

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

\$.99 STORES, INC., GLENN SEGAL, JOSEPH LIEBERMAN and NOTHING OVER \$1.00 STORE, INC.,	:	JULY TERM, 2005
	:	NO.: 0728
Plaintiffs,	:	(Commerce Program)
v.	:	Control Nos. 041337, 041349
KDN LANCHESTER CORP., NILES M. SILVERMAN, KEVIN J. PICKELL, BRISTOL MANAGEMENT GROUP, LTD., ARTHUR E. TORRINGTON, COMMONWEALTH PROFESSIONAL GROUP, ROBERT F. CARDAMONE, and INTERNATIONAL PLACEMENT SERVICES, INC.,	:	
	:	
Defendants.	:	

ORDER

AND NOW, this 30th day of July, 2007, upon consideration of the Motion for Summary Judgment of defendant Bristol Management Group, Ltd. (“BMG”), the Motion for Summary Judgment of plaintiffs, \$.99 Stores, Inc., Glenn Segal, and Joseph Lieberman, the Cross-Motion for Summary Judgment of defendant International Placement Services, Inc. (“IPSI”), the responses in opposition, the briefs in support and opposition, all other matters of record, and in accord with the Opinion issued contemporaneously, it is **ORDERED** that: (a) plaintiffs’ Motion is **DENIED**, and (b) BMG’s and IPSI’s Motions are **GRANTED**, and plaintiffs’ claims against BMG and IPSI are **DISMISSED**.

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.

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OPINION

Albert W. Sheppard, Jr., J. July 30, 2007

Plaintiffs \$.99 Stores, Inc., Glenn Segal, and Joseph Lieberman (collectively, the “Insured”) were insured under a general commercial liability insurance policy (the “Policy”) issued by Legion Indemnity Company (“Legion”). When a claim arose that should have been covered under the Policy, the Insured contacted Legion and learned that Legion was in receivership and would not provide any coverage under the Policy. The Pennsylvania Property and Casualty Insurance Guaranty Association (“PIGA”) also refused to cover the Insured because Legion was a surplus lines, or unlicensed, insurer in Pennsylvania.

The Insured brought this action against several entities that were involved in procuring the Policy: 1) the producing broker, defendants KDN/Lanchester Corporation, Kevin J. Pickell and Niles M. Silverman (collectively, “KDN”); 2) the surplus lines licensee, defendant Commonwealth Professional Group and Robert F. Cardamone (collectively, “CWPG”); 3) a wholesale insurance broker, defendant International Placement Services, Inc. (“IPSI”); and 4) a managing general agent for Legion, defendant Bristol Management Group, Ltd. (“BMG”). In its Amended Complaint, the Insured claims that these parties were negligent in procuring the Policy from Legion because they failed to: 1) assess Legion’s financial viability; 2) conduct a diligent search for similar coverage from an insurer admitted in Pennsylvania; and 3) notify the Insured that Legion was an unlicensed insurer and, therefore, that the Policy was not covered by PIGA.

BMG and IPSI have moved for summary judgment seeking to dismiss the negligence claims against them. They argue that they were under no obligation to perform the duties that the Insured claims were breached with respect to the procurement of the Policy. In the Insured’s own Motion for Summary Judgment and in its responses to defendants’ Motions, the Insured relies on a new theory of liability, which is based on an allegation that Legion was not only an unlicensed, or nonadmitted, insurer, but that it was also an ineligible, nonadmitted insurer.¹ Even though this claim was not initially pled, the Insured could ask, and should likely be

¹ The Insured also alleges that BMG is liable under the Surplus Lines Law as an agent of CWPG and KDN. The burden is on the Insured to prove that such an agency relationship existed. *See Gillian v. Consolidated Foods Corp.*, 424 Pa. 407, 411, 227 A.2d 858, 861 (1967) The Insured offers no such proof. Instead, it attempts to shift its burden to BMG to disprove agency. Contrary to the Insured’s argument, there is no disputed issue of material fact arising out of the evidence presented by BMG on the agency issue because the Insured did not proffer any contradictory evidence. Since it has failed to submit evidence that BMG was an agent of any party (other than Legion), the Insured’s agency claims against BMG fail.

permitted, to amend its Amended Complaint to include this claim, unless to do so would be futile or prejudicial.² Therefore, the court will consider whether this claim has any merit.

The Pennsylvania Surplus Lines Insurance Law governs the placement of policies with insurers that are not licensed or admitted to sell insurance in Pennsylvania. The statute permits policies to be placed with eligible nonadmitted insurers in certain circumstances.³ When placing such insurance with an eligible nonadmitted insurer, the producing broker and the surplus lines licensee incur certain duties. These are the duties that the Insured in its Amended Complaint claims were not met with respect to the Policy.⁴ The statute also provides that:

If the nonadmitted insurer is not an eligible surplus lines insurer and fails to pay a claim or loss within the provisions of the insurance contract, a person who assisted or in any manner aided, directly or indirectly, in the procurement of the insurance contract shall be liable to the insured for the full amount payable under the provisions of the insurance contract.⁵

In other words, if insurance is placed with an ineligible insurer everyone involved in the placement may be found liable if a claim is not paid. If insurance is placed with an eligible insurer, only the producing broker and the surplus lines licensee may be liable if they failed to comply with the various requirements of the Surplus Lines Law. There is no evidence that BMG or IPSI acted as either the producing broker or surplus lines licensee in procuring the Policy.

² “Leave to amend lies within the sound discretion of the trial court and the right to amend should be liberally granted at any stage of the proceedings unless there is an error of law or resulting prejudice to an adverse party.” Werner v. Zazyczny, 545 Pa. 570, 584, 681 A.2d 1331, 1338 (1996). “If the proposed amendment is against a positive rule of law, its allowance would be futile.” Tanner v. Allstate Ins. Co., 321 Pa. Super. 132, 138-9, 467 A.2d 1164, 1167 (1983).

³ 40 P.S. § 991.1604.

⁴ *Id.* (requirements producing broker must meet to place insurance with surplus lines insurer); *id.* at § 991.1608 (surplus lines licensee must notify insured or producing broker that insurer is not licensed.); *id.* at § 991.1609 (statements required of producing broker and surplus lines licensees); *id.* at § 991.1612 (evidence of insurance to be supplied by surplus lines licensee).

⁵ *Id.* at § 991.1603(b).

Thus, they are potentially liable only if Legion is found to have been an ineligible, nonadmitted insurer.

Under the definitions section of the Surplus Lines Insurance Law, the term “ELIGIBLE SURPLUS LINES INSURER” is defined as “[a] nonadmitted insurer with which a surplus lines licensee may place surplus lines insurance under section 1604.”⁶ However, the referenced Section 1604 does not define “eligibility.” Instead, it sets forth the requirements for placing insurance with a nonadmitted insurer, one of which is that the insurer be eligible:

Insurance may be procured through a surplus lines licensee from nonadmitted insurers if the following requirements are met:

- (1) Each insurer is an **eligible** surplus lines insurer.
- (2) The placement satisfies the criteria set forth in at least one of the following subparagraphs:
 - (i) The full amount or kind of insurance cannot be obtained from admitted insurers. Such full amount or kind of insurance or any portion thereof may be procured from **eligible** surplus lines insurers, provided that a diligent search is made among the admitted insurers who are writing, in this Commonwealth, coverage comparable to the coverage being sought.⁷

By defining the term “eligible” with reference to itself, the Legislature has engaged in unhelpful, circular reasoning. However, in the next section of the statute, this problem is rectified with a list of “Requirements for eligible surplus lines insurers:”

(a) No surplus lines licensee shall place any coverage with a nonadmitted insurer unless, at the time of placement, such nonadmitted insurer:

- (1) Is of good repute and financial integrity.
- (2) . . . (i) Has policyholder surplus equal to or greater than two times the minimum capital and surplus required to be fully licensed in this Commonwealth.

⁶ *Id.* at § 991.1602.

⁷ *Id.* at § 991.1604 (emphasis added).

* * *

(3) Has provided to the department a copy of its current annual financial statement certified by such insurer, such statement to be provided no more than thirty (30) days after the date required for filing an annual financial statement in its domiciliary jurisdiction and which is either:

(i) certified by the regulatory authority in the domicile of the insurer; or

(ii) certified by an accounting or auditing firm licensed in the jurisdiction of the insurer's domicile.

* * *

(b) In addition to meeting the requirements in subsection (a), a nonadmitted insurer shall be an eligible surplus lines insurer if it appears on the most recent list of eligible surplus lines insurers published by the department from time to time but at least semiannually. Nothing in this section shall require the department to place or maintain the name of any nonadmitted insurer on the list of eligible surplus lines insurers.⁸

When all of these sections are construed together, as they must be, the legislature's intent becomes clear.⁹ By satisfying the requirements of Section 1605, a nonadmitted insurer becomes generally eligible under the statute. Only after satisfying the additional criteria of Section 1604,

⁸ *Id.* at § 991.1605. The following regulations govern the Insurance Department's determination of whether a nonadmitted insurer should be placed on the list of eligible insurers:

(a) To be considered for placement on the most recent eligible surplus lines insurer list, a nonadmitted insurer shall meet the requirements of the act and this chapter. The nonadmitted insurer shall meet the following requirements:

(1) Currently licensed as an insurer in the state or country of its domicile for the kinds of insurance which it proposes to provide in this Commonwealth.

(2) Either engaged in doing the business of surplus lines insurance in one or more jurisdictions for at least 3 years immediately preceding the filing of an application to be an eligible surplus lines insurer; or an affiliate of an admitted insurer which has been so admitted for at least 3 years immediately preceding seeking approval to do business in this Commonwealth.

(b) In addition to the requirements in subsection (a), an alien insurer shall provide documentation evidencing its inclusion on the most recent quarterly listing of nonadmitted alien insurers which have met the criteria in the plan of operation adopted by the National Association of Insurance Commissioners International Insurers Department, or successor organization.

31 Pa. Code § 124.9.

⁹ "[I]n construing a statute, sections of the statute must be construed with reference to the entire statute and not alone. The court must determine legislative intent from the totality of a statute and render an interpretation which gives effect to all of its provisions." In re Interest of Jones, 286 Pa. Super. 574, 586, 429 A.2d 671, 677 (1981).

i.e., that the producing broker first conduct a diligent and unsuccessful search among admitted insurers, may a policy be procured from an otherwise eligible nonadmitted insurer in any particular case.

Once a nonadmitted insurer is found generally eligible under Section 1605, then the provisions of Section 1603, under which all persons involved in the procurement of a failed policy may be liable, do not apply. In this case, if Legion qualified as an eligible, nonadmitted insurer at the time the Policy was procured, then BMG and IPSI are not liable to the Insured under Section 1603. Nor are they liable under any other section of the statute because they did not act as either producing broker or surplus lines licensee with respect to the Policy.

Legion qualified as an eligible insurer and was included on the Insurance Department's list of eligible surplus lines insurers at the time the Policy was procured.¹⁰ Since Legion was an eligible insurer, as that term is used in the statute, there is no merit to the Insured's claim that BMG and IPSI are liable under Section 1603 for their involvement in procuring the Policy.

KDN also opposes the granting of summary judgment to BMG and IPSI on the Insured's claims. KDN argues that BMG and IPSI are somehow liable to the Insured for having transformed this insurance transaction from one governed by New Jersey law, with which KDN claims to have complied, to one governed by Pennsylvania law, which is where CWPG was licensed as a surplus lines licensee. Since Pennsylvania law is intended to protect and benefit the Insured, and it forms the basis for the Insured's claims in this action, the Insured was in no way harmed by any change in governing law. Instead, it appears that KDN was the only one "harmed" by having more onerous duties imposed upon it under Pennsylvania law. Any obligation that BMG or IPSI may have had to KDN to structure the transaction under New Jersey law cannot serve as the basis for a claim by the Insured against BMG and IPSI.

¹⁰ See Exhibits A-D of BMG's Response to the Insured's Motion for Summary Judgment.

CONCLUSION

For these reasons, BMG's Motion for Summary Judgment and IPSI's Cross-Motion for Summary Judgment are granted, and the Insured's claims against BMG and IPSI are dismissed.

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.