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

M.A.G. ENTERPRISES, INC. t/a CHEERLEADERS	:	August Term 2002
Plaintiff,	:	No. 3835
v.	:	Commerce Program
NATIONAL UNION FIRE INS. CO., EMBASSY INS. GROUP, INC. and CARGILL SHERMAN & ASSOCIATES AGENCY and THE CARMAN CORP.	:	Control No. 011245, 012049, 020530,021125, 021228
Defendants.	:	

ORDER and MEMORANDUM

AND NOW, this 16th day of February 2005, upon consideration of the parties' respective motions for summary judgment, all responses in opposition, the accompanying memoranda, all matters of record, and in accordance with the Memorandum Opinion being filed contemporaneously with this Order, it hereby is **ORDERED** and **DECREED** as follows:

1. The separate Motions for Summary Judgment of Defendants Embassy Insurance Group (Control No. 020530), Cargill Sherman & Associates Agency (Control No. 011245) and the Carman Corp. (Control No. 021125) are **DENIED.**

2. The Motion for Summary Judgment of Plaintiff M.A.G. Enterprises, Inc. t/a Cheerleaders (Control No. 021228) is **DENIED**.

3. The Motion for Summary Judgment of Defendant National Union Fire Ins. Co. (Control No. 012049) is **GRANTED** Counts I and II of the Complaint are **DISMISSED**.

BY THE COURT:

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C. DARNELL JONES, J.

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Defendants.	:	

MEMORANDUM OPINION

C. DARNELL JONES, J.

Before the Court are the respective Motions for Summary Judgment of Plaintiff M.A.G. Enterprises, Inc. t/a Cheerleaders ("M.A.G.")(Control No. 021228), Defendant National Union Fire Insurance Co. ("National Union")(Control No. 012049), Defendant Embassy Insurance Group ("Embassy")(Control No. 020530), Defendant Cargill Sherman & Associates Agency ("CSA")(Control No. 011245) and Defendant The Carman Corp. ("Carman")(Control No. 021125). Each will be addressed in turn.

DISCUSSION

I. The Motions for Summary Judgment of Carman, Embassy and CSA

M.A.G. owns and operates a gentlemen's club called Cheerleaders in Philadelphia and is licensed to serve alcoholic beverages to its patrons. Accordingly, it is required to carry sufficient commercial general/liquor liability insurance coverage. Since the early 1990's, M.A.G. has purchased such insurance on an annual basis through Carman, a Pennsylvania insurance broker.

In 1999, Carman sought to renew M.A.G.'s coverage and contacted CSA, an out-of-state wholesale broker which was licensed to conduct business in Pennsylvania. CSA thereafter contacted Embassy, another insurance broker, regarding the requested coverage. A quote from Frontier Pacific Insurance Company ("Frontier"), a California insurance company, was provided by Embassy to CSA, which forwarded same to Carman. Frontier was a "non-admitted insurer" under the Pennsylvania Surplus Lines Law, 40 P.S. §§ 991.1601-1625 ("Surplus Lines Law") and, as a result, Plaintiff would not be covered by the Pennsylvania Property and Casualty Insurance Guaranty Association Act, 40 P.S. §§ 991.1801-991.1820 (the "Guaranty Act"), in the event of Frontier's insolvency. M.A.G. accepted the proposal and a commercial general liability and liquor liability policy was issued through Frontier with an effective date beginning August 21, 1999 (the "Policy").

On March 17, 2000, an automobile accident occurred involving an alleged patron of Cheerleaders, which resulted in two lawsuits against the Plaintiff (the "Underlying Claims"). Frontier was notified of the claims and retained counsel to defend M.A.G. However, in November 2001, Frontier was placed in liquidation by the California Insurance Department, leaving M.A.G. without primary coverage for the Underlying Claims. As a result, M.A.G. has brought suit against CSA, Embassy and Carman for negligence (Count III) and against Embassy for negligence under a theory of *respondiat superior* (Count IV). M.A.G. asserts that each of these defendants are liable for failing to satisfy their professional and statutory obligations with respect to the placement of the requested insurance. Defendants have each moved for summary judgment as to the claims against them.[1]

1 CSA has also moved for summary judgment on the basis that M.A.G. failed to produce an expert report.

At bar, Defendants' duties require compliance with both common law standards as well as the statutory requirements of the Surplus Lines Law. In Pennsylvania, a plaintiff acquires a cause of action against its insurance broker or agent if the agent or broker fails to act with the proper and customary skill and care generally used by those in a like business. See Laventhol & Horwath v. Dependable Ins. Assoc., Inc., 396 Pa. Super. 553, 579 A.2d 388, 391 (1990); Consolidated Sun Ray, Inc. v. Lea, 401 F.2d 650 (3d Cir. 1968). Moreover:

> One who in the course of his business or profession supplies information for the guidance of others in their business transactions is subject to liability for harm caused to them by their reliance upon the information if :
>
> (a) he fails to exercise that care and competence in obtaining and communicating the information which its recipient is justified in expecting, and
>
> (b) the harm is suffered:
>
> (i) by the person or one of the class of persons for whose guidance the information was supplied, and
>
> (ii) because of his justifiable reliance upon it in a transaction in which it was intended to influence his conduct or in a transaction substantially identical therewith.

Rempel v. Nationwide Life Insurance Co., 471 Pa. 404, 370 A.2d 366 (1977)(*citing* Restatement of Torts § 522). Additionally, the failure to comply with applicable statutes and regulations governing the selling of insurance, specifically the Surplus Lines Law[2], may also provide a basis

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This court finds that the lack of an expert report in this instance does not necessitate the granting of summary judgment against Plaintiff. The law in Pennsylvania is clear: "[i]f all the primary facts can be accurately described to a jury and if the jury is as capable of comprehending and understanding such facts and drawing correct conclusions from them as are witnesses possessed of special training, experience or observation, then there is no need for the testimony of an expert." Storm v. Golden, 371 Pa. Super. 368, 538 A.2d 61 (1988). The court finds this to be the case at bar, as the necessary requirements are clearly spelled out in the Surplus Lines Law. While the facts currently before it do not demonstrate a need for an expert report, the court reserves the right to revisit this issue at trial, should the evidence warrant.

2 Two of the stated purposes of the Surplus Lines Law are "to protect the public interest by: (1) [p]rotecting persons seeking insurance in this Commonwealth; and, (2) [p]ermitting surplus lines

for a finding of negligence *per se* against an agent or broker. Al's Café, Inc. v. Sanders Ins. Agency, 2003 Pa. Super. 110, 820 A.2d 745 (2003).

In Al's Café, when addressing this very issue as one of first impression,[3] the Superior Court found that by synthesizing the above common law and statutory standards of care, insurance agents and brokers possessed the following duties when dealing with the Surplus Lines Law: 1) to act with reasonable care, skill, and judgment in the selection of insurer; 2) to ascertain whether the insurer is reputable and financially sound; and 3) to inform the insured of findings if investigation reveals evidence of financial infirmity, where agent or broker nonetheless intends to place a policy with that insurer. Id. at 751. Failure to comply with such duties may render the agent or broker liable in the event the insurer is unable to satisfy a claim due to its insolvency. Id. The court further held that "at least with respect to placement of insurance with a surplus lines insurer, it is clear that Pennsylvania law is in step with those jurisdictions recognizing that an insurance agent/broker has an obligation to investigate the financial soundness of the insurance carrier with which the agent/broker places insurance and to refrain from placing insurance with a carrier that the agent/broker knows or should know to be financially unsound." Id. (citations omitted). In so finding, the Superior Court did not distinguish between the types of agents and brokers involved in the transaction, but rather sent the case to a jury to determine the

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insurance to be placed with reputable and financially sound non-admitted insurers and exported from this Commonwealth…" 40 P.S. § 991-1601. The law accomplishes these goals by providing very detailed instructions about how and when surplus lines may be procured. For example, § 1605 precludes the placement of "any coverage with a non-admitted insurer unless, at the time of placement, such non-admitted insurer [i]s of good repute and financial integrity." Id. at § 991.1605(a)(1).

3 In Al's Café, a liquor seller brought an action against an insurance agent, asserting claims sounding in assumpsit and negligence regarding procuring a liquor liability insurance policy with an unlicensed and financially unstable carrier. In turn, the agent joined the insurance broker, which in turn joined another broker. The lower court entered summary judgment in favor of the agent and brokers and the Superior

factual issues surrounding liability and damages. This court finds this to be the appropriate course of action with respect to the instant matter.

"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 that 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). This burden rests with the moving party. First Wisconsin Trust Co. v. Strausser, 439 Pa. Super. 192, 198, 653 A.2d 688, 691 (1995). When considering summary judgment, the record must be viewed in the light most favorable to the non-moving party and any doubts as to the existence of a genuine issue of material fact must be resolved against the moving party. Ertel v. Patriot-News Co., 544 Pa. 93, 98, 674 A.2d 1038, 1041 (1996).

Based on the foregoing, this court finds that that M.A.G. has produced evidence of facts essential to its cause of action and that genuine issues of material fact exist which require these issues to be submitted to a jury. Specifically, a factual inquiry is necessary to determine whether Defendants have met their professional and statutory obligations with respect to the placement of the requested insurance, including, without limitation, whether Frontier was considered a high risk carrier, what investigation was undertaken to determine the financial soundness of Frontier and whether such information would have assisted Plaintiff in making an informed and reasonable determination as to whether or not to select the insurance, as well as the giving and receiving of statutory notice regarding Frontier's status and other related issues. Because Defendants have failed to establish that there exists no genuine issue of material fact, their

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Court reversed. Id.

respective Motions for Summary Judgment are denied.

II. Cross-Motions for Summary Judgment of M.A.G. and National Union

In addition to the aforementioned Frontier Policy, M.A.G. also had an excess policy with National Union, Policy Number BE 701-92-46, which was issued in December 1999 and designated as a Commercial Umbrella Policy (the "NU Policy"). NU Mtn. at Exh. 2. The NU Policy was a master policy issued to several insureds, including M.A.G. Each insured was provided with a Certificate of Association which set forth the applicable policy period, limits of liability and the underlying insurers for that specific insured. Id. at Exh. 3. MAG asserts that National Union is obligated to provide defense and indemnification for the Underlying Actions and has asserted claims against National Union for declaratory relief (Count I) and breach of contract (Count II).

Because of Frontier's insolvency, there is no primary coverage for the Underlying Actions. M.A.G. asserts that, under the NU Policy, National Union is obligated to "drop down" and provide defense and indemnity for the Underlying Actions. National Union on the other hand, argues that as an excess carrier, its obligations do not arise until the retained limit has been reached, regardless of the insolvency of the underlying insurer. Both parties have filed motions for summary judgment on this issue.

National Union's obligations in this instance are governed by its policy, thus, the resolution of this dispute hinges on the interpretation of the NU Policy language. 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). To prevail, the insurer must prove that the language of the insurance contract is clear and unambiguous; otherwise, the provision

will be construed in favor of the insured. White v. Keystone Ins. Co., 2001 Pa. Super. 124, 775 A.2d 812 (2001). Contractual terms are ambiguous if they are subject to more than one reasonable interpretation when applied to a particular set of facts. Wagner v. Erie Ins. Co., 2002 Pa. Super. 186, 801 A.2d 1226, 1231, *aff'd* 577 Pa. 563, 847 A.2d 1274 (2004). Where the policy language is clear and unambiguous, 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). If the court finds the policy language to be unambiguous on its face, then the court is bound to construe that language in accordance with its plain meaning and may not refer to extrinsic evidence of the drafters' intent. Standard Venetian Blind Co. v. American Empire Ins. Co., 503 Pa. 300, 469 A.2d 563, 566 (1983).

The crux of M.A.G.'s argument rests on the assertion that the NU Policy is ambiguous, however, the plain language of the policy renders such an interpretation illogical. After a review of the policy and briefs submitted by the parties, this court finds that the insurance contract between M.A.G. and National Union is not ambiguous. Since the policy language in this case is unambiguous, the court must give effect to the language in the issued policy and not refer to extrinsic evidence for any other meaning. Specifically, Section I of the NU Policy, captioned "Coverage," provides:

> We will pay on behalf of the Insured those sums in excess of the Retained Limit that the Insured becomes legally obligated to pay by reason of liability imposed by law or assumed by the Insured under an Insured Contract because of Bodily Injury, Property Damage, Personal Injury or Advertising Injury that takes place during the Policy Period and is caused by an Occurrence happening anywhere in the world.

Id. at 1, § I. The term "Retained Limit" is defined in Section III as follows:

> We will be liable only for that portion of damages in excess of the Insured's Retained Limit, which is defined as the greater of either:

1. The total of the applicable limits of the underlying policies listed in the Schedule of Underlying Insurance and the applicable limits of any other underlying insurance providing coverage to the Insured; or

2. The amount stated in the Declarations as Self-Insured Retention as a result of any one Occurrence not covered by the underlying policies listed in the Schedule of Underlying Insurance nor by any other underlying insurance providing coverage to the Insured;

and then up to an amount not exceeding the Each Occurrence Limit as stated in the Declarations.

Id. at III.E. In the Certificate of Association, Frontier was listed as providing M.A.G. with underlying insurance for liquor liability claims with a limit of $1 million for each occurrence. Id. at Exh. 2. It also provides that the Self-Insured Retention is $10,000. Id. The NU Policy also sets forth its obligation to defend M.A.G.:

A. We shall have the right and duty to defend any claim or suit seeking damages covered by the terms and conditions of this Policy when:

1. The Applicable Limits of Insurance of the underlying policies listed in the Schedule of Underlying Insurance and the Limits of Insurance of any other underlying insurance providing coverage to the Insured have been exhausted by payment of claims or suits to which this policy applies…."

Id. at § II.A.1.

Based upon the clear and unequivocal language of the NU Policy, the following facts are apparent. The NU Policy is an excess policy; National Union is not obligated to provide coverage until the Retained Limit has been reached, which in this case is $1 million (with a $10,000 Self-Insured Retention). There is no provision in the NU Policy which would justify accessing that policy until the condition precedent is achieved, in other words, National Union can only be held responsible when the damages are in excess of $1 million. The premium collected by National Union was clearly on the basis that its liability would be limited to that

which was set forth in the policy. National Union did not contract to provide coverage below the retained limit of $1 million, even if there was no underlying insurance. To now impose greater liability on National Union that that which it agreed to undertake would violate public policy insofar as it would contravene a valid contract.

Moreover, in Pennsylvania, an excess insurer is not required to drop down to provide primary coverage where the underlying primary insurer is insolvent, unless required to do so by the policy itself. Donegal Mut. Ins. Co. v. Long, 528 Pa. 295, 597 A,2d 1124, 1127-9 (1991); Kinderman & Sons, Inc. v. United National Insurance Co., 406 Pa. Super. 37, 539 A.2d 857, *aff'd* 533 Pa. 87, 619 A.2d 1058 (1993); Koppers Co., Inc. v. AETNA Casualty and Surety Co., 98 F.3d 1440 (3d Cir. 1996). At bar, the NU Policy clearly speaks to the issue of insolvency and states that "…under no circumstances will [the] bankruptcy, insolvency or inability [of your underlying insurers] to pay require us to drop down and replace the Retained Limit or assume any obligation within the Retained Limit Area." Id. at §VI.C.

In addition, the Policy also contained a provision which mandated that M.A.G. keep all underlying policies in "full force and effect." NU Mtn., Exh. 2 at § VI.I. This section also sets forth M.A.G.'s acceptance that:

> 3. The limits of insurance of the policies listed in the Schedule of Underlying Insurance shall not change except for any reduction or exhaustion of aggregate limits by payment of claims for occurrences governed by the policy; and
>
> 4. That the terms, conditions and endorsements of the policies listed in the Schedule of Underlying Insurance will not materially change during the period of this policy.

Id. This section further provides that, should M.A.G. fail to comply with the aforementioned requirements, that National Union would only be liable "to the same extent we would had you

fully complied with these requirements." Id. As the Superior Court explained when faced with similar policy language in Kinderman:

> The intent of the parties is clear from the insurance contract; [the excess insurer] did not intend to provide coverage until after the underlying insurance carrier's amount was fulfilled. The policy provides that in the case the insurance is not maintained, the insurance coverage would be the same as if the insured maintained underlying insurance. [The excess insurer's] coverage does not drop down simply because the underlying insurer has become insolvent.

539 A.2d at 860. Thus, based on the policy language and applicable law, the court finds that National Union has no obligation to drop down and provide coverage for the Underlying Actions below the $1 million Retained Limit.

The court likewise finds M.A.G.'s contention that the NU Policy is an umbrella policy to be unpersuasive and wholly unsupported by the record. Regardless of what the policy is titled, the coverage by the NU policy is still limited and controlled by its terms; the plain language can not be ignored. There is no evidence to support the existence of the type of coverage that M.A.G. seeks here. Moreover, the court find the application of the doctrine of reasonable expectations inappropriate at bar. First, in Madison Construction, the Pennsylvania Supreme Court rejected arguments that alleged "reasonable expectations," rather than policy language itself should be the focus of insurance contract analysis. Madison, 735 A.2d at 109, n.8. Furthermore, there has been no allegation or evidence that National Union in any way misled M.A.G. into believing that it would be afforded coverage beyond what was stated in the policy.

Based on the foregoing, M.A.G.'s claims against National Union fail as a matter of law. Accordingly, summary judgment is granted in favor of National Union and against M.A.G. as to Counts I and II of the Complaint.

CONCLUSION

Based on the foregoing, this court finds as follows:

1. The separate Motions for Summary Judgment of Defendants Embassy Insurance Group (Control No. 020530), Cargill Sherman & Associates Agency (Control No. 011245) and the Carman Corp. (Control No. 021125) are **denied.**

2. The Motion for Summary Judgment of Plaintiff M.A.G. Enterprises, Inc. t/a Cheerleaders (Control No. 021228) is **denied**.

3. The Motion for Summary Judgment of Defendant National Union Fire Ins. Co. (Control No. 012049) is **granted** and Counts I and II of the Complaint are **dismissed**.

This Court will enter a contemporaneous Order consistent with this Opinion.

BY THE COURT:

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C. DARNELL JONES, J.