

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

HARTFORD FIRE INSURANCE COMPANY :
v. :
TERRA INSURANCE COMPANY : Civil Action No. 01-5961

Norma L. Shapiro, S.J.

August 2, 2004

Memorandum and Order

Plaintiff, Hartford Fire Insurance Company ("Hartford"), brought this action seeking equitable contribution from defendant, Terra Insurance Company ("Terra"), for the cost of defending the parties' mutual insured, French & Parrello Associates ("FPA"), an engineering company. FPA was covered under a comprehensive general liability insurance policy issued by Hartford ("the Hartford policy"),¹ and professional liability insurance policy issued by Terra ("the Terra policy").² This action was filed in the Philadelphia Court of Common Pleas, and removed here by Terra.

Moving for summary judgment, Hartford argues that the Terra policy contractually obligated Terra to contribute to the cost of defense of a third party action. On a cross-motion for summary judgment, Terra asserts that it did not have an obligation of

¹Policy No. 13 SBK DD9392.

²Policy No. 940102.

equitable contribution because the Terra policy was a retrospectively-rate premium contract.

Background³

The Wilkinson Action

In 1994, Merle Barry Wilkinson, Sr., Administrator of the Estate of Merle Barry Wilkinson, Jr. filed a Complaint in the Luzerne County Court of Common Pleas, against a number of defendants, including FPA, for the death of Merle Barry Wilkinson, Jr.⁴ Upon receipt of the Wilkinson Complaint with allegations of general negligence and professional negligence, FPA served Hartford and Terra with notice of the Wilkinson Complaint.⁵

³The facts recited below are drawn from the stipulations of the parties.

⁴On September 21, 1992, Merle Barry Wilkinson, Jr. fell to his death from a water tower on which he was working.

⁵The Wilkinson Complaint set forth the following claims as to FPA:

29. The negligence of Defendant, French & Parrello, consisted of but is not limited to the following:

a. Failure to regard the rights and safety of Plaintiff's decedent;

b. Failure to properly inspect the Project and the work being performed thereon so that said Defendant would be made aware of an warn against the hazards/risks that would be disclosed by said inspection;

c. Failure to inspect the Project to insure the

safety of the workmen working thereon;

d. Failure to properly inspect and maintain the area in and around the Project;

e. Failure to plan, design, or supervise the Project and the associated work, labor, materials, equipment and/or safety equipment in a manner which would have avoided the said dangerous condition;

f. Failure to plan, design or supervise the Project in such a manner so as to remove or limit the dangerous condition presented by the open and unprotected height from the ground to the height from which Plaintiff's decedent fell to his death;

g. Failure to prepare proper specifications, drawings, diagrams, blueprints, instructions or other work orders;

h. Failure to schedule work on the Project in a manner in which would have avoided or minimized the dangerous condition;

i. Failure to adequately perform all of the terms and conditions of its contract so as to insure the safety of the workmen working on or about the Project;

j. In violating the provisions of Section 324(a) of the Restatement of Torts, 2nd;

k. In violating the provisions of Section 416 of the Restatement of Torts, 2nd;

l. Failure to use due care under the circumstances;

m. In failing to halt the work on the Project when, in the exercise of reasonable and prudent care, Defendant should ought to have done so due to lack of proper safety device and unsafe conditions then and there existing;

n. In utilizing in the operation, management, control, maintenance, supervision and design of the Project agents, servants, employees, contractors and/or subcontractors who were negligent, careless and reckless in the performance of their duties assigned to them and

After review of the Wilkinson Complaint, Hartford agreed to defend FPA. Terra advised Hartford that it "could not commit at this time to any split of the defense costs in this [Wilkinson] matter" Exh. L, Defendant's Motion for Summary Judgment, Letter from Ms. Talbot to Ms. Schoelkoph, at 2. Terra stated that "any costs incurred by Terra will have an direct impact on the Insured's [FPA] premium" because the FPA policy was

so known by said Defendants;

o. Failure to provide Plaintiff's decedent with a reasonably safe workplace or environment under conditions then and there existing;

p. Failure to plan, design, install, construct or supervise the Project and the associated equipment and/or labor and/or materials in a manner which would have avoided the said dangerous condition;

q. Failure to implement and insist upon the use of safety nets, catch platforms, temporary floors, mechanical lifts and/or mechanical fall protection devices in or upon the Project;

r. In causing, allowing, or permitting an unsafe and dangerous condition to exist on the Project, which condition was known, or in the exercise of reasonable care and diligence, should have and would have been known by said Defendant to exist and to present that unreasonable risk of harm to Plaintiff's decedent, and others lawfully upon the Project;

s. Failure to identify and warn of the dangerous condition on or about the Project and thereafter take the necessary action to cure said dangerous conditions.

Exh C., Plaintiff's Motion for Summary Judgment, Wilkinson Complaint, at ¶29.

retrospectively rated. Id., at 1.

Before FPA's Motion for Summary Judgment was granted Hartford paid \$176,285.58 in legal fees, costs and expenses for FPA's defense.

The Hartford and Terra Policies

The Hartford Policy provided:

This insurance shall apply only as excess insurance over any other valid and collectible insurance which would apply in the absence of this policy...

Exh. A, Plaintiff's Motion for Summary Judgment, The Hartford Policy, at 14. The Terra Policy included a similar provision with regard to "other insurance":

This insurance shall be excess insurance over the deductible and any other valid and collectible insurance available to **YOU** whether such insurance is stated to be primary, project specific, contributory, excess, contingent or otherwise, unless such other insurance specifically applies as excess insurance over the Limit of Liability set forth in the *GENERAL DECLARATIONS*, Item 6. ...We will not defend any **CLAIM** that any other insurer has a duty to defend.

Ordinarily, insurance premiums are calculated prospectively, based on an actuarial projection of the risk of loss. See generally, Marten Transport Ltd. v. Hartford Specialty Co., 533 N.W. 2d 452, 454 n. 2 (Wis. 1995). The Hartford Policy provided for such a typical prospective premium. The premium for the Terra Policy was "retrospectively-rated" in accordance with a Retrospectively Rated Premium Contract between FPA and Terra, associated with the Terra policy.

A retrospective premium has two components: a basic premium and a conversion loss factor to adjust the premium by consideration of the insured's actual losses during the policy period. Edward Gray Corp. v. Nat'l Union Fire Insurance Co. of Pittsburgh, PA, 94 F. 3d 363 (7th Cir. 1996); Marten, 533 N.W. 2d at 454 n. 2. An insurance policy with retrospectively-rated premium is sometimes referred to as a form of "self-insurance" because the policy covers only claims exceeding the maximum premium under the policy.⁶ Richmond, Douglas R., *Issues and Problems in "Other Insurance," Multiple Insurance, and Self Insurance*, 22 PEPP. L. REV. 1373, 1448 (2002).

Typically, a standard or tentative premium is paid initially and then adjusted at stated times:

If the actual losses incurred during the policy period are less than estimated, the insured receives a partial premium rebate. If actual losses are greater than the insurer estimated, the insured is charged an additional premium.

Richmond, Douglas R., *Issues and Problems in "Other Insurance," Multiple Insurance, and Self Insurance*, 22 PEPP. L. REV. 1373, 1450 (2002). See also, Holmes, APPLEMAN ON INSURANCE 2D, v. 6, §35.3, at 71. The retrospective premium is a percentage of the losses, sometimes coupled with some portion of defense costs or a charge for claims administration. Richmond, 22 Pepp. L. Rev. at

⁶The policy coverage extends only to the policy limit, which was \$1,000,000 annually under the Terra policy.

1450. The purpose of a retrospective premium is to make the premium more closely reflect the actual loss and cost experience of the insured by averaging such experience over an extended period. Edward Gray, 94 F. 3d at 367.

Under the Retrospectively Rated Premium Contract between FPA and Terra (dated July 6, 1992), the Provisional Premium was \$245,000 in 1992, \$250,000 in 1993, and \$250,000 in 1994, a total of \$745,000 over the three-year period. Exh. C, Defendant's Motion for Summary Judgment, Retrospectively Rated Premium Contract between French & Parrello Associates, P.A. and Terra Insurance Company, at 1. The Provisional Premium of \$745,000 consisted of a Minimum Premium, "the premium that the insurance company retains to cover the administrative cost of the policy," of \$98,000 in 1992, \$100,000 in 1993 and \$100,000 in 1994, a total of \$298,000 over the three-year period, plus a Deposit Premium of \$147,000 in 1992, \$150,000 in 1993, and \$150,000 in 1994, a total of \$447,000. Id., at 1-2. The premium was recalculated annually to account for actual loss and expenses, but there was a Maximum Premium; Terra could charge FPA no more than \$1,154,250 over the three year period, i.e. no more than an additional \$409,250 above the three year Provisional Premium of \$745,000 (\$298,000 + \$447,000) in the event claims exceeded the

deductible plus the Provisional Premium.⁷ Id., at 2 Terra could bill for the additional premium at 18 months, 30 months, and 42 months into the three year term. Id., at 2.

As of October 23, 1992, the Retrospectively-Rated Contract was amended, adjusting the Provisional Premium to \$725,800 and the Minimum Premium to \$278,000 over the three year term of the contract. Id., at 5. This amendment did not change the Maximum Premium or Deposit Premium, but did adjust the additional amount Terra could bill over the Provisional Premium in the event claims exceeded the deductible and Provisional Premium, to \$428,450 (from \$409,250). Id.

A deductible amount is distinct from a maximum premium or self-insured retention because a deductible amount is subtracted from the policy limits, to reduce an insurer's indemnity obligation, but the full policy limits are available once the self-insured retention has been satisfied. Richmond, 22 Pepp. L. Rev. at 1449.⁸ The Terra Policy provided for a per claim

⁷The Maximum Premium "is based on [an] estimate of [the] firm's revenues for the contract period and is subject to audit and subsequent adjustment at the end of the contract period."

⁸Other distinctions between a deductible and a self-insured retention ("SIR") are:

[S]hould an insured with a deductible become insolvent, the insurer must satisfy the deductible as part of its obligation to pay losses up to its limits of liability. With an SIR, the impact of the insured insolvency usually is felt by the claimant-not the insurer. The insured remains obligated to pay the amount of its SIR directly

deductible of Twenty-Five Thousand Dollars (\$25,000) which applied to any expenses or costs related to defending the claim.⁹ Exh. B, Defendant's Motion for Summary Judgment, The Terra Policy, Endorsement No. 2. FPA was solely responsible for payment of the deductible before any claim could be made against the policy coverage.

Both policies imposed on the insurer with the right and duty to defend any claim against the insured for damages covered under the policy. With regard to the duty to defend, the Hartford Policy provided:

The Company shall have the right and duty to defend any claim or suit against the **insured** seeking damages payable under this policy, even though the allegations of the suit may be groundless, false or fraudulent. The Company may make such investigations and settlements of any claim or suit as it deems expedient. The Company is not obligated to pay any claim or judgment or to defend any suit after the applicable limit of the Company's liability has been exhausted by payment of judgments or

to the claimant, and the insurer is liable only for that portion of the loss exceeding the SIR. Finally, when a liability policy includes an SIR, the insured generally adjusts claims, either directly or through a third-party administrator. With a deductible, however, the insurer retains control of claims handling.

Richmond, 22 Pepp. L. Rev. at 1449.

⁹Endorsement No. 2 provides "You agree that in *GENERAL DECLARATIONS* Item 7, the deductible is \$25,000 for each **CLAIM...**" A "claim expense" is defined as:
any expense which can be directly assigned to a specific **CLAIM**. These expenses include witness, expert, consultant, attorney, mediation and arbitration fees and costs, and any other litigation or court expenses or costs.

settlements.

The Hartford Policy at 8.

With regard to the duty to defend, the Terra Policy provided:

We agree to investigate and defend any **CLAIM** against **YOU** caused by **YOUR** actual or alleged **PROFESSIONAL ACTS, ERRORS OR OMISSIONS** for **CLAIMS** to which this policy applies, even if the allegations of the **CLAIM** are groundless or false. **OUR** obligation to defend includes, but is not limited to, designating and employing defense counsel and obtaining expert testimony. **WE** are not obligated to continue to defend any **CLAIM**, or defend any **CLAIM**, or to pay any further **DAMAGES** or **EXPENSES** after **OUR** available Limit of Liability is exhausted by payment of **DAMAGES**, judgments, settlements, **EXPENSES**, or any combination thereof.

The Terra Policy, at 4.

Discussion

The parties, as co-insurers of the same insured, dispute the nature of their obligations to each other. Hartford and Terra agree that, were Terra liable for contribution, Hartford would be solely responsible for the payment of the first \$25,000 of legal fees, costs and expenses incurred in the defense of FPA in the Wilkinson action. But Hartford contends that the Terra Policy constituted "other insurance" within the meaning of the Hartford Policy, and because both insurers had a duty to defend, Terra should have contributed equally to the payment of the remaining \$151,285.58 in attorneys fees, expenses and costs, so it seeks

judgment against Terra in the amount of \$75,642.79. Terra argues its policy was not "other insurance" within the meaning of the Hartford Policy because under its retrospectively-rated premium contract, FPA not Terra be responsible for all defense and/or indemnity costs arising from all claims if less than the maximum premium of \$1,154,250.

The parties, and the court, agree that New Jersey law applies to this action because FPA's principal office is located in New Jersey, and the accident which gave rise to the underlying lawsuit occurred in New Jersey.

A. Standard of Review

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). A genuine issue is one in which the evidence is such that a reasonable jury could return a verdict for the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986). Where, as here, the facts are not in dispute, and the issue presented, (whether a retrospectively rated policy is "other insurance") is entirely a matter of law, resolution at the summary judgment stage is appropriate.

B. Duty to Defend

The allegations in the Wilkinson Complaint triggered both Hartford and Terra's duty to defend. Although Terra's Answer to the Complaint denied any breach of duty to FPA, at argument before the court on the summary judgment motions, Terra conceded that the Wilkinson Complaint had allegations of both general negligence (falling within the Hartford policy), and professional negligence (falling within the Terra policy). Cf., Answer, Affirmative Defenses and Counterclaim of Defendant, Terra Insurance Company, at 4 ¶11; Tr. Hartford Ins. Co. V. Terra Ins. Co., Civ. Action No. 01-5961 (Nov. 21, 2002), at 15-16.

An insurer's duty to defend must be determined in the first instance by comparing the allegations of the Complaint with the provisions of the insurance policy. Danek v. Hommer, 100 A. 2d 198, 202-03 (N.J. Super. Ct. App. Div. 1953). If there are allegations in the Complaint which could, if proved, come within the coverage provided, there is a duty to defend, whether the insured is found liable or not, even if the allegations were unfounded or fraudulent. Id. This duty remains even though ambiguity may result based on other charges in the Complaint or other allegations which do not come within the coverage of the policy. Even if the claims are mixed or based on conflicting theories, only one of which requires coverage, the carrier still has the duty to defend (until the claim triggering the duty is dismissed or terminated). Mt. Hope Inn v. Travelers Indem. Co.,

384 A. 2d 1159 (N.J. Super. Ct. Law Div. 1978).

Upon consideration of the allegations against FPA in the Wilkinson Complaint, supra, n. 5, and the concession of counsel for Terra, it is apparent that Terra's duty to defend was triggered when FPA provided it with notice of the Wilkinson action. The issue remaining is whether Hartford is entitled to contribution from Terra (less the \$25,000 deductible) for having assumed the cost of the defense in its entirety.

C. Contribution

Where two or more insurers are primarily liable to provide coverage and/or costs of defense, and where one fails to contribute, the other is entitled to a judgment for contribution. Hartford Accident and Indemnity Co. v. Ambassador Ins. Co., 394 A. 2d 867 (N.J. Super. Ct. App. Div. 1978) (holding Hartford was entitled to contribution from Ambassador for indemnity and defense costs incurred by Hartford in an action brought against an insured of both Hartford and Ambassador). In American Home Assurance Co. v. St. Paul Fire & Marine Ins. Co., 137 A. 2d 65, 68-69 (N.J. Super. Ct. App. Div. 1989), the court also held there was a right of contribution for defense costs between and among primary insurers.

Relying on American Nurses Ass'n v. Passaic General Hospital, 484 A. 2d 670 (N.J. 1984), Moore v. Nayer, 729 A. 2d 449 (N.J. Super. Ct. App. Div. 1999), and related cases, Terra

asserts that Hartford is not entitled to contribution for defense costs because the Terra policy includes a retrospectively-rated premium with the insured's "self-insured retention" up to \$1,154,250. Because Hartford requests contribution in the amount of \$75,642.79, less than the maximum possible premium of \$1,154,250, Terra's argument is that FPA, not Terra, is responsible for its share of defense costs, and Terra has no obligation of contribution.

A deductible amount in an insurance policy does not make the insured an insurer for that amount and does not constitute "other insurance" in considering indemnity obligations between and among co-insurers. In American Nurses Ass'n v. Passaic General Hospital, 484 A. 2d 670, 673 (1984), the Supreme Court of New Jersey held that a deductible paid by the insured hospital did not constitute "other insurance" under an excess provision of a co-insurer's policy. The court stated:

National's excess provision refers to "valid and collectible insurance for an occurrence," "excess of such insurance," and "when such insurance is exhausted." In our opinion, lay persons would consider "[other] insurance" to refer to another policy comparable to the one issued to them. Such references would not ordinarily be understood to include the obligation of an insured to pay a deductible.

Id. The court held that the insured hospital's \$100,000 deductible was not "other insurance" for the purposes of co-insurance.

Similarly, in Moore v. Nayer, 729 A. 2d 449, 460 (N.J.

Super. Ct. App. Div. 1999), the New Jersey Superior Court Appellate Division held that neither a deductible nor self-insured retention was "other insurance" for the purposes of co-insurance. Moore involved a dispute over allocation of liability to the primary insurance carriers for a freight line and a trucking company. The Moore court noted that when considering co-insurance, New Jersey courts have not differentiated between a deductible and self-insured retention because both require a limited assumption of risk by the insured, with the rest of the loss assumed by the insurer.¹⁰ Id. Because the freight liner's insurance policy included a large deductible plus self-insurance retention, the freight liner company was not insured for the risk it assumed itself. Id. The amount of the self-insured retention exceeded the amount requested for indemnification, so the issue of indemnification did not have to be addressed. The insured rather than the insurer, was primarily liable. Id.

However, the duty to defend is distinct from and broader than, the duty to indemnify. An insurer's duty to defend is extremely broad, and is triggered if there is any possibility that the claim against the insured falls within the coverage of the policy. Danek v. Hommer, 100 A. 2d at 202-03., The

¹⁰The court also distinguished that a deductible requires an up front payment by the insurer, while self-insured retention requires some payment as a condition to the insurer's duty to pay under the policy. Moore, 729 A. 2d at 460.

obligation to contribute to defense costs may be implicated even where insurers cover different risks. NL Industries, Inc. v. Commercial Union Insurance Co., 935 F. Supp. 513, 519 (D.N.J. 1996).

In NL Industries, the District Court of New Jersey, applying New York law, determined the duty to defend may trigger an obligation to contribute, even if there is ultimately no obligation to indemnify. NL Industries was a dispute between two primary insurers of the same insured regarding obligations to defend and indemnify their mutual insured. Id. Because an insurer's duty extends only to "covered" claims, the insurer can seek contribution only if both policies cover the same risk. Id., at 519. But acknowledging the broader scope of the duty to defend, NL Industries held that a primary insurer may seek contribution for defense costs against another primary insurer even where there is a self-insured retention. NL Industries, 935 F. Supp at 521. The court found that the insurer was obligated to provide a complete defense, and might seek contribution from the insured later for any periods of self-insurance. Id., at 521-22.

Although NL Industries was decided under New York law, the result should be the same under New Jersey law. An insurance company must defend the action if the factual allegations of the underlying complaint on their face state a claim against the

insured to which the policy *potentially* applies. Cooper Laboratories, Inc. V. Int'l Surplus Lines Insurance Co., 802 F.2d 667, 675 (3d Cir. 1986) (applying New Jersey law). "A duty to defend is a matter of contract, and the reason why primary insurers provide a defense is that their policies require that they do so." Id., at 675.

Upon receiving notice of a complaint including both claims of general negligence and professional negligence, Terra was obligated to provide a defense as FPA's primary insurer for professional negligence claims. It failed to do so at the time, but still was obligated to pay its share of the defense costs, less the deductible, in the amount of \$75,642.79, even if those costs and expenses could later increase FPA's premium under the retrospectively-rated premium contract.

Conclusion

For the reasons stated above, Plaintiff's Motion for Summary Judgment is granted and Defendant's Motion for Summary Judgment is denied.

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

HARTFORD FIRE INSURANCE COMPANY :
v. :
TERRA INSURANCE COMPANY : Civil Action No. 01-5961

Order

AND NOW, this 2nd day of August, 2004, upon consideration of Plaintiff's Motion for Summary Judgment and Defendant's Motion for Summary Judgment, and responses thereto, it is hereby **ORDERED** that:

1. Plaintiff's Motion for Summary Judgment (Paper #18) is **GRANTED** in favor of Hartford Fire Insurance Company and against Terra Insurance Company.

2. Defendant's Motion for Summary Judgment (Paper #22) is **DENIED**.

Norma L. Shapiro, S.J.