

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

TRUSTEES OF THE INTERNATIONAL : CIVIL ACTION
BROTHERHOOD OF ELECTRICAL :
WORKERS LOCAL 98 PENSION PLAN, :
 :
 v. :
 :
AETNA CASUALTY & SURETY COMPANY, :
 :
 v. :
 :
LAURANCE E. BACCINI, ESQ. : NO. 97-7407

M E M O R A N D U M

WALDMAN, J.

March 5, 1999

I. Introduction

Plaintiffs have asserted claims against their former insurer for breach of a contractual obligation to provide a defense in underlying litigation, to recoup funds paid to their own attorney on a quantum merit theory and under 42 Pa. C.S.A. § 8371 for a bad faith failure to provide a proper defense. The defendant insurer joined the attorney plaintiffs engaged in the underlying litigation as a third-party defendant and asserted claims against him for indemnification, contribution and tortious interference with contractual relations. Presently before the court is defendant's motion for judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c).

II. Legal Standard

A motion for judgment on the pleadings is most practically employed by a defendant who asserts entitlement to judgment based on a statute of limitations or other waivable defense in light of the plaintiff's allegations. The standard for deciding such a motion is the same as that for a motion to dismiss for failure to state a claim. See Grindstaff v. Green, 133 F.3d 416, 421 (6th Cir. 1998); Jubilee v. Horn, 975 F. Supp. 761, 763 (E.D. Pa. 1997), aff'd, 151 F.3d 1025 (3d Cir. 1998). Such a motion thus tests the legal sufficiency of a claim accepting the veracity of the claimant's allegations. See Markowitz v. Northeast Land Co., 906 F.2d 100, 103 (3d Cir. 1990); Sturm v. Clark, 835 F.2d 1009, 1011 (3d Cir. 1987).

The court considers the pleadings, any appended exhibits and matters of public record, assumes to be true the plaintiff's factual allegations, draws all reasonable inferences in favor of the plaintiff and determines whether the plaintiff may be able to prove any set of facts to support his claim which would entitle him to relief. See Oshiver v. Levin, Fishbein, Sedran & Berman, 39 F.3d 1380, 1384 & n.2 (3d Cir. 1994); Rocks v. Philadelphia, 868 F.2d 644, 645 (3d Cir. 1989). A claim will be precluded when the facts alleged and the reasonable inferences therefrom are legally insufficient to support the relief sought. See Pennsylvania ex. rel. Zimmerman v. PepsiCo., Inc., 836 F.2d 173, 179 (3d Cir. 1988).

III. Facts

The pertinent factual allegations are as follow.

On May 1, 1996 the Trustees of the International Brotherhood of Electrical Workers Local 98 Pension Plan ("the Trustees") reached a settlement with the United States Department of Labor ("DOL") which terminated litigation initiated by the DOL in October 1988. The DOL had charged that the Trustees then serving had violated their fiduciary duties under ERISA by engaging in a prohibited loan transaction. Defendant Aetna then insured the Plan and its Trustees. Aetna paid \$140,000 in connection with the settlement.¹ The Plan's current Trustees filed this suit to recover from Aetna the money expended by the former Trustees to compensate their counsel for work in the prior DOL litigation.

During the first five months that the underlying litigation was pending, Aetna failed to appoint counsel to represent the Trustees. As a result, the Trustees incurred "substantial legal expenses" for representation by their attorney, third-party defendant Laurance Baccini.

While reserving its rights under the policy, on April 5, 1989 Aetna engaged the Philadelphia firm of Blackburn,

¹ The Aetna policy provided fiduciary responsibility coverage of \$5,000,000. The DOL sought the restoration to the Plan of the unpaid balance of an \$800,000 loan. See Dole v. Compton, 753 F. Supp. 563, 565 (E.D. Pa. 1990).

Michelman & Tyndall to defend the Trustees in the DOL suit. The Blackburn firm "lacked any competence to litigate ERISA claims" and "assigned their least experienced" associate to the case. The firm "represented Aetna in other matters" and thus was conflicted. Rather than "zealously represent the former trustees," the Blackburn firm "sought solely to advance the interests" of defendant Aetna. The "Blackburn firm failed to participate meaningfully in the case and made no substantive contributions to the defense of the case."

To ensure effective representation, the former Trustees utilized the services of their own attorney, Mr. Baccini. Mr. Baccini ultimately obtained a "very favorable" settlement of the DOL litigation.

As early as May 10, 1989, Aetna advised Mr. Baccini by letter that defense costs incurred and any future defense costs for his services would not be paid by Aetna and would be "the responsibility of the trust fund." Aetna thereafter failed to pay or reimburse plaintiffs for the cost of Mr. Baccini's services. As a result, the Trustees expended "hundreds of thousands of dollars" in the defense of the underlying litigation which they have never recovered.

IV. Discussion

A. Contract Claim

Aetna's contentions that it fulfilled the contractual obligation it purportedly breached when it admittedly engaged counsel to defend the Trustees and that it is not liable for the professionally deficient performance of appointed counsel are correct to an extent. Ordinarily, an insured's recourse for legal malpractice or other breach of professional responsibilities by a defending attorney would be against the attorney and not the insurer which engaged him to provide a defense. See Ingersoll-Rand Equipment Corp. v. Transp. Ins. Co., 963 F. Supp. 452, 454 (M.D. Pa. 1997).²

It fairly appears from plaintiffs' allegations, however, that their contract claim is not based solely on their appointed counsel's conduct but on Aetna's conduct in retaining them. Absent a contractual right to select or to veto the selection of counsel, an insured must generally accept and work with counsel appointed by the insurer. Further, an insurer is not required to oversee and evaluate the professional performance of appointed counsel at every turn in the litigation. On the other hand, the right to a defense fairly contemplates the

² When counsel is retained by an insurer to defend an insured, the client is the insured and counsel is obligated to act exclusively in the insured's best interests. Point Pleasant Canoe Rental, Inc. v. Tinicum Twp., 110 F.R.D. 166, 170 (E.D. Pa. 1986).

appointment of counsel able and willing actively to provide representation. An insurer has a duty to exercise due care in defending a claim against an insured. See Ingersoll-Rand Equipment Corp., 963 F. Supp. at 455; Builders Square Inc. v. Scirocco, 1997 WL 3205, *6 (E.D. Pa. Jan 7, 1997), aff'd, 135 F.3d 763 (3d Cir. 1997). Accepting plaintiffs' allegations as true, one could reasonably infer that Aetna breached its duty by appointing evidently unqualified counsel who failed to provide any meaningful representation.³

More forceful is Aetna's argument that plaintiffs' contract claim is barred by the statute of limitations. The statute of limitations for contract claims under Pennsylvania law is four years. See 42 Pa. C.S.A. § 5525. The statute of limitations begins to run at the time a right of action accrues, that is, as soon as the right to institute a suit arises. Centre Concrete Co. v. AGI, Inc., 559 A.2d 516, 518 (Pa. 1989). A claim accrues when the plaintiff is damaged and not when the precise amount or extent of damages is determined. Liberty Bank v. Ruder, 587 A.2d 761, 765 (Pa. Super. 1991); Manzi v. H.K. Porter Co., 587 A.2d 778, 779-80 (Pa. Super. 1991), app. denied, 607

³ In fairness to the Blackburn firm, it is noted that Aetna avers that to the extent the firm did not participate effectively in the DOL litigation this was because counsel engaged by the Trustees "interfered with, hindered and impeded" its ability to do so. In considering a motion for judgment on the pleadings, however, the court necessarily assumes that plaintiffs' factual allegations are true.

A.2d 254 (Pa. 1992); Pashak v. Barish, 450 A.2d 67, 69 (Pa. Super. 1982). Because the Trustees assert that Aetna breached its contract when it failed promptly to appoint counsel in 1988 and then engaged inadequate counsel in 1989, Aetna argues that a contract claim asserted in December 1997 is untimely.

Plaintiffs respond that they were contractually barred from filing suit until the termination of the DOL litigation by virtue of a "no action" clause in the insurance contract. The "no action" clause provided in pertinent that no action could be asserted against Aetna "until the amount of the Insured's obligation to pay shall have been finally determined either by judgment against the Insured after actual trial or by written agreement of the Insured, the claimant and the Company. Any person or organization or the legal representative thereof who has secured such judgment or written agreement shall thereafter be entitled to recover under this policy to the extent of the insurance afforded by this policy."

As the language itself suggests, such a "no action" provision is essentially aimed at suits by third-party claimants. The principal purposes of such provisions are to prevent a suit by a third-party claimant for a monetary judgment against the insurer before damages are fixed and to prevent the litigants from joining the insurer as a party in the underlying action. See Apalucci v. Agora Syndicate, Inc., 145 F.3d 630, 633 (3d Cir.

1998). Such a provision does not preclude a suit by an insured against an insurer who has breached its contractual obligation to provide a defense to the insured. Id. at 634. See also Eureka Fed. Sav. & Loan Ass'n v. American Casualty Co. of Reading, Pa., 873 F.2d 229, 233 (9th Cir. 1989) ("no action" clauses do not bar actions by insureds to adjudicate issues of coverage and defense); Cardin v. Pacific Employers Insurance Co., 745 F. Supp. 330, 334 (D. Md. 1990) (statute of limitations begins to run when insurer first communicates to insured dissatisfied with appointed counsel that it will not pay fees of preferred counsel engaged by insured and not at termination of underlying litigation despite presence of "no action" clause).

It is clear from their pleadings that the Trustees knew in 1989 that Aetna had failed diligently to appoint counsel during the first five months of the pendency of the DOL litigation. Presumably, the Blackburn firm did not become less competent and less experienced in handling ERISA claims after its appointment by Aetna in April 1989. If, as plaintiffs allege, the Blackburn firm did nothing substantive to defend the DOL case and never participated in the case in any meaningful way, this was clearly apparent before December 4, 1993, four years and a day prior to the filing of this action. Thus, the Trustees clearly knew over four years before initiating suit that Aetna had breached its obligation to provide a meaningful defense. Plaintiffs' contract claim is time-barred.

B. Quantum Meruit Claim

Quantum meruit is an equitable, quasi-contractual remedy by which a contract is implied in law under a theory of unjust enrichment. Hershey Foods Corp. v. Ralph Chapek, Inc., 828 F.2d 989, 998 (3d Cir. 1987). The claimant must show that the party against whom recovery is sought wrongfully secured or passively received a benefit which it would be unconscionable for the party to retain without compensating the provider. Id. at 999.

A quantum meruit recovery is not possible if there is a written contract that covers the subject as to which recovery is sought. See Matter of Penn Central Trans. Co., 831 F.2d 1221, 1230 (3d Cir. 1987); Refac Financial Corp. v. Patlex Corp., 912 F. Supp. 159, 162 (E.D. Pa. 1996); J & L Assoc., Inc. v. Philadelphia Housing Auth., 1993 WL 349438, *6 (E.D. Pa. Sept. 10, 1993); McClellan Realty Corp. v. Institutional Investors Trust, 714 F. Supp. 733, 739 (M.D. Pa. 1988), aff'd, 879 F.2d 858 (3d Cir. 1989); Schott v. Westinghouse Electric Corp., 259 A.2d 443, 448 (Pa. 1969). The parties' insurance contract obligated Aetna to provide the Trustees with a legal defense in the underlying litigation.

C. Statutory Bad-Faith Claim

42 Pa. C.S.A. § 8371 does not define "bad faith." Most § 8371 claims involve the failure of an insurer to pay the proceeds of a policy. The statute on its face, however, applies to any form of bad faith conduct by an insurer towards an insured relating to an action arising under an insurance policy. See Argonaut Ins. Co. v. HGO, Inc., 1996 WL 433564, *4 (E.D. Pa. July 25, 1996); Rottmund v. Continental Assu. Co., 813 F. Supp. 1104, 1108-11 (E.D. Pa. 1992). Negligence or bad judgment, however, do not constitute bad faith. To establish bad faith, the insured must prove by clear and convincing evidence that the insurer knowingly or recklessly breached a duty to the insured. See Polsell v. Nationwide Mut. Fire Ins. Co., 23 F.3d 747, 751 (3d Cir. 1994). One could reasonably infer from plaintiffs' pleadings that Aetna knowingly or recklessly breached its duty to provide the Trustees with a defense when it failed to appoint counsel during the first five months of the DOL litigation and then engaged counsel with no competence to litigate ERISA claims and who were incapable of providing adequate representation.

Section 8371, however, does not apply to conduct which occurred before July 1, 1990. Aetna left the Trustees without appointed counsel from November 1988 through March 1989. The appointment of allegedly inexperienced and incapable counsel occurred on April 5, 1989. By May 10, 1989 Aetna had

communicated that it would not pay the fees of the Trustees' preferred counsel for prior or future services. It appears that true to its word, Aetna did not pay for services rendered by Mr. Baccini into the spring of 1996. Courts, however, have rejected attempts to impose liability under § 8371 for conduct before July 1, 1990 on a "continuing violation" theory. Thus, while an insurer may be liable under § 8371 for an independent act of bad faith committed on or after July 1, 1990, there is no liability for an insurer's reaffirmation on or after July 1, 1990 of bad faith conduct preceding July 1, 1990. See Rottmund, 813 F. Supp. at 1106; Lombardo v. State Farm Mutual Auto Ins. Co., 800 F. Supp. 208, 214 (E.D. Pa. 1992); American Internat'l Underwriters Corp. v. Zurn Industries, Inc., 771 F. Supp. 690, 703 (W.D. Pa. 1991).

Plaintiffs have not alleged an independent act of bad faith by Aetna on or after July 1, 1990. Accordingly, there is no liability under § 8371.

IV. Conclusion

Because it appears from their pleadings that plaintiffs have not asserted a timely contract claim or legally viable § 8371 and quantum meruit claims, defendant's motion will be granted. Because all of Aetna's claims against Mr. Baccini are contingent on Aetna's liability to plaintiffs, the third-party claims against Mr. Baccini will be dismissed. An appropriate order will be entered.

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O R D E R

AND NOW, this day of March, 1999, upon
consideration of the defendant's Motion For Judgment on the
Pleadings (Doc. #10) and plaintiffs' response thereto, consistent
with the accompanying memorandum, **IT IS HEREBY ORDERED** that said
Motion is **GRANTED** and accordingly **JUDGMENT is ENTERED** on the
pleadings in the above action for defendant Aetna and against
plaintiffs and as all of the claims against third-party defendant
Baccini are contingent upon defendant's liability to plaintiffs,
defendant Aetna's third-party complaint against Mr. Baccini is
DISMISSED.

BY THE COURT:

JAY C. WALDMAN, J.