

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

PENNSYLVANIA TURNPIKE COMMISSION
Plaintiff,

: JULY TERM, 2003

: No. 1464

v.

FIRST STATE INSURANCE COMPANY,
Defendant.

: Commerce Program

: Control Number 122292

O R D E R

AND NOW, this 14th day of April, 2004, upon consideration of defendant First State Insurance Company's Motion to Join Indispensable Parties or to Dismiss the Claims which require the Presence of Indispensable Parties, plaintiff's response in opposition, the respective memoranda, all matters of record and in accord with the contemporaneous Opinion, it is hereby **ORDERED** that defendant's Motion is **Denied** without prejudice.

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.

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OPINION

Albert W. Sheppard, Jr. J.April 14, 2004

Before the court is defendant, First State Insurance Company's ("First State") Motion to Require plaintiff to Join Indispensable Parties or to Dismiss the Claims Which Require the Presence of Indispensable Parties. For the reasons discussed the Motion is **Denied** without prejudice.

BACKGROUND

The Pennsylvania Turnpike Commission ("PTC") from July 1, 1982 through February 15, 1984 maintained an umbrella liability policy issued by First State. (Plts. Complaint ¶ 6). This policy included \$20,000,000 in annual aggregate coverage in excess of two underlying layers of coverage. (Id.). The first underlying layer of coverage was a \$ 250,000.00 self insured retention by PTC per occurrence. (Plts.

Complaint ¶ 7). The second underlying layer of coverage was provided under an excess general liability and automobile policy issued by Southern America Insurance Company (“Southern America”). (Plts. Complaint ¶ 8). On March 26, 1992 Southern America was ordered into liquidation, which process is proceeding at this time. (Plts. Complaint ¶ 9). Southern America provided up to \$750,000.00 coverage for each occurrence and in the aggregate where applicable in excess of PTC’s \$250,000.00 self insured retention per occurrence. (Plts. Complaint ¶10).

During First State’s applicable policy period, PTC gave notice of four occurrences, three automobile accidents and one claim by residents living near the Hickory Run Service Plaza on the North East Extension of the Turnpike asserting that road salt and petroleum products contaminated the wells in their housing development. (Plts. Complaint ¶ 11). The contamination claim is referred to as the “Arthur claim,” which was assigned an occurrence date of July 1, 1982. (Plts. Complaint ¶ 11 (d)).

PTC alleges that its self insured retention and Southern America’s \$750,000.00 layer of coverage are completely exhausted and that First State is liable to PTC in connection with the four matters in the sum of \$2,847,578.38. (Plts. Complaint ¶ 27). This figure represents the total of each of the settlement and defense costs in these matters, net of PTC’s \$250,000.00 self insured retention per occurrence and Southern America’s full \$75,000.00 layer of coverage for the applicable policy period. (Id.) PTC also claims that First State is obligated to “drop down” to cover Southern America’s obligations and reimburse PTC for all settlement funds and defense costs over and above PTC’s self insured retention per occurrence. (Plts. Complaint ¶ 30-32).

First State denied coverage. As a result, PTC instituted suit against First State for Breach of Contract (Count I), Declaratory Judgment (Count II), Bad Faith (Count III) and Breach of the Duty of Good Faith and Fair Dealing (Count IV).

DISCUSSION

First State filed this motion to require PTC to join as indispensable parties PTC's insurers which provided coverage to PTC during the period from 1957 to 1991. In the alternative, First State asks this court to dismiss that portion of the complaint which seeks coverage for the Arthur claim. In response, the plaintiff argues that the other insurers referenced by First State are not indispensable because their interests are not implicated.

An indispensable party is one whose rights or interests are so pervasively connected with the claims of the litigants that no relief can be granted without infringing on those rights or interests. Hubert v. Greenwald, 743 A.2d 977, 979 (Pa. Super. 1999). A party may raise this objection at any time during the proceedings and it is not waivable.

Id. The following factors are used in determining whether a party is indispensable:

1. Do absent parties have a right or interest related to the claim?
2. If so, what is the nature of that right or interest?
3. Is that right or interest essential to the merits of the case?
4. Can justice be afforded without violating the due process rights of absent parties? Id.

Contrary to First State's contentions none of the allegations within the complaint indicate that PTC's other insurers rights are so affected that a disposition on the merits would be void absent their presence. Rather, the gravaman of the complaint is that the First State policy period is July 1, 1982 through February 1984 (¶6), that the assigned occurrence date is July 1, 1982(¶ 11(d)), that PTC has exhausted its underlying levels of insurance coverage and the \$1,000,000.00 attachment point under the policy was reached

(¶ 25-27) and that First State is obligated to “drop down” to assume the coverage for Southern American. (¶ 30-31).

Based on those allegations the only interests implicated are those of First State. As the litigation progresses it may be determined that other insurers have an interest in this dispute. At that time, the parties may move to join such insurers as indispensable parties, since the issue of failure to join an indispensable party may be raised at any time.

University Mechanical & Engineering Contractors, Inc. v. Insurance Company of America, 2002 WL 857105 (2002) (Sheppard).

CONCLUSION

For these reasons, defendant’s Motion to Require Plaintiff to Join Indispensable Parties or to Dismiss the Claims Which Require the Presence of Indispensable Parties is Denied. The court will enter a contemporaneous Order consistent with this Opinion.

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.