IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

ACE AMERICAN INSURANCE COMPANY	:	July Term 2001
Plaintiff,	:	No. 0077
v.	:	Commerce Program
UNDERWRITERS AT LLOYDS AND COMPANIES, et al.	:	
Defendants.	:	

OPINION

This case arose out of a commercial insurance coverage dispute between ACE American Insurance Company ("ACE"), an excess carrier, and the companies though which ACE had its Errors and Omissions ("E&O") coverage: Universal Underwriters at Lloyds and Companies ("Lloyds") and Columbia Casualty Company ("Columbia")(collectively, "Defendants").[1] This opinion is meant to address the appeals filed by ACE, Columbia and ACE's counsel, J. Randolph Evans, in connection with this matter.

I. Background

In December 1996, ACE was sued by its policyholder, Refuse Fuels, Inc. ("Refuse Fuels") for bad faith in failing to pay $25 million in contract damages which Refuse Fuels claims should have been paid in 1990. The Lloyd's Policy, which was incorporated by Columbia, (the "Policy"), provided:

> **Notice of Claim:** The insured shall provide notice of all Claims to the Insurer as soon as practicable after such claims first become known to the General Counsel or Risk Manager of the Principal Insured, ***but in no event later than ninety (90) days after the***

1 Gulf Underwriters Insurance Company, which provided the second layer of excess coverage, was originally a party to the lawsuit but was dismissed with prejudice on May 9, 2005.

> ***expiration of the Policy Period*** or the Optional Extension Period, if purchased. If a Claim, which is ***reasonably likely to result in Loss exceeding $4,000,000*** is made against the Insured, then the Insured shall forward, ***as soon as practicable*** to the Insurer every demand, notice, summons or other process received by the Insured or by their representatives. The Insured may provide a cumulative notice of all Claims which the Insured ***reasonably believes are unlikely to result in Loss exceeding $4,000,000*** by means of a quarterly bordereau listing all such Claims.

Lloyds' App. Exh. 1, Claims Section, ¶ 1 (emphasis added) (the "Notice Provision").

It is undisputed that ACE reported the Refuse Fuels Claim by way of bordereau listing, at the very latest, as of June 28, 1999. It is likewise undisputed that ACE did not provide more detailed notice of the Refuse Fuels Claim until well after June 30, 1999.

Prior to trial, all parties filed Motions for Summary Judgment and, in a Memorandum Opinion dated August 26, 2005, this court held that the Notice Provision was unambiguous and that, based on the plain language of that provision, ACE's actions in evaluating and reporting the claim must be judged objectively and in accordance with that of a reasonable insurance carrier under similar circumstances. Finally, the court found that, under Pennsylvania law, Defendants were not required demonstrate prejudice as a result of ACE's alleged failure to comply with the Notice Provision because the Policy was a "claims-made" policy. *See* Memorandum Opinion of August 26, 2005. Following a two week trial, the jury returned a verdict in favor of Defendants.

Following the trial, as a result of certain unprofessional and improper trial conduct by one of ACE's attorneys, J. Randolph Evans, the court revoked Evans' *pro hac vice* admission. *See* March 21, 2006 Order. Thereafter, Columbia filed a Post-Trial Motion seeking further sanctions against ACE, which this court denied without opinion. Columbia appealed the denial of this motion.

ACE also filed Post-Trial Motions, which were denied. ACE then filed an appeal from: "1) the final judgment entered on October 17, 2006, 2) the May 17, 2006 Order denying ACE's

Emergency Motion for Contempt and/or Sanctions; and 3) the March 21, 2006 Order revoking the *pro hac vice* admission of ACE's counsel." *See* ACE's Statement of Matters Complained of on Appeal. ACE raises several issues on appeal; each will be discussed in turn. ACE's counsel, Evans, also personally appealed the revocation of his *pro hac vice* admission.

II. Discussion

Several of the issues raised by ACE are misleading and contain misstatements of the rulings of this court. Clarification is therefore necessary. Such conduct is representative of ACE's counsel's conduct throughout the trial, as evidenced by the trial transcript.

A. ACE's Appeal

1. Did the trial court err as a matter of law in failing to impose on Defendants the burden of proving a breach of the [Notice Provision]?

ACE appears to be of the mistaken belief that Defendants were required to prove that ACE breached the Notice Provision, rather than ACE, the plaintiff, bearing such a burden. This is wholly inaccurate. First, the Notice Provision was a condition precedent to coverage, not a limitation of coverage. Second, ACE incorrectly attempts to avail itself of the Pennsylvania Supreme Court's ruling in Brakeman v. Potomac Insurance Co., 472 Pa. 66, 371 A.2d 193 (1977), which held that where an insured provides late notice under an occurrence liability policy, an insurance company is relieved of its obligations under the policy only if it can show actual prejudice. However, it is important to note that Brakemen involved an occurrence policy, not a claims made policy as in the case at bar. Pennsylvania has not extended the Brakeman "notice-prejudice" rule beyond the context of occurrence liability policies.[2] The court declined

2 "In a 'claims-made' policy, the liability insurance coverage is effective if the negligent or omitted act is discovered and brought to the attention of the insurance company during the period of the policy, no matter when the act occurred." Appleman on Insurance § 130.1 (2d ed. 2005). A "claims-made" policy

to do so here.

2. Did the trial court err as a matter of law in failing to impose on Defendants the burden of proving prejudice resulting from ACE's alleged breach/late notice?

ACE's position is incorrect for the same reasons as set forth above. The court's rationale for its decision is discussed at length in its Memorandum Opinion of August 26, 2005, issued in connection with the parties' Motions for Summary Judgment, which is incorporated herein by reference. The August 26, 2005 Opinion is not being appealed. *See* ACE's Statement of Matters Complained of on Appeal.

3. Did the trial court err in submitting the issue of ACE's compliance with the first sentence of the [Notice Provision] to the jury – when, as the trial court initially found at the summary judgment stage, ACE complied with the first sentence as a matter of law?

This is a misstatement of the court's ruling on the Motions for Summary Judgment. This court never found that ACE "complied with the first sentence [of the Notice Provision] as a matter of law." *See* August 26, 2005 Opinion.

4. Did the trial court err in failing to grant ACE judgment as a matter of law concerning its compliance with sentence two of the [Notice Provision] – because the second sentence unambiguously provided that specific notice is to be provided as soon as practicable once the Risk Manager/General Counsel knows that a claim is reasonably likely to result in a loss exceeding $4 million)(and ACE provided such notice); or alternatively, even if the second sentence were [sic] based on an objective standard, the Defendants failed to establish when a

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differs from an "occurrence" policy. "In the 'occurrence' liability insurance policy, the insured event triggering coverage is the 'occurrence' itself. Once the 'occurrence' happens, liability insurance coverage attaches even though the claim may not be made for some time thereafter." Id. In rendering its decision, the court in Brakeman concluded that if an insurer could not show prejudice from a late notice, the purpose of the notice provision in an occurrence policy, to give the insurer time to investigate the claim for defense or settlement, would not have been frustrated. Id. at 74-5. The Court found that, in a claims-made policy, the provision requiring notice before the end of the policy period serves a different purpose, rather it provides a certain date after which an insurer knows that it no longer is liable under the policy, and accordingly, allows the insurer to more accurately fix its reserves for future liabilities and compute premiums with greater certainty. Id.

reasonable insured would have provided specific notice of the Refuse Fuels claim?

This statement borders on incomprehensible. It is unclear whether ACE is objecting to the court's failure to grant ACE's Motion for Summary Judgment (which, incidentally, is not one of the orders being appealed and is therefore waived. *See* ACE's Statement of Matters Complained of on Appeal) or its failure to grant ACE's Post-Trial Motion. Regardless, the court's rationale for submitting to the jury the issues of whether ACE provided notice "as soon as practicable" and whether it was reasonable in its determinations that the Refuse Fuels Claim was unlikely to result in a loss exceeding $4 million, was that neither could be decided as a matter of law because both presented disputed issues of material fact which required determinations by the fact finder. *See* August 26, 2005 Opinion. After hearing all the evidence, the jury found in favor of Defendants.

5. After the parties submitted competing, irreconcilable interpretations of the [Notice Provision] to the Court and revealed that the policy had a latent ambiguity, did the court err in the ruling that the [Notice Provision] was not ambiguous – and thereby (a) fail to construe that provision in favor of the insured, ACE, to mean subjective knowledge by the Risk Manager/General Counsel that a claim is likely to exceed $4 million, and/or (b) preclude the jury from hearing evidence of the parties' intent concerning the provision?

At the summary judgment stage, the court determined that a plain reading of the Notice Provision revealed that it was unambiguous and required ACE's conduct to be judged objectively. *See* August 30, 2006 Opinion. This decision is not being appealed. *See* ACE's Statement of Matters Complained of on Appeal. Since the court found the Notice Provision to be unambiguous, evidence of the parties' intent constitutes inadmissible parole evidence. *See* Myers v. McHenry, 398 Pa. Super. 100, 580 A.2d 860, 863 (1990) (*citing* Phillips Gas and Oil Co. v. Kline, 368 Pa. 516, 519, 84 A. 2d 301 (1951)); *see also* March 14, 2006 Order,

incorporated herein by reference.

6. Did the trial court err as a matter of law by interpreting the April 13, 2004 Order as pertaining solely to discovery on bad faith – and therefore, erroneously refuse to (a) enforce the Order; (b) force ACE to proceed to trial without Lloyds' documents; and/or (c) hold Lloyds' in contempt and/or award other sanctions for Lloyds' violation of the Order?

By way of background, on January 16, 2003, the Hon. Gene D. Cohen limited discovery in this case to the issue of notice only, which essentially bifurcated the case. *See* January 16, 2003 Order. On April 13, 2004, Judge Cohen entered a sanction order against Lloyds which required them to produce "all documents listed on [Lloyd's] privilege log, as supplemented through November 7, 2003." *See* April 13, 2004 Order. Lloyds appealed this order and obtained a stay from the Superior Court until April 27, 2005.

On August 26, 2005, the court stayed the bad faith portion of the case pending final resolution of the coverage phase. *See* August 26, 2005 Order. Thereafter, Judge Cohen's Order was affirmed by the Superior Court on August 18, 2005. Lloyds sought a discretionary appeal and stay from the Pennsylvania Supreme Court, which was eventually denied. On February 9, 2006, ACE filed a Motion to Stay the Trial – scheduled for March 6, 2006 - pending Lloyds' appeal. The court denied this request on February 14, 2006, finding that the "discovery dispute which is the subject of the appeal does not become relevant unless the bad faith portion of this case resumes, which can not occur unless there is a finding of coverage in the first phase of trial." *See* February 14, 2006 Order, incorporated herein by reference.

Despite this clear ruling, ACE filed a Motion for Contempt against Lloyds for violation of the April 13, 2004 Order. The court denied the motion in an Order dated May 17, 2006, which is incorporated herein by reference, concluding that the April 13, 2004 Order addressed discovery solely related to the bad faith portion of this bifurcated case, which had been stayed

following the entry of the April 13, 2004 Order. The court found that the sanction component of the April 13, 2004 Order did not render the discovery admissible, but merely obviated the necessity of an *in camera* review by permitting ACE to conduct a review the bad faith discovery Lloyds claimed as privileged. The sanction of allowing ACE to review the allegedly privileged documents was imposed in anticipation that the court would eventually rule on the admissibility of such documents in connection with the bad faith portion of the case – a matter which was rendered moot by the defense verdict in the coverage phase. *See* May 17, 2006 Order. There was no allegation that the materials at issue contained evidence relating to the issue of notice or any other matters pertinent to the coverage phase. It should also be noted that no appeal has been taken from the orders bifurcating the case, staying the bad forth portion of case or any of the discovery orders at issue. *See* ACE's Statement of Matters Complained of on Appeal.

7. Did the trial court err in permitting defendants to introduce evidence of both (a) the April 30, 2001 $37 million settlement (when, under the court's summary judgment order, June 30, 1999 was the relevant date for measuring whether ACE's belief was reasonable and, under the court's February 14, 2006 Order, all evidence after July 27, 2000 was inadmissible) and (b) ACE's alleged bad faith exposure measured by Defendants' rote formulaic computation of damages, and then further err, by precluding ACE from responding to such evidence by introducing (a) opinions of its outside counsel, Robert Reeder, concerning his evaluation of the Refuse Fuels claim and/or (b) Defendants' admissions regarding the value of the Refuse Fuels claim?

With respect to #7 (a), the settlement figure was pertinent to the issue of whether ACE was reasonable in its contention that the Refuse Fuels Claim was "not reasonably likely to exceed $4 million." The number itself is irrelevant and its admission did not prejudice ACE. It was clearly in evidence that the settlement of the Refuse Fuels Claim was in excess of $35 million, because it would have had to have been for each of the excess layers of coverage to be

implicated. Moreover, during deliberations, the jury requested and was given without objection two demonstrative exhibits which set forth the layers and amounts of coverage, clearly demonstrating that the settlement figure was in excess of $35 million. The undisputed evidence showed that the primary policy, issued by Lloyds, provided $10 million of coverage for each claim after a satisfaction of a self-insured retention of $15 million. *See* Lloyds Policy, at 5. The first layer excess policy, issued by Columbia, provided $10 million of coverage in excess of the $10 million. *See* Columbia Policy, at 78. Despite the fact that Gulf was dismissed prior to trial, the jury was made aware that a second layer of coverage existed, providing an additional $10 million in coverage. *See* Layer of Coverage Exhibit. Simple math clearly demonstrates that, in order to implicate all levels of coverage, the settlement must have been in excess of $35 million.

Issue #7 (b) and its subparts are incoherent, incomprehensible and do not properly preserve any issue for appeal. Contrary to ACE's implication, the court allowed extensive testimony (approximately 136 pages) by outside counsel, Robert Reeder, concerning information for which he had a factual basis, and only precluded Reeder from offering his opinions regarding the value of the underlying case. In other words, Reeder was precluded from "providing an endorsement" of his clients' decisions, since ACE admits that it was not relying upon "advice of counsel" as a defense.[3] ACE admitted at trial that it never advised any of its outside attorneys of the Policy's reporting threshold and never hired any attorneys to advise whether to report the Refuse Fuels Claim to its excess carriers. Therefore, the court found the proffered testimony was

3 Despite the court's ruling, ACE's counsel referred to "Reeder's shock" concerning the ultimate value of the case in his closing, a comment which clearly constituted an endorsement of ACE's position as to the value of the Refuse Fuels Claim, which the court specifically precluded. (N.T. 3/16/06 at 120, L21-3). This is an example of ACE's counsel attempts to mislead the jury and circumvent the rulings of the court.

not relevant and that its probative value was outweighed by the danger of unfair prejudice.[4]

With respect to the issue of "admissions," the court's rationale for its ruling is fully set forth in its March 15, 2006 Order, incorporated herein by reference. Specifically, the court stated:

> With respect to the testimony which purports to constitute "admissions against interest made by the Defendants that are pertinent to the Notice Provision," or any other evidence relating to the parties conduct following July 27, 2000, such evidence is precluded. This court has previously ruled that "any documents or other evidence after July 27, 2000 – when specific notice of the Refuse Fuels claim was provided - is irrelevant to and therefore inadmissible during the coverage phase of the trial." This court granted a limited exception to this ruling with respect to the ultimate settlement figure in the underlying matter and allowed some very limited testimony by Plaintiff explaining how this figure was reached. Unless Plaintiff can demonstrate that Defendants' "admissions" were based upon the full disclosure of all information known to ACE at the time the alleged admission was made, such evidence is inadmissible, as it is not relevant to the issues currently being tried.

See March 15, 2006 Order. ACE made no such demonstration at trial, therefore the evidence was never admitted.

8. Did the trial court err in precluding evidence that showed that Defendants were estopped from asserting their late notice defense?]

ACE does not cite to the record in connection with this issue and did not properly preserve the issue for appeal, thereby waiving it. ACE attempted to argue that Lloyds – never Columbia – waived its late notice defense, through its reservation of rights letter. The court found ACE's position to be without merit, as it was belied by the record in this case and

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4 The court's determination as to whether relevant evidence should be excluded as more prejudicial than probative is a matter within the court's discretion. Commonwealth v. Marshall, 523 Pa. 556, 568 A.2d 590 (1989).

unsupported by the pleadings.

9. Did the trial court improperly give a misleading jury instruction on the Notice Provision – when its sole fact-specific instruction to the jury was an admonition not to ignore the "as soon as practicable" language of the policy, without reference to any other policy language?

Again, ACE misrepresents the statements of the court, particularly its instruction to the jury regarding the Policy. While the court specifically instructed the jury not to ignore the "as soon as practicable," language it is clear that the court implored the jury to consider all the Policy's language. "Only when there is an abuse of discretion or an inaccurate statement of the law is there reversible error." Commonwealth v. Jones, 542 Pa. 464, 668 A.2d 491, 517 (1995).When reviewing a challenge to a part of a jury instruction, the court must review the jury charge as a whole to determine if it is fair and complete. *See* Fish's Parking, Inc. v. Independence Hall Parking, Inc., 432 Pa. Super. 263, 638 A.2d 217, 222 (1994). Unless the appellate court determines that the charge as a whole was erroneous and may have prejudiced the appellant, the appellate court will not reverse for isolated inaccuracies. Id.

As the record demonstrates, following the jury charge, the court gave counsel the opportunity to request additional or supplemental instructions. The court gave a supplemental instruction regarding the "as soon as practicable," language in response to an objection by Columbia's counsel based on ACE's counsels' "mischaracterization" of the Policy language during closing arguments. At no time did ACE's counsel object to or deny Columbia's characterization. In fact, ACE did not object to the supplemental instruction at all. True to form, ACE does not cite to the record where it objected to the supplemental instruction, because it did not did so. Accordingly, such objection was not properly preserved for appeal and is therefore

waived, both procedurally and substantively.

10. Did the trial court err in revoking, *sua sponte*, the *pro hac vice* Order for J. Randolph Evans, Esquire following closing arguments?

As previously stated, on March 21, 2006, this court entered an order revoking Evans' *pro hac vice* admission following the trial. Specifically, the court found that "Counsel J. Randolph Evans Esquire's closing argument manifested a lack of familiarity with the decorum, candor and fairness expected of attorneys practicing in a Pennsylvania courtroom." *See* March 22, 2006 Order. A review of Evans' closing remarks – as well as his conduct throughout the trial - demonstrates improper behavior which is not acceptable in this Commonwealth. As evidenced by the record, such conduct included racial pandering, misstatements of the law, circumvention of the rulings of the court, attempts to unfairly portray the defendants' actions as racially motivated, improper attempts to personalize the case, and other unprofessional conduct. (N.T. 3/16/06 at 114-129). The revocation of Evan's *pro hac vice* admission following the trial was a proper sanction under the circumstances. As aptly stated,

> Counsel admitted to practice law in another jurisdiction have no right to practice in Pennsylvania. Upon representing that the bar of another state has found an individual of good character and adequate learning to practice law, counsel are routinely admitted *pro hac vice* without any investigation. Usually *pro hac vice* counsel comport themselves honorably and professionally. Unfortunately, the *pro hac vice* counsel can engage in practices not generally accepted by the legal culture of the admitting jurisdiction, secure in the knowledge that "slash and burn" tactics will not draw the loss of credibility and reputation which usually accompany such an approach. *Pro hac vice* counsel can engage in reprehensible conduct with the expectation of impunity because they foresee no need to ever deal with either opposing counsel or the local court on any second occasion in the future.

General Refractories Co. v. Fireman's Fund Ins. Co., 45 Pa. D.& C.4th 159 (Pa. C.P. 2000). This is exactly what occurred here. Accordingly, the court concluded that Evans privileges to appear in this Commonwealth should be revoked.

B. Columbia's Appeal

In its Statement of Matters Complained of On Appeal, Columbia alleges:

> **Did the trial court err in failing to conduct a hearing on [Columbia's] Post-Trial Motion for Sanctions, Costs and Attorneys Fees, to resolve factual disputes between the parties concerning the conduct of ACE and its counsel and to determine whether the violations of the Pennsylvania Rules of Professional Conduct took place?**

The court was within its discretion to deny Columbia's Post-Trial Motion for Sanctions. As a practical matter, Pennsylvania follows the American Rule which provides that "the parties to litigation are responsible for their own fees unless otherwise provided by statutory authority, agreement of the parties or some other recognized exception." Equibank v. Miller, 422 Pa. Super. 240, 619 A.2d 336, 338 (1993). A court may, in its discretion, award counsel fees pursuant to 42 Pa.C.S. § 2503(7) upon a "specific finding of dilatory, obdurate or vexatious conduct." Township of South Strabane v. Piecknick, 546 Pa. 551, 686 A.2d 1297, 1301 (1996). As previously stated, the court sanctioned Evans, ACE's counsel, for his conduct at trial in the form of an order revoking of his *pro hac vice* admission after the trial. The court deemed this to be an appropriate sanction under the circumstances. The court observed ACE and its counsel's conduct firsthand and did not need hearing in order to evaluate post-trial.

There are other and more appropriate remedies of which Columbia never availed itself. Columbia never filed a Motion for Sanctions pursuant to Pa.R.C.P. 1023.1, which provides a remedy for "frivolous filings."[5] Charges concerning violations of the Rules of Professional

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5 Pa.R.C.P. 1023.1 (c) provides:

> The signature of an attorney or *pro se* party constitutes a certificate that the signatory has read the pleading, motion, or other paper. By signing, filing, submitting, or later advocating such a document, the attorney or pro se party certifies that, to the best of that person's knowledge, information and belief, formed after an inquiry reasonable under the circumstances,

Conduct are a matter for the Disciplinary Board, not this court. Moreover, discovery sanctions are to be dealt with during discovery, not post-trial. To the extent such sanctions were even requested, Columbia does not appeal from this court's denial of any such sanctions. Finally, there is nothing precluding Columbia from filing a malicious prosecution/abuse of process lawsuit against ACE, if it feels that is warranted.

Accordingly, the court's denial of Columbia's Post-Trial Motions should be affirmed.

III. Conclusion

For the reasons fully set forth above and in its preceding orders and opinions, this court's prior decisions should be affirmed.

BY THE COURT:

HOWLAND W. ABRAMSON, J.

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(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation,

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification or reversal of existing law or the establishment of new law,

(3) the factual allegations have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual allegations are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

Dated: February 8, 2007