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.	:	Control Nos. 051292, 051357, 051363
Defendants.	:	

ORDER and MEMORANDUM

AND NOW, this 26th day of August 2005, upon consideration of the Cross Motions for Summary Judgment of Plaintiff Ace American Insurance Company ("Ace") (Control No. 051363) and Defendants Universal Underwriters at Lloyds and Companies ("Lloyds") (Control No. 051292) and Columbia Casualty Company ("Columbia") (Control No. 051357), all responses in opposition, all matters of record, and in accordance with the Memorandum Opinion being contemporaneously filed with this Order, it hereby is **ORDERED** and **DECREED** that said Motions are **DENIED**.

The parties are directed to appear for a Pre-Trial Conference on , 2005 at a.m. in Courtroom 443. In the meantime, the bad faith phase of this case is stayed pending final resolution of the coverage phase.

BY THE COURT:

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HOWLAND W. ABRAMSON, J.

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MEMORANDUM OPINION

Currently before the court are the Cross-Motions for Summary Judgment of Plaintiff Ace American Insurance Company ("Ace") (Control No. 051363) and Defendants Universal Underwriters at Lloyds and Companies ("Lloyds") (Control No. 051292) and Columbia Casualty Company ("Columbia") (Control No. 051357). For the reasons fully set forth below, said Motions are denied.

DISCUSSION

A. Factual Issues Exist Which Preclude Summary Judgment

"Summary judgment is proper when the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits demonstrate that there exists no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Pa.R.C.P. 1035.2; Horne v. Haladay, 1999 Pa. Super. 64, 728 A.2d 954 (1999). At bar, this court finds that genuine issues of material fact exist which preclude the entry of summary judgment, particularly with respect to the issue of notice, as defined by the Lloyd's Policy and incorporated by the excess carriers (the "Policy"), which provides:

> **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 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").

Based on the foregoing, it is clear that notice of *any* claim under the Policy was to be provided by June 30, 1999, at the very latest. Id. 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. The question then becomes whether Ace was reasonable in its determination that the Refuse Litigation Claim was unlikely to result in a loss exceeding $4,000,000. If not, Ace was obligated to provide notice in a more detailed manner than by bordereau listing "as soon as practicable." The court finds that these are disputed issues of material fact which require determination by the fact finder.

With respect to the issue of reasonableness, this court finds the Notice Provision to be unambiguous. Interpretation of an insurance contract is a matter of law and is to be performed by the court. Hutchinson v. Sunbeam Coal Corp., 513 Pa. 192, 519 A.2d 385, 390 (1986). Where the policy language is clear and unambiguous, as here, the court must give effect to that language. Madison Construction Co. v. The Harleysville Ins. Co., 557 Pa. 595, 735 A.2d 100, 106 (1999); Pennsylvania Mfrs' Asso. Ins. Co. v. Aetna Casualty & Surety Ins. Co., 426 Pa. 453, 233 A.2d 548 (1967). In such cases, neither oral testimony nor prior written agreements or other

writings are admissible to explain or vary the terms of that contract. Lenzi v. Hahnemann University, 445 Pa. Super. 187, 664 A.2d 1375, 1379 (1995). Based on the Policy language, it is clear that the requirement of "reasonableness" indicates that Ace's actions in evaluating and reporting claims must be judged objectively and in accordance with that of a reasonable insurance carrier under similar circumstances.

B. Defendants Needs Not Demonstrate Prejudice As A Result of Ace's Alleged Untimely Notice

In addition, the parties further dispute whether Defendants need to demonstrate that they were prejudiced by Ace's alleged untimely notice. As a general rule, under Pennsylvania law, where an insured provides late notice under an occurrence policy, an insurance company is relieved of its obligations under the policy only if it can show actual prejudice. Brakeman v. Potomac Insurance Co., 472 Pa. 66, 371 A.2d 193 (1977). However, the Policy at issue is not an occurrence policy, but rather a "claims made" liability insurance policy.[1]

While Pennsylvania courts have yet been silent on the issue, federal courts interpreting Pennsylvania law have consistently declined to extend the Brakeman "notice-prejudice" rule to claims-made policies, finding that such policies differ from occurrence policies insofar as claims-made policies are reporting policies for which the parties have specifically bargained. *See, e.g.*, Women's Christian Alliance v. Executive Risk Indemnity, Inc., 2003 U.S. Dist. LEXIS 12188 (E.D.Pa. 2003); Westport Ins. Corp. v. Mirsky, 2002 U.S. Dist. LEXIS 16967 (E.D.Pa. 2002)("[u]nder Pennsylvania law, the 'notice-prejudice' rule does not apply to 'claims made'

1 "In a claims made policy, coverage is effective if a 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." Lee R. Russ and Thomas F. Segalla, 1 Couch on Insurance § 1:5 (3d ed., updated June 2003). An occurrence policy, on the other hand, covers all occurrences that take place during the policy period. 7 Couch on Insurance § 102:20.

policies."); Pizzini v. American Int'l. Specialty Lines Ins. Co., 210 F. Supp. 2d 658, 669-70 (E.D. Pa. 2002) ("[t]he weight of existing case law leads me to conclude, as have the courts in this circuit, that under Pennsylvania law the Brakeman 'notice-prejudice' rule does not apply to 'claims made policies'."); Borish v. Britamco Underwriters, Inc., 869 F. Supp. 316, 319 (E.D. Pa. 1994) (noting that courts within the Eastern District of Pennsylvania have adopted the rule that "an insurance company need not show prejudice when there has been a failure to comply with notice provisions in a claims-made policy"); Clemente v. The Home Ins. Co., 791 F. Supp. 118, 121-22 (E.D. Pa. 1992) (holding that an insurer was not liable to the insured for coverage due to late notice regardless of the question of prejudice, where the insurance policy at issue was a claims-made policy); Employers Reinsurance Corp. v. Sarris, 746 F. Supp. 560, 565 (E.D. Pa. 1990) (finding "that a claims-made policy is of such a different nature from an occurrence policy that the 'notice-prejudice' rule of *Brakeman* should not apply"); City of Harrisburg v. International Surplus Lines Ins. Co., 596 F. Supp. 954, 962 (M.D. Pa. 1984), *aff'd without opinion*, 770 F.2d 1067 (3d Cir. 1985) (holding that *Brakeman* notice-prejudice rule does not apply to claims-made policies).

While the foregoing decisions are not binding upon it, this court finds the analyses contained therein to be persuasive and concludes that, under Pennsylvania law, an insurance company need not demonstrate prejudice when there has been a failure to comply with notice provisions in a "claims-made" policy. Accordingly, if it is determined that Ace's notice was untimely, Defendants need not demonstrate prejudice in order to deny coverage under the Policy.

CONCLUSION

For the above-mentioned reasons, the parties' respective Motions are **denied**. The parties are directed to appear for a Pre-Trial Conference on , 2005 at a.m. in Courtroom 443. In the meantime, the bad faith phase of this case is stayed pending final resolution of the coverage phase.

BY THE COURT:

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HOWLAND W. ABRAMSON, J.