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

CDL, INC.	:	JULY TERM, 2009
Plaintiff,	:	NO. 00758
v.	:	COMMERCE PROGRAM
CERTAIN UNDERWRITERS AT LLOYD'S, LONDON, et al.,	:	
Defendants.	:	

ORDER

AND NOW, this 24th day of May, 2013, after a trial without a jury in this matter, and in accord with the Findings of Fact and Conclusions of Law issued simultaneously, it is

ORDERED that **JUDGMENT** is entered as follows:

1. In favor of plaintiff CDL, Inc. ("CDL") and against defendant Certain Underwriters at Lloyd's, London ("Lloyd's") on CDL's claim for breach of contract in the amount of $73,130.24, plus prejudgment interest at the rate of 6.00% per annum running from August 7, 2007.

2. Against CDL and in favor of Lloyd's on CDL's claim for bad faith.

BY THE COURT:

ALBERT JOHN SNITE, JR., J.

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Defendants.	:	

FINDINGS OF FACT
AND CONCLUSIONS OF LAW

Plaintiff CDL, Inc. ("CDL") was in the business of leasing commercial truck drivers to its clients on a temporary basis. CDL obtained from defendant Certain Underwriters at Lloyd's London ("Lloyd's") a Commercial General Liability Policy for the period September 29, 2006 through September 29, 2007 (the "CGL Policy"). CDL did not obtain either an automobile or a professional liability policy for that period.

In January 2007, CDL apparently leased a driver named David Martin to a client, Ready Pac Produce, Inc. ("Ready-Pac"), and Mr. Martin was involved in an automobile accident with a school bus driven by Vicki Richards. Ms. Richards and her husband sued Mr. Martin, Ready Pac, CDL, and Penske, which provided the truck that Mr. Martin was driving. With respect to CDL's liability, the Richards alleged as follows in their Complaint:

> 7. At all times pertinent hereto, Defendant David Martin was the agent, servant, workman and/or employee of Defendants Ready Pac Produce, Inc., Commercial Drivers Leasing, Penske Truck Leasing Co., L.P., and/or Penske Truck Leasing Corp. and was acting within the course and scope of his employment.
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> 8. At all times pertinent hereto, Defendant Commercial Drivers Leasing provided

driver placement services on behalf of and/or at the request of Defendant Ready Pac Produce, Inc. and Defendant Commercial Drivers Leasing placed Defendant David Martin as a driver with Defendant Ready Pac Produce, Inc.

* * *

37. The aforesaid accident was due solely to the negligent conduct, careless conduct and gross, wanton and reckless conduct of Defendant, Commercial Drivers Leasing, by and through its agents, servants, workmen, employees and/or contractors, including but not limited to David Martin, and in no way due to any negligent act or failure to act on the part of the Plaintiffs.

38. The negligent conduct, careless conduct and gross, wanton and reckless conduct of Defendant, Commercial Drivers Leasing, also consisted of the following:

a. placing David Martin as a tractor trailer driver with Defendant Ready Pac Produce, Inc. when it knew or should have known that David Martin lacked sufficient skill, judgment and prudence in the operation of a tractor trailer;
b. failing to adequately ascertain that David Martin lacked the ability necessary to safely operate a tractor trailer prior to placing him as a tractor trailer driver with Defendant Ready Pac Produce, Inc.;
c. representing that David Martin was able to operate a tractor trailer safely when it knew or should have known that he was not able to do so;
d. failure to conduct a background check of the driving record of David Martin;
e. failure to maintain David Martin's DOT certification file as required by the Federal Motor Carrier Safety Regulations;
f. failure to ensure that Defendant David Martin would operate a tractor trailer in compliance with the Federal Motor Carrier Safety Regulations prior to assisting him in finding employment as a tractor trailer operator;
g. failure to conduct a background check of the driving record of David Martin as required by 49 CFR 391 et seq.;
h. failure to ascertain that David Martin was capable of operating a tractor trailer in compliance with the applicable hours of service regulations prior to assisting him in finding employment as a tractor trailer operator;
i. failure to train David Martin in how to operate a tractor trailer safely prior to assisting him in finding employment as a tractor trailer operator.[1]

CDL tendered the Richards' claim to Lloyd's under the CGL Policy. Lloyd's denied the claim based on the following exclusions contained in the CGL Policy:

[1] Ex. P-4, Richards' Complaint, ¶¶ 7-8, 37-38.

> This insurance does not apply to . . . "Bodily injury" or "property damage" arising out of the ownership, maintenance, use or entrustment to others of any aircraft, "auto" or watercraft owned or operated by or rented or loaned to any Insured. Use includes operation and "loading or unloading."
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> This exclusion applies even if the claims against any Insured allege negligence or other wrongdoing in the supervision, hiring, employment, training or monitoring of others by that Insured, if the "occurrence" which caused the "bodily Injury" or "property damage" involved the ownership, maintenance, use or entrustment to others of any aircraft, "auto" or watercraft that is owned or operated by or rented or loaned to any Insured.[2]
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> * * *
>
> It is agreed that this policy shall not apply to liability arising out of the rendering of or failure to render professional services, or any error or omission, malpractice or mistake of a professional nature committed by or on behalf of the "Insured" in the conduct of any of the "Insured's" business activities.[3]

The claims examiner for Lloyd's, Nancy Haag, testified credibly at trial that she reviewed the Richards' Complaint and the CDL CGL Policy and understood the Complaint to allege that Mr. Martin was CDL's employee and that CDL negligently performed its professional driver placement services.[4]

CDL provided its own defense to the Richards' claims and was found not liable. CDL then renewed its demand that Lloyd's cover CDL's defense costs, which totaled $73,130.24.[5] Lloyd's continued to deny the claim based on the Auto and Professional Liability Exclusions. In July, 2009, CDL filed this action against Lloyd's alleging breach of the CGL Policy and bad faith.

Around that same time, Lloyd's made the business decision not to renew the CGL Policy and sent CDL a notice of non-renewal on July 24, 2009. The reason given for the nonrenewal

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[2] Policy, Exclusion "g", p. 4 of 16 (the "Auto Exclusion").

[3] Policy, Endorsement PS-1 (3/99) (the "Professional Liability Exclusion").

[4] Notes of Testimony ("N.T.") 12/17/12 PM, pp. 41- 91.

[5] Ex. P-14.

was that Lloyd's was "no longer writing this class of business."[6] Kermit Shaulis, the Branch Manager of Lloyd's underwriting agent, Burns & Wilcox, testified credibly that he made the decision not to renew CDL's Policy, not in retaliation for CDL's lawsuit, but because Lloyd's did not want to be subject to additional claims for auto accidents under commercial general liability policies.[7]

During the course of this litigation, Lloyd's discovered that it was providing CGL coverage to another entity engaged in the same business as CDL. Mr. Shaulis testified credibly that, as soon as it was able to do so, Lloyd's issued notice of nonrenewal to that entity too.[8]

The question before this court is whether, upon review of the underlying Complaint and the CGL Policy, Lloyd's should have agreed to defend CDL against the Richards' claims.

> An insurer's duty to defend is broader than its duty to indemnify. It is a distinct obligation, separate and apart from the insurer's duty to provide coverage. An insurer is obligated to defend its insured if the factual allegations of the [underlying] complaint on its face encompass an injury that is actually or potentially within the scope of the policy. As long as the complaint might or might not fall within the policy's coverage, the insurance company is obliged to defend. Accordingly, it is the potential, rather than the certainty, of a claim falling within the insurance policy that triggers the insurer's duty to defend.
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> The question of whether a claim against an insured is potentially covered is answered by comparing the four corners of the insurance contract to the four corners of the complaint. [Lloyd's] may not justifiably refuse to defend [the underlying] claim against [CDL] unless it is clear from an examination of the allegations in the complaint and the language of the policy that the claim does not potentially come within the coverage of the policy. In making this determination, the factual allegations of the underlying complaint are to be taken as true and liberally construed in favor of [CDL].[9]

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[6] Ex. P-33.

[7] N.T. 12/18/12 PM, pp. 30-38, 73-76, 83-85, 95-98.

[8] *Id.* at pp. 49-73, 77-82.

[9] Am. & Foreign Ins. Co. v. Jerry's Sport Ctr., Inc., 606 Pa. 584, 608-611, 2 A.3d 526, 540-542 (2010).

In the Complaint in the underlying action, the Richards asserted claims against all the defendants, including CDL, for bodily injury arising out of the use by Mr. Martin of an auto, *i.e.*, the Penske truck he was driving. Since this is the sort of injury normally covered under an automobile insurance policy, not a commercial general liability policy, Lloyd's denied coverage for the claim under the Auto Exclusion in CDL's CGL Policy.

By its own terms, the Auto Exclusion applies only if the auto involved in the accident was "owned or operated by or rented or loaned to" CDL or its employee.[10] To the extent the Richards alleged in the Underlying Complaint that Mr. Martin was CDL's employee, then the auto exclusion applies because his operation of the truck is attributable to CDL. However, the Complaint also contains allegations in the alternative regarding Mr. Martin's employment status; plaintiffs alleged he was the "employee of Defendants Ready Pac Produce, Inc., Commercial Drivers Leasing, Penske Truck Leasing Co., L.P., **and/or** Penske Truck Leasing Corp." Because the Complaint contains the term "and/or," it is possible to read the Complaint as alleging a situation in which Mr. Martin was not CDL's employee, but was instead the employee of another defendant, and therefore that the truck was not "operated by" CDL. If the truck was not "operated by" CDL, then the auto exclusion does not apply, and Lloyd's had a duty to defend CDL under the policy with respect to plaintiffs' claims that CDL negligently placed Mr. Martin as a driver with Ready Pac.

With respect to the negligent placement claims, Lloyd's denied coverage based on the Professional Liability Exclusion. However, the leasing and placement of truck drivers is not the

[10] There is no allegation that CDL owned, rented or leased the truck, so the dispute is solely whether CDL, through its agent Mr. Martin, operated the truck

"rendering of or failure to render a professional service" as set forth in that Exclusion.[11] When not specifically defined, "professional services" are services rendered by someone practicing one of the recognized professions, such as medicine, law, accounting, or architecture. Such "professionals" are distinguished by specialized training or education, state licenses, and legal liability for professional negligence or malpractice.[12]

As Todd Hoener, the president of CDL, credibly explained at trial, truck driver placement services may be rendered without specialized training or licensing, although there are apparently some federal regulations regarding safety and driver DOT certification that must be followed.[13] Furthermore, a person rendering truck driver placement services is not subject to professional malpractice liability, although he may be held liable in ordinary negligence for the shoddy provision of such services. Since the placement services that CDL was alleged in the underlying Complaint to have rendered improperly were not "professional services," the Professional Liability Exclusion did not bar coverage under the CGL Policy, and Lloyd's should have provided CDL with a defense for such claims.

Because the court finds that Lloyd's should have provided CDL with a defense in the underlying action, the question then is whether Lloyd's refusal to do so was made in bad faith.[14]

> [T]o succeed on a claim [for statutory bad faith], the insured must show that the insurer did not have a reasonable basis for denying benefits under the policy and

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[11] The Policy does not define "professional services." If it had been defined to include CDL's business activities, then they would be excluded under the Professional Liability Exclusion.

[12] *See* 15 Pa. C. S. § 102 (defining "profession" based on state licensing for purposes of corporations law); Pa R. Civ. P. 1042.1 (defining "licensed professional" for purposes of a professional liability action.); Visiting Nurse Ass'n of Greater Philadelphia v. St. Paul Fire & Marine Ins. Co., 65 F.3d 1097, 1101 (3d Cir. 1995) (noting "the generally held view that a 'professional service' must be such as exacts the use or application of special learning or attainments of some kind. A 'professional' act or service is one arising out of a vocation, calling, occupation, or employment involving specialized knowledge, labor, or skill.")

[13] N.T. 12/19/12 AM, p. 8-12.

[14] *See* 42 Pa. C.S. § 8371.

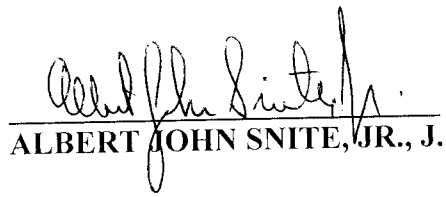
> that the insurer knew of or recklessly disregarded its lack of reasonable basis in denying the claim. To constitute bad faith it is not necessary that the refusal to pay be fraudulent. However, mere negligence or bad judgment is not bad faith. The insured must also show that the insurer breached a known duty (i.e., the duty of good faith and fair dealing) through a motive of self-interest or ill will.[15]

In this case, CDL has made no showing that Lloyd's was motivated by self-interest or ill-will in denying coverage for the defense of the Richards' claims. At most, the Lloyd's representatives involved in the decision to deny coverage to CDL were negligent or exercised bad judgment in finding the Auto and Professional Liability Exclusions applicable to the Richards' claims. There is no evidence that they acted with malice in misreading the claims.

Likewise, CDL failed to show that the decision not to renew CDL's CGL Policy was made in bad faith. The representative of Lloyd's involved in that decision exercised his business judgment not to continue to insure truck driver placement companies because they could give rise to claims, such as the Richards', that did not fit neatly into the separate CGL, auto, and professional liability insurance categories. Making a reasonable business decision is not the same thing as being motivated by improper self-interest, and does not constitute bad faith.

For all the foregoing reasons, judgment shall be entered in favor of CDL and against Lloyd's on CDL's claim for breach of the CGL Policy and in favor of Lloyd's and against CDL on CDL's claim for bad faith.

BY THE COURT:



ALBERT JOHN SNITE, JR., J.

[15] Berg v. Nationwide Mut. Ins. Co., Inc., 44 A.3d 1164, 1171 (Pa. Super. 2012).