

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

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|---------------------------|---|--------------|
| ACANDS, INC. | : | CIVIL ACTION |
| | : | |
| v. | : | |
| | : | |
| AON RISK SERVICES, et al. | : | NO. 01-3277 |

MEMORANDUM and ORDER

Juan R. Sánchez, J.

November 10, 2004

In this insurance case, ACandS, Inc. claims Aon Risk Services, Inc. breached an oral contract and a duty of care in procuring excess liability coverage for the insulation installer in 1969. Aon answers that ACandS's own negligence resulted in its loss of coverage or, alternatively, that ACandS received the coverage for which it paid.

Several motions *in limine* and well-articulated disputes over points for charge must be decided before trial. The first of those is raised in Aon's Motion *in limine* to exclude evidence of an underlying mediation and settlement. The decision on that motion goes to the heart of this case.

ACandS, an insulation installer, was spun off from its parent company, Armstrong Cork and Seal. In anticipation of that spinoff, ACandS bought separate primary and excess insurance coverage in 1969 through a broker, Alexander & Alexander, predecessor company to Aon Risk Services. In 1999, ACandS exhausted its primary and first layers of excess insurance coverage on asbestos claims, reaching an excess layer Alexander & Alexander procured from American Home Assurance Company. American Home refused coverage on grounds Endorsement 2 required it to cover \$15 million in claims for either Armstrong Cork and Seal or ACandS, but not both. ACandS sued

American Home and Aon separately for damages. After mediation, American Home settled with ACandS for \$9 million. This case is ACandS's suit against Aon for the difference between \$15 million and the settlement amount based on its oral contract with Aon to procure excess coverage and on an insurance broker's duty of care.

DISCUSSION

The Third Circuit held under Pennsylvania law¹ an insurance broker who violates its duty to its principal is liable for breach of contract. *Consolidated Sun Ray, Inc. v. Lea* 401 F.2d 650, 657 (3d Cir. 1968) (holding broker liable for failing to include a subsidiary in a company's insurance policies). An insurance broker is liable to its client if the broker "neglects to procure insurance, or does not follow instructions, or if the policy is void or materially defective through the agent's fault." *Laventhol & Horwath v. Dependable Ins. Associates, Inc.*, 396 Pa. Super. 553, 559, 579 A.2d 388, 391 (1990). When an insurance policy provides an insurer "a defense it could not have raised if plaintiffs' instructions had been carried out," the broker is liable. *Consolidated Sun Ray*, 401 F.2d at 657.

In cases of breach, either of the contract to procure insurance or of the duty of care, a broker is liable "[t]o the same extent as the insurer would have been liable had the insurance been properly effected." *Id.*; see also *Walker, Stratman & Co. v. Black*, 216 Pa. 395, 397, 65 A. 799, 799 (1907) (holding negligence of insurance brokers is a question for a jury). Aon argues the settlement between ACandS and American Home forecloses a resolution of the question of the "extent to which the insurer would have been liable." *Laventhol & Horwath*, 396 Pa. Super. at 559, 579 A.2d at 391.

¹This is a diversity case under 28 U.S.C. §§ 1332 to which Pennsylvania law applies. *Erie Railroad Company v. Tompkins*, 304 U.S. 64, 78, 58 S.Ct. 817, 822, 82 L.Ed. 1188 (1938).

Our predecessor judge in this case, Judge Van Antwerpen, relying on *Consolidated Sun Ray*, properly analyzed the question in the case as “whether the policy was written in such a way that it enabled the insurer to raise colorable defenses to ACandS’s claim.” Memorandum and Order, September 18, 2003, p. 10. Aon asks us to instruct the jury that ACandS must prove at trial it would not have recovered had it proceeded to obtain an adjudication of its claim against American Home. In fact, under the law of this case ACandS has to prove only that American Home possessed a colorable defense in its case in chief because otherwise there is no liability by the broker. *Consolidated Sun Ray*, 401 F.2d at 656. Also following Judge Van Antwerpen’s memorandum and order as the law of the case, this court declines Aon’s invitation to interpret Endorsement 2 prior to trial. The question is not the interpretation of the paragraph, but whether it was sufficiently imprecise as to raise a colorable defense for American Home.

As part of its case, ACandS wants to explore the settlement process between ACandS and American Home at length. To encourage the compromise and settlement of disputes, evidence of settlements or offers of settlement are ordinarily not admissible in federal proceedings. Fed. R. Evid. 408 and advisory committee note; Fed.R.Civ.P. 68; *Bank of America Nat. Trust and Sav. Ass'n v. Hotel Rittenhouse Associates*, 800 F.2d 339, 344 (3d Cir. 1986) (holding when the parties invoke the jurisdiction of the court to enforce the terms of a settlement, they forego confidentiality). In subsequent litigation, the terms of a settlement are admissible, but statements by a judge or parties about that settlement are not. *Trustees of University of Pennsylvania v. Lexington Ins. Co.*, 815 F.2d 890, 906 (3d Cir. 1987). The terms of the settlement are not disputed or at issue sufficiently to inquire as to the underlying intent of the parties. *Hotel Rittenhouse*, 800 F.2d at 244. Therefore, Judge Van Antwerpen’s order confirming the settlement is admissible but any testimony by James

Hipolit, ACandS's president, relating to the settlement proceedings; any documents created or produced solely for settlement discussions; and, Judge Van Antwerpen's Memorandum of October 29, 2002², are, on Aon's motion, excluded from the case with the warning to Aon not to open the door to such testimony in rebuttal.³

Several of the parties' proposed jury instructions raise legal questions which will affect the conduct of trial. The first of these are the statute of limitations questions. Judge Van Antwerpen established for the purposes of this case that the statute of limitation was tolled on the contract question by the discovery rule. Memorandum, November 8, 2002. Aon argues depositions taken after November 8, 2002, change the dynamics of the tolling of the statute on the contract cause of action. Aon argues ACandS should have known it was not covered separately in 1981 and 1982 when it reviewed its policies.

Aon's argument is a red herring, however; had ACandS sought a declaratory judgment in 1982 concerning its coverage, the case would have been dismissed as speculative since ACandS had not yet been injured. Judicial determination that is unnecessary to decide an actual dispute constitutes an advisory opinion and has no legal effect. *Okkerse v. Howe*, 521 Pa. 509, 520, 556 A.2d 827, 833 (1989). The courts of Pennsylvania "may not exercise jurisdiction to decide issues that do not determine the resolution of an actual case or controversy. . . . To avoid dismissal, an actual case

²Judge Van Antwerpen's Memorandum confirming settlement was filed under seal and is, as a consequence, unavailable for this trial.

³Aon's Motion in Limine also asked this court to exclude testimony or evidence concerning New York Attorney General Eliot Spitzer's investigation of insurance broker and related matters and to exclude any testimony about the ultimate recipients of any damages ACandS might be awarded. Testimony about Spitzer's investigation will be excluded but we will deny the motion as far as the ultimate recipients of any damages.

or controversy must usually exist at every stage of the judicial process.” *Borough of Marcus Hook v. Pennsylvania Mun. Retirement Bd.*, 720 A.2d 803, 804 -05 (Pa. Commw. 1998) (dismissing a case which sought an advisory contract interpretation). No case or controversy existed until 1999 when American Home refused coverage.

Legal argument also continues on the question of the statute of limitation on the negligence count. As a matter of law, however, a cause of action accrues on the date of injury. A cause of action does not arise until some person suffers injury or loss by reason of the alleged negligent conduct; mere negligence itself establishes no right of action. *Emert v. Larami Corp.*, 414 Pa. 396, 200 A.2d 901 (1964). In this case, the date of injury was the date on which American Home refused coverage. American Home refused coverage on July 12, 1999, ACandS filed this action on June 26, 2001. An appropriate instruction on statutes of limitations will be given.

A significant question underlying this case is whether Pennsylvania law of contributory or comparative negligence applies. For the reasons that follow we find contributory negligence applies and no instruction regarding comparative negligence will be given.

The Pennsylvania Comparative Negligence Act⁴ replaced the “harsh common law doctrine of contributory negligence under which a plaintiff whose own negligence, however slight, contributed to the happening of the accident in a proximate way, was barred from recovery.” *Elder v. Orluck*, 511 Pa. 402, 416, 515 A.2d 517, 524 (1986) (plurality) (apportioning comparative liability among joint tortfeasors). The Act applies only to actions which seek to recover damages for negligence resulting in “death or injury to person or property.” 42 Pa.C.S. § 7102(a). Both the Third Circuit and the Pennsylvania Superior Court have found the Act does not apply when the

⁴42 Pa.C.S. § 7102.

negligence averred does not involve destruction or damage to tangible property. *Industrial Valley Bank and Trust Co. v. Dilks Agency*, 751 F.2d 637, 639 (3d Cir. 1985) (reversing an award to the plaintiff bank against an insurance broker for a coverage gap because the plaintiff was also negligent, barring recovery); *Wescoat v. Northwest Sav. Ass'n*, 378 Pa. Super. 295, 303, 548 A.2d 619, 623 (1988) (reversing the submission of a case to the jury on a comparative negligence basis when the question involved the alleged negligence of a mortgagee in obtaining insurance).

The Pennsylvania Superior Court re-iterated the holding of *Wescoat* that damage to “tangible property, real or personal . . . is required to bring the provision of the Act into play.” *Butler v. Flo-Ron Vending Co.*, 383 Pa. Super. 633, 655, 557 A.2d 730, 741, *appeal denied*, 523 Pa. 646, 567 A.2d 650 (1989). Had the Legislature intended a contrary reading of the Act, it has had a decade and a half in which to amend the language and it has not done so. *Wertz v. Chapman Tp.*, 559 Pa. 630, 636, 741 A.2d 1272, 1275 (1999)(stating, “we are secure in the knowledge that if we are mistaken as to the legislature's intent, the General Assembly may simply amend the [act] to realize any heretofore unstated legal right that it contemplated.”) As a consequence, we will instruct the jury on contributory and not comparative negligence. Accordingly, we enter the following:

ORDER

AND NOW, this 10th day of November, 2004, it is hereby ORDERED that

- Defendant’s Motion in Limine (Document 83) is GRANTED as to part 1, excluding testimony or evidence relating to mediation unless or until it is offered in rebuttal;
- Defendant’s Motion in Limine (Document 83) is GRANTED in part as to part 2, excluding the Court’s Memorandum of October 29, 2002, and DENIED in part as to part 2, admitting the Court’s Order of October 29, 2002;
- Defendant’s Motion in Limine (Document 83) is GRANTED as to part3, excluding testimony or evidence about Attorney General Spitzer’s investigation;

- Defendant's Motion in Limine (Document 83) is DENIED as to part 4, admitting any otherwise competent and relevant evidence about the ultimate recipients of any damage award.
- Plaintiff's Motion in Limine to exclude certain testimony of Wallace Hofferth is GRANTED in part and DENIED in part: Hofferth's opinion testimony regarding the conduct of Defendant's agent is excluded; other competent and relevant testimony will be admitted.

Proposed jury instructions 20, 21, and 22 on negligence and standard/duty of care will be merged and modified; Plaintiff's proposed jury instruction 23 on factual cause will be given; Plaintiff's proposed jury instruction 24 on statute of limitations – negligence – will be modified and given; Defendant's proposed jury instruction 25 on contributory negligence will be given and no instruction will be given on comparative negligence (proposed instruction 26). Plaintiff's proposed jury instruction 27 on contract formation and oral contract will be given as will Plaintiff's proposed instruction 28 modified. Plaintiff's instruction 29 on the statute of limitations – contract – will be modified and given.

BY THE COURT:

Juan R. Sánchez, J.