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

FEDERAL INSURANCE COMPANY	:	CIVIL ACTION
	:	
v.	:	
	:	
MICHAEL O'HANLON and	:	
STEVEN GARFINKEL	:	NO. 04-05068-JF

MEMORANDUM AND ORDER

Fullam, Sr. J. February 1, 2005

Plaintiff seeks a declaratory judgment to the effect that it has no obligation to defend or indemnify the defendants under a policy of excess insurance issued by plaintiff, in which these defendants are two of the named insureds. The defendants were, respectively, the CEO and the Chief Financial Officer of DVI, Inc. which declared bankruptcy after disclosing various accounting irregularities.

Plaintiff alleges that it issued its policy in reliance upon representations made in the application for the policy, and in the application for the primary policy to which plaintiff's policy is excess; that these representations were false and fraudulent; and that these defendants were responsible for the false representations. Count I of the Complaint seeks rescission of the excess policy, insofar as it relates to these two defendants. Count II, alternatively, seeks a declaration that, in any event, the defendants are not entitled to coverage because, when the policy was issued, they well knew of events

which had already occurred, and which would give rise to claims against them, but falsely represented to plaintiff that they had no such knowledge. In Count III of the Complaint, plaintiff asserts that there are numerous other (unspecified) reasons for denying coverage, and purports to preserve a right to assert such additional grounds if necessary.

Both defendants have filed motions to dismiss the Complaint. Except with respect to Count III, these motions are plainly lacking in merit. Defense counsel seem to have overlooked the distinctions between Fed. R. Civ. P. 12(b)(6), and Fed. R. Civ. P. 56. At this stage, I am required to accept as true all well-pleaded factual averments in the Complaint. Since the facts alleged in this case would, if proved, entitle plaintiff to a declaration of non-coverage, the Complaint withstands dismissal.

Both defendants argue that plaintiff is seeking partial rescission of the insurance contract, and that the insurance policy must either be rescinded as to all insureds, or none. This is an interesting theoretical point which, in my view, need not be addressed in this action. The only defendants whose coverage we are considering are the two named defendants. Whether or not plaintiff denies coverage to defendants' former employer, or to other officers and directors, is of no concern to these defendants.

The defendant O'Hanlon makes the interesting argument that the Complaint should be dismissed because plaintiff has merely alleged wrongdoing on his part - the same wrongdoing which various class action plaintiffs and others are asserting in the numerous lawsuits now pending - and that, unless and until judgment is entered against him, there is no basis for rescission or for denial of coverage. In other words, plaintiff in our case will have to prove many of the same facts being asserted in other litigation by others. Just how that converts into a basis for a Rule 12(b)(6) dismissal is not explained.

With respect to Count III of the Complaint, it seems that plaintiff's counsel has failed to observe the distinction between correspondence with policyholders and others in the course of claims processing, and a complaint filed in a lawsuit in federal court. I am not aware of any provision in the federal rules for a purported reservation of rights. The final judgment in this case will be *res judicata* as to all issues which either were or could have been raised in the course of the litigation. Count III will be dismissed, with leave to amend.

An order follows.

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ORDER

AND NOW, this 1st day of February 2005, upon consideration of the motions to dismissed filed, respectively, by the defendants Michael O'Hanlon and Steven Garfinkel, IT IS HEREBY ORDERED:

1. Count III of plaintiff's Complaint is DISMISSED, with leave to amend within 20 days.

2. In all other respects, the motions to dismiss are DENIED.

BY THE COURT:

/s/ John P. Fullam
John P. Fullam, Sr. J.