as an affiliate of Safeco Corporation). On December 20, 2004, American Economy advised CCRM's and Dr.

Schoolcraft's counsel that their commercial general liability policy did not provide coverage or a defense for the claims asserted in the underlying lawsuit. Counsel sought reconsideration of the denial in a letter dated January 4, 2005. On April 13, 2005, an American Economy adjuster, Michael Kreutzer, telephoned counsel and advised that American Economy would, in fact, provide CCRM and Dr. Schoolcraft with a defense subject to a reservations of rights.

The matter was subsequently re-assigned to a new claims adjuster at American Economy, Lola Shoemake. On May 23, 2005, Ms. Shoemake informed CCRM and Dr. Schoolcraft that American Economy "does not presently believe that it has a duty to provide a defense to [CCRM and Dr. Schoolcraft] in connection with the claims contained in the [underlying] complaint."

Thereafter, CCRM and Dr. Schoolcraft entered into an agreement with Goff and Taylor settling the claims in the underlying lawsuit. In exchange for the dismissal of the claims against the named doctors, CCRM agreed to arbitrate the issue of damages only. CCRM also agreed to an unconditional payment under the COPIC professional liability policy of its limits.

As part of the settlement agreement, CCRM and Dr. Schoolcraft assigned to Goff and Taylor "all of their rights, title, and interest in their claims against [American Economy] for collection of the amount of the unsatisfied portion of the judgment . . . if any" as set by the arbitration award. The settlement agreement specifies that Goff and Taylor "intend to initiate proceedings against [American Economy] to recover the full amount of the judgment against [CCRM] obtained following arbitration. The claims in these proceedings will includes, among others, breach of contract, breach of the implied covenant of good faith and fair dealing, and violations of the Colorado Consumer Protection Act." The settlement agreement further specified that COPIC retained the "right to prosecute any claims that it has against [American Economy]