

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY

FIRST JUDICIAL DISTRICT OF PENNSYLVANIA

CIVIL TRIAL DIVISION

KVAERNER US INC.,
KVAERNER HOLDINGS, INC.

: APRIL TERM, 2003

: No. 0940

v.

: Commerce Program

ONEBEACON INSURANCE COMPANY,
KEN RANDALL AMERICA, INC., and
ACE INA HOLDINGS, INC.

:

: Control No. 071534

ORDER

AND NOW, this 29th day of September 2003, upon consideration of defendant ACE INA Holdings' Preliminary Objections, plaintiffs' response in opposition, the respective memoranda, all matters of record and in accord with the contemporaneous Opinion being filed of record, it is **Ordered** as follows:

1. Defendant's Preliminary Objections are **Sustained** and the first Amended Complaint is dismissed against ACE INA Holdings, Inc., only, in its entirety; and
2. In the event that plaintiffs are able to plead sufficient facts in support of their claims for duty to defend, duty to indemnify and breach of contract against ACE, plaintiffs are granted leave to amend, with respect to Counts I, II, and III, only within twenty-two (22) days from the date of entry of this Order.

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.

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OPINION

Albert W. Sheppard, Jr., J. September 29, 2003

Before this court are the Preliminary Objections of defendant ACE INA Holdings' Inc. For the reasons discussed, this court is issuing a contemporaneous Order **sustaining** these Objections and dismissing the Amended Complaint as to ACE INA Holdings, Inc.

FACTUAL AND PROCEDURAL BACKGROUND

Kvaerner U. S. Inc. and Kvaerner Holdings, Inc. ("Kvaerner") instituted this Declaratory Judgment action seeking a finding that insurance policies issued to plaintiffs from 1964 to 1986 obligate the defendants to defend Kvaerner against asbestos related bodily injury claims (Count I) and indemnify Kvaerner for all sums it pays as damages with respect to the asbestos claims (Count II). The insurance policies were issued to Kvaerner by Century Insurance Company ("Century") and OneBeacon Insurance Company ("OneBeacon"). Century is the successor in interest to certain insurance policies issued by Insurance Company of North America (INA). ACE INA Holdings Inc.

(“ACE”) is the third party administrator responsible for handling claims under INA policies.

Plaintiffs’ Amended Complaint in this matter also asserts the following causes of action against ACE: Count III -breach of contract, Count IV - bad faith in failing to provide coverage, and Count V- negligent misrepresentation.

DISCUSSION

ACE filed Preliminary Objections to plaintiffs’ Amended Complaint asserting that, (1) Counts I, II and III fail because plaintiffs have not alleged the existence of any insurance policy to which plaintiffs and ACE are parties, (2) Counts I and II for declaratory judgment fail because plaintiffs have not joined all parties necessary to such an adjudication, (3) Count IV fails because plaintiffs have not alleged facts sufficient to demonstrate that ACE is an insurer, and (4) Count V fails because plaintiffs have not alleged sufficient facts to support a claim of negligent misrepresentation or intentional and that the economic loss doctrine bars plaintiffs’ claim for negligent misrepresentation.

I. Count I, II and III Do Not Sufficiently Set Forth Claims Against ACE-INA Holdings, Inc.

ACE objects to Count I (Duty to Defend), Count II (Duty to Indemnify) and Count III (Breach of Contract) on the ground that plaintiffs failed to identify any contract to which ACE is or was a party. Thus, ACE argues that it cannot be liable for a breach of contract.

A claim for breach of contract exists where it can be shown that there was a contract, a breach of an obligation imposed by that contract and damages that resulted from the breach. Koken v. Steinberg, 825 A.2d 723, 729 (2003). Here, the Amended

Complaint fails to allege the existence of a contract between plaintiffs and defendant ACE. The Amended Complaint alleges that Century is the successor in interest under certain insurance policies issued by the Insurance Company of North America. (Plts. Amended Complaint ¶ 5). Plaintiffs further allege that ACE directly or through various agents and through the use of the trade name “ACE USA” acts or holds itself out as the third party claims administrator responsible for handling claims under the INA policies and for discharging certain of the obligations of the insurer under such policies. (Plts. Amended Complaint ¶ 6). Plaintiffs do not allege that ACE is the successor in interest to INA or that Ace issued any policy of insurance to Kvaerner. Plaintiffs allege only that ACE is the third party claims administrator.

This court finds that Counts I, II and III are insufficiently plead as to ACE, since there are no allegations of a contract between plaintiffs and ACE. Accordingly, these three Counts are dismissed as to Ace.

II. Failure to Join Necessary Party-Counts I and II

In the alternative, Ace argues that Counts I and II for declaratory judgment fail because plaintiffs have not joined all parties necessary to this action. (Dfts. Memo p. 6).¹ The court need not address this objection since ACE’s Preliminary Objections to Counts I, II and III are sustained for failure to state a claim.

¹ This court’s finding with respect to this issue is set forth in the contemporaneous Opinion filed in connection with the Preliminary Objections filed by OneBeacon. (See Control number 071506).

III. Count IV of Plaintiffs' Amended Complaint Fails To Set Forth A Cause of Action For Bad Faith Against ACE.

Count IV purports to state a claim for bad faith against defendants. ACE demurs to Count IV on the ground that it is not an “insurer” under 42 Pa. C.S. A. § 8371 and therefore cannot be liable for bad faith.

Bad faith actions against an insurance company in Pennsylvania were established and are governed by 42 Pa. C.S. A. § 8371. Margaret Auto Body, Inc. v. Universal Underwriters Group, 2003 WL 1848560 * 1 (January 10, 2003) (Jones). There is no common law remedy in Pennsylvania for bad faith on the part of insurers. Terletsky v. Prudential Property and Cas. Ins. Co., 437 Pa. Super. 108, 649 A.2d 680, 688 (Pa. Super. 1994)(citing D'Ambrosio v. Pennsylvania Nat. Mut. Cas. Ins. Co., 494 Pa. 501, 507, 431 A.2d 966, 970 (Pa. 1981) and Romano v. Nationwide Mut. Fire Ins. Co., 435 Pa. Super. 545, 552, 646 A.2d 1228, 1232 (Pa. Super. 1994)). Thus, plaintiffs' argument that a common law cause of action exists for bad faith is incorrect.

Section 8371 contains no definition of an “insurer” and the courts of this Commonwealth have yet to clearly address the issue. Margaret Auto Body, Inc. v. Universal Underwriters Group, Supra. However, it is generally recognized that an “insurer issues policies, collects premiums and in exchange assumes certain risks and contractual obligations.” Id. (quoting Ihnat v. Pover, 35 Pa. D. & C. 4th 120 (1997)), see also T & N PLC v. Pennsylvania Ins. Guar. Ass'n, 800 F. Supp. 1259, 1261 (E.D. Pa. 1992). By its terms, 42 Pa. C. S. A. § 8371 applies only to the conduct of an insurer toward an insured. Bad faith claims against insurance agents, claims representatives, peer review physicians have been found to be impermissible under § 8371. Cipriani v.

Federal Insurance Company Division of Chubb Group Insurance Companies, 1999 WL 554601 *2 (E. D. Pa. July 20, 1999).

Taking the facts as set forth in the Amended Complaint as true, ACE is described as acting or holding itself out as the third-party claims administrator responsible for handling claims made under the INA policies discharging certain of the obligations of the insurer under the policies. (Amended Complaint ¶ 7)

Based on plaintiffs' allegations, defendant ACE is not an insurer as contemplated by 42 Pa. C.S. A. §8371. Plaintiffs identify ACE as an agent of Century. In the capacity of a third party administrator, demurring defendant does not issue the policies, collect the premiums or assume any risks or contractual obligations in exchange for the payment of premiums on such policies. Accordingly, ACE can not properly be found liable under section 8371 and the demurrer to Count IV is Sustained.

IV. The Economic Loss Doctrine Bars Kvaerner's Negligent Misrepresentation Claim

ACE objects to Count V of plaintiffs' Amended Complaint (alleging misrepresentation) arguing that: (1) plaintiffs' Amended Complaint fails to assert a claim for intentional misrepresentation, and (2) plaintiffs' cause of action for negligent misrepresentation is barred by the economic loss doctrine. In response, plaintiffs argue that Count V solely asserts a claim for negligent misrepresentation and that the claim is not barred by the economic loss doctrine since the negligent misrepresentation claim is separate and apart from the contractual coverage obligations imposed by the policies

themselves. ²(Plts. Memo p. 10).

The purpose of the economic loss doctrine, as adopted in Pennsylvania, is “maintaining the separate spheres of the law of contract and tort.” JHE, Inc. v. , Southeastern Pennsylvania Transportation Authority, November Term No. 1790 (May 17, 2002) (Sheppard)³ (quoting New York State Elec. & Gas Corp. v. Westinghouse Elec. Corp., 387 Pa. Super. 537, 550, 564 A.2d 919, 925 (Pa. Super. 1989)). In its current form, the doctrine precludes recovery for economic losses in negligence and strict liability where the plaintiff has suffered no physical injury or property damage. Id. (citing Moscatiello v. Pittsburgh Contractors Equip. Co., 407 Pa. Super. 378, 385-86, 595 A.2d 1198, 1201 (Pa. Super. 1991)).

Here, there is no allegation of any physical injury or property damage incurred by plaintiffs. Plaintiffs’ negligent misrepresentation seeks damages for administrative, clerical and legal expenses as well as other costs, expenses and losses. Such damages are purely economic. This court concludes that the economic loss doctrine bars plaintiffs’ negligent misrepresentation claim. Count V should be dismissed.

² Plaintiffs’ argument that the economic loss doctrine does not bar its claim for negligent misrepresentation since plaintiffs’ claim for negligent misrepresentation is separate and apart from the breach of contract claim confuses the doctrine of economic loss with the gist of the action doctrine. The gist of the action doctrine requires an inquiry into the nature of the cause of action. Economic loss focuses on the injury sustained by the plaintiff.

³ <http://courts.phila.gov>.

CONCLUSION

For reasons discussed, the Preliminary Objections of defendant ACE are **Sustained**. Plaintiffs' Amended Complaint is dismissed against ACE. This court will enter a contemporaneous Order consistent with this Opinion.

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.