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

M. DIANE KOKEN, in her official capacity as Insurance Commissioner of the Commonwealth of Pennsylvania, as Liquidator of RELIANCE INSURANCE COMPANY (IN LIQUIDATION),	:	FEBRUARY TERM, 2005
	:	NO. 01503
	:	Commerce Program
Plaintiff,	:	Control No. 041337
v.	:	
SCOTT SPECIALTY GASES, INC.,	:	
Defendant.	:	

O R D E R

AND NOW, this 14th day of March, 2007, it is hereby **ORDERED** the defendant's Motion for Summary Judgment is denied. A new Case Management Order is issued herewith.

BY THE COURT,

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MARK I. BERNSTEIN, J.

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OPINION

Before the Court is a debt collection case. Reliance Insurance Company was declared insolvent and placed in liquidation in October, 2001. Plaintiff Koken acting as Insurance Commissioner of the Commonwealth of Pennsylvania is the Liquidator of Reliance Insurance Company. Plaintiff ("Reliance") brings this action against defendant Scott Specialty Gases, Inc. ("Scott") to recover a debt for retrospective premium calculated, billed and unpaid. Plaintiff alleges payment is due for Workers' Compensation insurance premiums for policies issued to Scott for years 1993 through 1999.[1] Reliance has calculated that $194,948.00 in additional premiums are owing.[2] Scott has refused to pay.

Under the terms of the Worker's Compensation Insurance Policies, Reliance Insurance Company was responsible for administering all Workers' Compensation claims made by

[1] Reliance asserts claims for breach of contract for non-payment of premiums and for declaratory relief. Plaintiff asks for a monetary recovery and an Order that Scott is liable "for future retrospective premium adjustments in accordance with the Reliance Policies."

[2] Retrospective Premium Endorsement, Sections A, C, and Amendment of Definition of Incurred Losses, Amended Complaint, Exhibits I, J & K.

defendant Scott's employees.[3] At the beginning of each policy term defendant paid estimated premiums. Defendant was obligated to pay a "retrospective premium" at the conclusion of the policy period. Retrospective premiums were to be calculated "…using all loss information as of the date six months after the rating plan period ends and annually thereafter."[4] If retrospectively calculated premium was less than the estimated premium already paid, Scott was due a refund. If, as claimed by Reliance in this action, the calculated retrospective premium exceeded payments made, Scott was obligated to pay the additional amounts.

Here plaintiff is merely seeking premiums owed on a retrospectively rated insurance policy. A retrospectively rated insurance policy is merely a retrospective risk shifting mechanism. Although this retrospective rated insurance policy consists of complicated language it is in its essence a contract for professional insurance claims handling services to which a specific fee is attached. Inherent in any such insurance contract is the assumption that the professional insurance claims handling agency licensed by the State of Pennsylvania contracted to do these professional services in a reasonably competent and professional manner in accord with all applicable professional standards. To properly charge for retrospective premium the insurance company must comport with this professional standard of care. Inherent in any retrospective premium bill is the implicit statement that the professional standard of care has been met.

Initially, Scott argues that Reliance is not owed retrospective premiums because Reliance has not handled or paid any claims since 2001. However, state guaranty associations have incurred losses on Reliance's and Scott's behalf by paying outstanding claims against Scott as

[3] Following the Reliance liquidation in 2001, state insurance guaranty associations assumed the obligation to administer and pay Worker's Compensation claims filed against all Reliance's insureds including Scott.

[4]Policy Retrospective Premium Endorsement, Section D, Amended Complaint, Exhibits I, J & K.

required by law. These guaranty associations may claim of Reliance (or the Liquidator) all sums paid. Under the statutory scheme, Scott obtains the benefit of its bargain under the policies when Workers' Compensation claims are paid by the guaranty associations, and Reliance ultimately bears the cost to the extent that it can repay the guaranty associations. Accordingly, Reliance is entitled to demand that Scott pay all consideration due under the policies, namely all retrospective premiums owing.

Affirmative Defenses

Pleading a denial requires no affirmative evidence to prevail. A denial is a demand that credible evidence be produced for a claim to be proven. An affirmative defense is different in character from a denial. An affirmative defense requires the defendant produce evidence and meet a burden of proof to prevail.

Pa. R.C.P. 1030 provides that except for "assumption of the risk," "comparative negligence" and "contributory negligence" all affirmative defenses must be pled as new matter in a responsive pleading. In new matter to this Amended Complaint, Scott pled the following affirmative defenses:

> Reliance breached its duty of good faith and fair dealing under the insurance program, including various insurance policies sold there under, by, among other things, (1) failing to handle and pay claims in good faith and otherwise failing to act diligently in performing its contractual obligations; (2) failing to keep Scott reasonably informed about the claims; (3) failing to divulge to Scott the reasoning or basis for paying claims so that Scott cannot ascertain whether or not claims were paid out properly; (4) failing to divulge to Scott Reliance's settlement practices so that Scott cannot ascertain whether or not claims were settled properly; (5) failing to explain to Scott the basis for Reliance's calculation of the retrospective premium owed to Scott and/or due to Reliance; (6) failing to set and adjust appropriate reserves; and (7) otherwise failing to perform its obligations in good faith and in accordance with the custom and usage of the insurance business.

The defendant has the burden of proof in asserting an affirmative defense.

Professional Negligence

Defendant Scott argues that because plaintiff has not affirmatively proffered expert opinion that the claim payments and expenses upon which retrospective premiums had been calculated had been properly handled summary judgment must be granted in favor of defense.

Scott attaches to its Motion for Summary Judgment the expert report of Michael P. Kirwan. Mr. Kirwan criticizes Reliance for failing to provide a "claims review" of the claims handled.[5] He asserts: "In a claims review, the insurance company would generally make its claims files and adjuster notes available to the policy holder and would have a claims person from the insurance company explain the status of the claims." Expert Kirwan has neither analyzed claims files nor performed any calculation to determine whether retrospective premiums are due according to the policy language. Nonetheless he renders the opinion that "retrospective premiums are not presently owed by [Scott] and that there is a strong likelihood of mishandling of the claims by Reliance and/or the state guaranty associations." The report anecdotally mentions four Workers Compensation claims filed against Scott. Although no opinion is offered that these claims were inappropriately handled the report notes that between March 2001 and March 2005: "claim payments and particularly reserves skyrocket." The report utterly fails to provide expert opinion of any mishandling of claims.

In support of their motion Scott claims that merely by having pled their affirmative defenses and merely by putting the propriety of Reliance's claims handling at issue the burden shifts to the plaintiff to disprove their affirmative defense. Scott claims it is entitled to summary judgment because Plaintiff Reliance has not presented expert opinion that the claims had been

[5]MSJ, Ex. 6(A), p. 3.

properly handled. Defendant claims that expert opinion evidence of proper claims handling is necessary to meet plaintiff's initial prima facie burden of proving any debt is owing.

Whether an insured may assert improper claims handling as an affirmative defense to an insurer's claim for retrospective premiums, and, if so, which party bears the burden of proof on that issue is an issue of first impression in Pennsylvania. Obviously, if the claims were handled in accord with industry standards of competence and due care, the amount of retrospective premium owed is simply a mathematical calculation. Obviously if improper claim handling below the standard of competence and due care required of an insurance carrier caused unnecessarily increased retrospective premiums lesser amounts are due. The affirmative defense that no retrospective premium is due because of improper claims handling is a straightforward claim of professional negligence. Of course insurers must act "with due care in representing the interests of the insured."[6] The failure to meet this professional duty of care because of negligent or improper claim handling may cause an insured to pay an excess verdict, to suffer damage to its reputation, to be required to pay higher future premiums because of their claims history or, as is claimed in this case, to pay unnecessarily high retrospective premiums.

As in all collection cases the party seeking payment for services rendered must ultimately meet the burden of proving by a preponderance of the evidence that they have fulfilled their contract. The negligent performance of a contract which causes harm to the contracting party is always a defense in a collection matter for professional services rendered. A law firm whose malpractice required that motions be repeatedly reworked, withdrawn, and refiled in proper form could hardly expect the client to pay for their negligent and unproductive time. A hospital which commits malpractice by performing medical testing not ordered by any doctor and unwarranted by any medical condition could hardly expect to be paid for unnecessary testing. A medical

[6] The Birth Ctr. v. The St. Paul Cos., Inc., 567 Pa. 386, 407, 787 A.2d 376, 389, n. 17 (2001).

laboratory which mistakenly provides inaccurate lab results and belatedly determines that tests need to be repeated or negligently allows a sample to become unusable or lost could not expect to be paid twice when only their negligence resulted in the duplication. A carpenter who measures incorrectly could hardly expect the customer to pay twice for wood destroyed due to negligence. A party is not obligated to pay for services incompetently handled and professionally unnecessary. Inherent in the agreement hiring any professional is the requirement that the professional services will be handled in a minimally competent manner. Inherent in any bill for professional services is the implicit statement that the services rendered were done in a professionally competent manner. Professionally competent is defined by the appropriate and applicable standard of care of the industry or profession. There is nothing extraordinary about any of these propositions.

In contrast, Reliance claims that Scott may not assert improper claims handling as an affirmative defense. Reliance apparently bases this position on New York state cases which preclude any such defense, including Insurance Co. v. Glen Haven Residential Health Care Facility, 253 A.D.2d 378, 379, 676 N.Y.S.2d 176 (1st Dept. 1998). New York state and other Courts have reasoned that: "The policy [or insurance] commits the investigation of claims to plaintiff insurer, and the manner in which plaintiff performed this function was a matter of business judgment within the discretion of its management."[7]

Of course insurance contracts always include fiduciary responsibilities and presume an obligation to act in good faith towards its insureds. However, in this context considerations of "an implied obligation of acting reasonable and in good faith in handling claims" and "duties of good faith and reasonableness" and "fiduciary obligation to its insured" unreasonably complicate a straightforward collections case in which the defense claims that the retrospectively

[7]See Insurance v. Glen Haven.

calculated premium was unnecessarily high because of the professional malpractice of the insurance company. Any analysis of the good or bad faith of the insurance carrier is unnecessarily complicated and ultimately irrelevant. It is not necessarily bad faith for an insurance company to have acted negligently. It is not necessarily any violation of the obligation of good faith for an insurance company to have acted negligently. It is certainly not necessarily a violation of any fiduciary duty if the company only acted negligently.

An insurance company whose clerk negligently files the report of an independent medical examination in the wrong file has not breached any fiduciary duty, has not acted in bad faith but may nonetheless cause significant unnecessary loss to an insured. An insurance adjuster who negligently fails to note that what originally presented as a simple back strain has turned into a herniated disk requiring surgery has neither acted in bad faith nor violated any fiduciary duty but that failure may subsequently result in a precipitous rise in reserves when the medical record of the surgical procedure and the medical opinion that the claimant has become permanently disabled from all work activity is finally properly recorded.

An insurer offering to provide insurance and accepting premiums for claims management and adjustment of Workers Compensation claims operates in one of the most highly regulated industries in Pennsylvania. A carrier must be a licensed claims handling professional entity. A Workers' Compensation insurer is obligated to use due care and meet all appropriate professional standards in administering and resolving claims.[8]

An insurer who mishandles automobile or homeowner claims on a policy which does not require retrospective premiums, injures itself financially because the insurance company has assumed the risk that claim payment and adjustment costs will be higher than the premium

[8] A liquidator is held to the same professional standard. See Koken v. Legion Ins. Co., 2004 WL 3132017. "The …liquidator steps into the shoes of the insurer's officers and directors in the conduct of that insurer's affairs."

charged. By contrast, an insurer who mishandles a policy on which retrospective premiums may be charged causes a direct financial loss to its insureds. A Workers' Compensation insurer which fails to meet industry standards in claims adjustment on a retrospective premium policy may not use claims handling below the applicable industry standard of care as a justification or excuse to charge additional premiums. An insured is entitled to raise the insurer's breach of its claims handling duty to meet professional standards as a defense to an insurer's claim for retrospective premiums. Negligent claims handling, even that which does not rise to bad faith or a breach of the duty of fidelity, which does in fact result in loss to the insured is a full and complete defense to a claim for retrospective premiums. Therefore, Scott has properly raised the affirmative defense that Reliance's professional negligence in claims handling resulted in unnecessarily and unreasonably high retrospective premium.

Having determined that such an affirmative defense has been properly pled, and having determined that to prevail upon that defense no determination, fidelity, or good or bad faith is necessary, the Court must address the first impression question of burden of proof.

Burden of Proof

A party which raises an affirmative defense has the burden of proof on that defense. Even where professional negligence malpractice is raised as a defense, the party raising it has the burden of proof . The mere fact of professional licensure creates a rebuttable presumption that the professional acted within applicable professional standards.

As an affirmative defense to the claim for retrospective premium, the debtor must prove both professional negligence and demonstrate that negligence resulted in an unnecessary increase in the amount owed as a retrospective premium. Negligence which does not result in any

unnecessary claim payment or extra adjustment costs is sad but not causally connected to any loss to the insured and is not any defense in this collection matter.

An insurance adjuster who misfiles information favorable to the insured and by settling a claim significantly higher than would otherwise have been necessary commits professional negligence which eventually results in an unnecessarily high retrospective premium and causes injury. If the defense can prove that in fact the plaintiff's negligence resulted in any unnecessarily high retrospective premium then of course that negligently produced increase is not owing. Causal negligence alone is sufficient to demonstrate professional malpractice and loss. Defendant need not demonstrate any bad faith or breach of fiduciary obligation.[9]

Of course the ultimate burden of proof in any debt collection or premium due case remains with the plaintiff who must demonstrate what if any amounts are owing. But proof that the amount owed has not been unreasonably increased because of negligence does not shift to the plaintiff simply because a professional is suing for a debt derived from professional services rendered. The professional does not have to prove the negative of negligence in the performance of its professional service to prevail in an otherwise straightforward collection case. The mere "suggestion" or allegation of performance below professional standards raised as an affirmative defense does not shift any burden of proof.

When read carefully, even the cases cited by defendant Scott hold the same. Scott bases its incorrect position concerning burden of proof on the opinion of the District Court for the Eastern District of Pennsylvania in Liberty Mutual Insurance Co. v. Marty's Express, Inc., 910 F. Supp. 221 (E.D. Pa. 1996) ("Marty's Express"). This is a misreading of the holding of a District

[9]Bad faith is defined by Black's law dictionary as "conduct [that] imports a dishonest purpose and means a breach of known duty…through some motive of self-interest or ill will."

Court opinion which could have been more tightly expressed but which has no precedential authority in Pennsylvania State Court.[10]

The district court in Marty's Express followed the reasoning described herein, predicting that the Pennsylvania Supreme Court:

"…would place upon the insured the burden of producing sufficient evidence to suggest that the insurer violated an implied obligation of acting reasonably and in good faith in handling claims, but would place upon the insurer the ultimate burden of persuading the jury that it acted reasonably and in good faith."[11]

That District Court's use of the word "suggest" however is unreasonably and unnecessarily colloquial. The standard in Pennsylvania is not "suggestion" but "proof," generally provided by competent expert testimony stated to a "reasonable degree of certainty." Shifting to plaintiff the burden of disproving an affirmative defense as defendant herein claims is the law of Pennsylvania unnecessarily and unreasonably complicates the straightforward defense of malpractice to a debt collection case and does not comport with Pennsylvania law. Pennsylvania law does not require a professional to prove professional competence when a former client questions competency in defense of a claim for fees. Herein, Defendant Scott bears the burden of proof as to any affirmative defense including the claim that Reliance's mishandling of Workers' Compensation claims led to an unreasonably and unnecessarily higher calculation of retrospective premium. Except under unusual circumstances a claim of professional malpractice requires expert testimony.

In Marty's Express a Workers' Compensation insurer sought to collect unpaid retrospective premiums. In dicta the district court: "place[d] upon the insurer the ultimate

[10] See Martin v. Hale Products, Inc., 699 A.2d 1283 (Pa. Super. 1997. "The decisions of the Federal District Courts and courts of appeal…are not binding on Pennsylvania Courts."

[11] Liberty Mut. Ins. Co. v. Marty's Express, 910 F. Supp. 221, 222 (E.D. Pa. 1996).

burden of persuading the jury that it acted reasonably and in good faith."[12] The District Court found no Pennsylvania Law directly on point and apparently adopted the reasoning of a Maryland decision, Port East Transfer, Inc. v. Liberty Mutual Ins. Co.[13] In that case, the Court of Appeals of Maryland quoted and adopted the reasonable holding of the Louisiana Court of Appeals in Insurance Company of North American v. Binnings Construction Co., 288 So. 2 359 (La Ct. App. 1974):

> "…to require the insurer, in the absence of any evidence of bad faith, to offer proof of its good faith in investigating, adjusting, and settling hundreds of claims in order to prove its action for premiums, 'would abuse both the parties and the judicial system.'"

Even the cases cited by Scott do not shift the burden of the affirmative defense of professional malpractice.

The only requirement is that plaintiff proves by a preponderance of the evidence that the amount billed is due. The only requirement for the affirmative malpractice defense is to prove by a preponderance of the evidence that the retrospective premium charged is excessive as a result of professional negligence on the part of the hired professional.

In the present matter Defendant's argument in its motion for summary judgment presumes that plaintiff must disprove negligence in every claim Apparently, the defense believes that simply by pleading "breach of fiduciary duty" or "bad faith" or "breach of the duty of good faith" in new matter they have no further obligation of proof. [14] Indeed were this reasoning correct not even pleading would be needed since it becomes an affirmative element of plaintiff's proof and not an affirmative defense. The law is opposite. Where the defense claims the amount

[12] This is a proper analysis after the defendant has prima facie demonstrated malpractice in claims handling which is what the District Court held.

[13] 330 Md. 376, 624 A.2d 520 (1993).

[14] Such as the Commonwealth's burden of proving a homicide "clear of self-defense." See Com. V. Cropper, 463 Pa. 529, 345 A.2d 645 (1975). "…[T]he burden is upon the Commonwealth to prove beyond a reasonable doubt that the defendant was not acting in self-defense."

billed is inflated due to negligence, the defense bears the burden of proving both negligence and causation, namely that the negligence resulted in an increased retrospective premium which was accordingly not owed.

Defendant's expert report fails utterly. Defendant's expert selects a minimal number of exemplar claims and "suggests"[15] that these may have been mishandled. Defendant's expert's claim that the plaintiff had an affirmative obligation to explicitly demonstrate that all claims handling and payments were proper, ignores the actual contract language which does not require a detailed accounting prior to billing for a retrospective premium.[16]

Inherent Conflict

The Defendant discusses the fact that retrospective premium policies carry "an inherent conflict of interest, since the policy premiums are retrospective in nature" and put the plaintiff in the position of receiving more premium based on the claims paid. This does not in any way change the basic nature of this collection case or the defense of negligence which has been raised.

This inherent conflict was obvious to both the insurance company and the corporation that hired them. This was necessarily part of the consideration in evaluating which if any of the competing insurance companies in the universe of insurance carriers was best qualified to handle the assignment professionally, competently and ethically. The Court in Port East Transfer, Inc. v. Liberty Mutual Insurance Company, 624 A.2d 520, in dicta stated that the complicated nature of the retrospective insurance contracts and other non-retrospective insurance contracts between the parties "…created an inherent conflict of interest that entitled the insured

[15] No opinion is offered, merely a suggestion.
[16] Even if a professional obligation to explain all claims handling does exist, the retroactive premiums billed is still due if properly calculated.

'to have the insurer produce the information pertinent to the reasonableness and good faith of the settlement and assume the burden of proof on the issue.'" In this case the contract of insurance had been negotiated at arms length by competent professional executives advised as necessary by attorneys and other professionals charged with responsibly entering into contracts to protect multi-million dollar businesses by evaluating the most cost efficient method of insuring against workers compensation losses.

The defendant had been perfectly capable of negotiating a requirement that any retrospective premiums charged had to be justified by case by case proof of non-negligent claims handling. The higher administrative costs of such a requirement however would undoubtedly have resulted in higher premiums. Such a requirement if it had been negotiated into the original contract could have resulted in the insurance carrier modifying its procedures to ensure that the insured was constantly apprised of every claim.

To meet its burden of proof, defendant must proffer expert opinion that Reliance failed to meet the applicable industry standard of care in claims handling and that such failure did in fact cause damages namely, the increased retrospective premium sought in this case.[17] The expert must also have a sufficient factual basis of record to describe the manner in which Reliance breached its duty in the handling of specific Workers' Compensation claims.[18]

The defendant's expert report contains no opinion as to claims handling standards nor any deviation therefrom. Expert Kirwan only delineates an insurer's reporting duties to its insured. In opinion Mr. Kirwan merely notes that Reliance neglected to submit claims reviews

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[17] "Expert testimony is required to establish professional negligence where the determination of whether the actions were negligent is beyond the understanding of the ordinary person." Cipriani v. Sun Pipe Line Co., 393 Pa. Super. 471, 488, 574 A.2d 706, 715 (1990). An ordinary person cannot be presumed to know insurance industry standards for handling Worker's Compensation claims.

[18] See Pa. Rule of Evidence 705 Starr v. Veneziano, 560 Pa. 650, 663 n.10; 747 A.2d 867, 874 n. 10 (2000).

to Scott as in his opinion plaintiff should have.[19] Reliance's failure voluntarily to document its claims handling practices or provide it's insured with the files or even a summary does not in itself demonstrate any improper claim handling or any excessive losses or any increase in retrospective premiums. Neither does this demonstrate that reserves were established too high on any case. Indeed Reliance's failure to provide information is irrelevant both to any defense or anything else in this case. While Reliance's failure to provide claims reviews and other information may have been a method by which Reliance keep the client from learning of its improper claims handling, after months of discovery in this litigation Scott has not demonstrated any improper claims handling which affected the retrospective premium calculation. The only relevant inquiry is whether Reliance improperly incurred compensation payments or adjustment expenses which led to improperly high retrospective premiums.

Using the claims information available through discovery, defendant's expert may readily determine whether, in fact, Reliance or any state guaranty association acting in Reliance's stead. excessively paid any Workers' Compensation claim filed against Scott or incurred any unnecessary adjustment expenses. If true, Scott's expert can describe with particularity how the claims mishandled by Reliance resulted in improperly calculated retroactive premiums. The expert's report lacks any such analysis. His report comments on only four Workers' Compensation claims and apparently bases his conclusion that they were improperly handled on the fact that the amounts paid increased significantly after Reliance's insolvency and liquidation when compared to the previous estimates.

Increased payments from prior estimates is not proof that Reliance mismanaged any claim. The medical condition of Workers' Compensation claimants deteriorate. Medical care

[19] Even if not met, if the claims were competently handled the failure to properly keep the client informed resulted in no excess charges and constitutes no defense to this collection of premiums case.

may turn out to be more expensive than originally projected. Reserves can be mistakenly established or based upon insufficient or inaccurate preliminary information and corrected without any negligence or deviation from appropriate claims handling standards without any breach of any duty of fidelity or bad faith. The fact that actual payments were significantly higher than estimated losses cannot establish claims mishandling. It is not surprising that an insurance company facing insolvency would set reserves unreasonably low in a desperate attempt to appear solvent to insurance regulators and financial analysts. To demonstrate that Reliance mishandled claims an expert must demonstrate, at least by opinion evidence, that increased payments and expenses were unreasonable given the nature of the injuries and claims involved. Accordingly, defendant's Motion for Summary Judgment is denied.

Nonetheless, since expert Kirwan's Report fails to explore these issues and defendant seems to have mistakenly believed that it does not have the burden of proving its affirmative defense, but rather wrongly believed that the mere "suggestion" of mishandled claims shifted the burden of proof to the plaintiff to disprove malpractice, discovery is reopened in the interests of justice. Defendant may file a supplemental expert report detailing how Reliance mishandled claims increased expenses and what if any retrospective premiums are in fact due.

The plaintiff always bears the burden of proving what if any sums are owing and the defense has the burden of proving that the amount claimed has been unreasonably increased because of the negligence of the defendant. By this straightforward statement the complicated claim of a breach of the duty of good faith in a retrospective premium policy insurance contract is reduced to what it actually is, a collection case.[20]

[20]Unnecessary confusion from legalese is exemplified in the following quotation from the Port East Transfer Inc. v. Liberty Mutual Insurance Co. of the Court of Appeals of Maryland: "Although the ultimate burden of proving the absence of mitigation rests upon the state when the issue is properly in the case the burden of initially producing some evidence on that issues (or of relying upon evidence produced by the state or adduced from witnesses called by

Accordingly, defendant's Motion for Summary Judgment on Reliance's claims for retrospective premiums is denied. A new Case Management Order is issued herewith.

BY THE COURT,

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MARK I. BERNSTEIN, J.

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the state) sufficient to give rise to a jury issue with respect to mitigation is properly cast upon the defendant." Indeed following a detailed but esoteric and labyrinthian discussion, even the Port East Transfer Court finally unambiguously holds that proving the negative of malpractice is not plaintiff's burden saying: "In the insurer's action for unpaid retrospective premiums, the reasonableness and good faith of the insurer in connection with claims subject to such retrospective premium adjustment need not be specifically alleged in the claim nor proven as part of the insurer's case in chief." After carefully parsing the opinion, even that Maryland State Court concluded that proof of good faith and fidelity to the insured is not an element of plaintiffs proof in a collection case. Even that Court obliquely held that the insurer must only prove prima facie payments in accord with the policy and bills properly calculated in accord with the contract of insurance. Demonstrating that the professionalism and competence are in accord with the standard of care for which the insured was hired was in fact accomplished in every case adjusted is not part of the plaintiff's proof and: "Need not be specifically alleged in the complaint nor proven as part of the insurer's case in chief." While complicated in its formulation the essence even of that opinion is that as a defense to a collection claim negligence can be a defense to eliminate or reduce the amounts owed.