State of Vermont Agency of Natural Resources v. Stonington Ins. Co., et al., Docket No. 811-12-02 Wncv (Teachout, J., Aug. 2, 2007)

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STATE OF VERMONT
WASHINGTON COUNTY

State of Vermont Agency of Natural Resources,	)	
Plaintiff,	)	**Washington Superior Court**
	)	**Docket No. 811-12-02 Wncv**
v.	)	
	)	
Stonington Insurance Co., et al.,	)	
Defendants.	)	

DECISION
Summary Judgment Motions on State's Claims

This case arises out of a large petroleum release from underground storage tanks (USTs) serving the Go Go Gas gas station at the Springfield Shopping Plaza in Springfield, Vermont. In 1996, S.R. Young, Inc., at the State's direction, initiated an investigation and ensuing remediation of the site, which continues at present. Since 1997, the State has been reimbursing S.R. Young for related expenses through the petroleum cleanup fund (the Fund), 10 V.S.A. § 1941. Now, the State seeks reimbursement of these PCF expenditures in the amount of $572,565, pursuant to 10 V.S.A. § 1941(f), from three insurance companies that it claims provided applicable coverage: Stonington Insurance Company (Stonington), Northern Security Insurance Company (Northern Security), and Great American Assurance Company (Great American).[1]

At the time of the discovery of the petroleum release, the Springfield Shopping Plaza was owned by the Springfield Realty Corporation, which had a commercial general liability (CGL) policy with Northern Security. S.R. Young, Inc., held the permits for the USTs and had a CGL policy with Stonington. Springfield Realty and S.R. Young were closely related corporations owned and operated by members of the extended Young family. Bradford Oil Company, an unrelated corporation, leased and operated the gas station. Bradford Oil had a CGL policy with Stonington. Additionally, both S.R. Young and Bradford Oil had catastrophe liability policies with Great American providing certain excess and "drop-down" coverage. The State has filed claims against each of these insurers based on the above policies.

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[1] Stonington has been known at various times in the past as the Nobel Insurance Company and the Atlantic Casualty Fire Insurance Company. For ease of reference, the court will refer to these various corporate names exclusively as "Stonington."

In addition to the State's claims, Northern Security, as insurer of Springfield Realty, has filed a third-party claim against Bradford Oil for indemnity and contribution. Northern Security also has filed a third-party claim against Lawrence & Wheeler, its agent, for indemnification. Stonington and Bradford Oil have filed third-party claims against each other.

In this opinion, the court will address the issues of liability and damages on the State's claims under 10 V.S.A. § 1941(f) against the three insurers. These issues are raised in the summary judgment motions filed by the State, Stonington, Northern Security and Lawrence & Wheeler, and Great American. Any issues raised in these motions not relating to liability and damages on the State's claims, as well as other pending motions, will not be addressed at this time.

The issues affecting liability tend to differ from policy to policy. Damages and the State's entitlement to prejudgment interest as of right are common issues. The court will address damages and prejudgment interest after addressing liability.

I. The Northern Security/Springfield Realty Policy

The State seeks reimbursement from Northern Security based on a policy held by Springfield Realty that provides claims-made "pollution coverage" with a $1,000,000 limit in an endorsement to the commercial liability part. The State contends that Springfield Realty has liability for the pollution damage and that the policy provides coverage for that liability.

Northern Security has not disputed that Springfield Realty is a responsible party under 10 V.S.A. § 6615, but has argued that the State nevertheless lacks statutory authority to seek reimbursement to the Fund because its insured was not the owner, permittee, or operator of the USTs that caused the contamination.[2] Northern Security also argues that there is no coverage under the commercial liability part of the policy because coverage had to be triggered by a claim made against the insured during the policy period and was not, and exclusion 2(j), relating to governmental requests to remediate contaminated property, applies. Northern Security also argues that the limited pollution coverage available in the commercial property coverage part of the policy (as opposed to the commercial liability part) does not apply in the circumstances of this case.

A. Applicability of 10 V.S.A. § 1941(f)

Generally, disbursements from the Fund are available to compensate uninsured costs related to petroleum contamination of the soil and groundwater, as well as damage to third parties. 10 V.S.A. § 1941(b). The State "may seek reimbursement to the fund of cleanup expenditures only when the owner of the tank is in significant violation of his or her permit or rules, *or* when a required fee has not been paid for the tank from which the release occurred, *or*

[2] The State also claims that the underlying liability of Springfield Realty, as well as the other insureds relevant to this case, is evident under statutes other than 10 V.S.A. § 6615 as well as common law tort claims. Because the insurers essentially concede that their insureds are responsible parties under section 6615, the court does not need to resolve whether underlying liability has the other bases alleged by the State.

to the extent covered, when there is insurance coverage." 10 V.S.A. § 1941(f) (emphasis added). This subsection grants the State a direct right of action against an insurer providing relevant coverage. *ANR v. U.S. Fire Ins. Co.*, 173 Vt. 302, 307 (2002).

Northern Security essentially concedes that the release contaminated property (the land) owned by its insured that is covered generally by the policy, but argues that the State nevertheless lacks authority to seek reimbursement because subsection 1941(f) limits an action for reimbursement to the insurers of owners of the USTs that leaked. Northern Security claims that while its insured owned the land, it did not own or operate the USTs specifically. Therefore, concludes Northern Security, the State may not seek reimbursement under this policy.

The State disputes Northern Security's claim that Springfield Realty did not own the USTs causing the release, but argues that the fact is irrelevant because subsection 1941(f) is not limited in the fashion urged by Northern Security.

The plain language of 10 V.S.A. § 1941(f) suggests a broad interpretation. This subsection provides three separate bases for reimbursement, only the third of which is at issue. That clause stands on its own and allows the State to seek reimbursement to the extent of available coverage. The statute does not expressly confine such reimbursement claims to the insurers of UST owners, operators, or permittees, and nothing in the related statutes implies such a limitation. The primary purpose of the Fund is to facilitate the investigation and remediation of contaminated property when the funds needed to do so may not otherwise be available, not to benefit UST owners who failed to have adequate insurance in place. Hence, the Fund expressly compensates uninsured costs generally, not uninsured UST owners specifically.

The court concludes that subsection 1941(f) permits the State's reimbursement claim against Northern Security, to the extent that coverage is available, regardless of whether Springfield Realty was the owner, operator, or permittee of the relevant USTs. The issue under subsection 1941(f) is merely whether the coverage applies to the contaminated property, not the identity of the insured.

B. The Timeliness of the State's Claim

The Vermont pollution endorsement in the Northern Security policy is "claims-made" in the sense that coverage is limited to those claims made "during the policy period." Vermont Pollution Endorsement § A.1.b.(3). A claim is made "[w]hen notice of such claim is received and recorded by *any insured or by us*, whichever comes first." *Id.* § A.1.c.(1) (emphasis added). Northern Security argues that the State may have made its claim to S.R. Young, but never made the claim to Springfield Realty, its insured.

The Endorsement requires the claim to be made either to the insured or the insurer. There is no dispute that notice of the substance of the claim during the policy period was given to the person of Richard Young, a principal of both Springfield Realty and S.R. Young during the policy period, and that Richard Young in turn reported the claim to Lawrence & Wheeler, agent for Northern Security, by telephone during the policy period. Furthermore, there is no dispute that Lawrence & Wheeler denied the claim by letter, incorrectly indicating that the policy—the

Northern Security policy insuring Springfield Realty—did not provide pollution coverage. Regardless whether Richard Young thought he was acting in behalf of one corporation or the other in reporting the claim to Lawrence & Wheeler, the fact of notice is established affirmatively by Lawrence & Wheeler's denial letter. Northern Security cannot plausibly maintain that its agent expressly acknowledged a claim under a particular policy, denied that claim in writing, and yet was not given notice of the claim. This is sufficient notice under the policy.

Furthermore, Richard Young was a principal of both Springfield Realty and S.R. Young and the evidence does not establish that the Young family carefully kept the operations of the corporations separate as a practical matter. The record is clear, for instance, that the Young family generally considered that the gas station was an S.R. Young business, while the shopping center at which it was located was a Springfield Realty business. However, while S.R. Young paid to construct the gas station on the property of Springfield Realty, there was never any lease or other agreement between the two defining their relationship, and Springfield Realty apparently paid the property taxes for it. The gas station was listed as an insured building in Springfield Realty's commercial property insurance policy with Northern Security as well.

S.R. Young, representing itself as owner, eventually leased the gas station to Bradford Oil. However, included in the lease is some of the shopping center premises that was the property of Springfield Realty, which was not a named party to the lease. Additionally, there was a family practice at the time of accessing funds, when needed, from whichever corporation's accounts had the cash on hand at the time, regardless of which corporation actually needed the money. There apparently were annual reconciliations to some extent, but there is no clear evidence that the finances or legal obligations of the two corporations truly were kept distinct.

Richard Young's deposition testimony suggests that when the State approached him about the UST contamination, he did not approach Lawrence & Wheeler to report the claim as a representative of one corporation or the other, but as a member of the Young family responsible for the contamination problem identified by the State. Nothing in the record suggests that he, or any other member of the Young family, ever took any steps to clarify to the State that Richard Young, in dealing with the contamination problem, was representing S.R. Young and the gas station business exclusively.

In his affidavit, John Schmeltzer, project manager for the site, explains that the corporations appeared to him to be interchangeable and he essentially dealt directly with Richard Young as the responsible Young family member, not as the representative of one corporation rather than the other. This appears to be consistent with how the Young family treated the two corporations. To the extent that Northern Security argues that the State, in approaching Richard Young, made its claim to S.R. Young exclusively, the facts in the summary judgment record simply do not support that fact.

Under the policy, the claim is "made" when notice of it is provided to the insurer or the insured. Notice sufficient to trigger coverage was provided to both during the policy period.

C. Exclusion 2(j) of the Pollution Endorsement

Northern Security argues that an exclusion in the pollution endorsement, Pollution Endorsement § A(2)(j), applies in this case to bar coverage. This is the same 2(j) exclusion that the Vermont Supreme Court analyzed in *ANR v. U.S. Fire Ins. Co.*, 173 Vt. 302, 307–10 (2002). Excluded from pollution coverage is "[a]ny loss, cost or expense arising out of any governmental direction or request that you test for, monitor, clean up, remove, contain, treat, detoxify or neutralize pollutants."

The State and Northern Security urge different interpretations of this exclusion and its treatment in *U.S. Fire*. The court does not need to resolve this conflict, however, because even if the court assumes that Northern Security's interpretation is correct, the factual record nevertheless does not support the application of the exclusion.

Northern Security essentially argues that the exclusion operates to bar coverage where its insured acted only in a non-negligent manner with regard to third-party property damage from pollution. Northern Security claims that its insured has liability exclusively as a matter of strict liability pursuant to 10 V.S.A. § 6615 because it owns the shopping center and not anything related to the USTs. Northern Security has not come forward with evidence meaningfully supporting its allegation that Springfield Realty did not own the USTs or the gas station located on its premises, and even if it had, that mere fact would not be sufficient to support the inference that Springfield Realty has acted only in a non-negligent manner with regard to liability for third-party property damage.

The insurer has the burden of proving that an exclusion applies to bar coverage. *State v. CNA Ins. Cos.*, 172 Vt. 318, 330 (2001). Self-serving inferences drawn from a vague record are insufficient.

D. The Commercial Property Coverage Part

The State alleges in the complaint, as amended, that coverage is available under the commercial property coverage part of the Northern Security policy as well as the commercial liability part. Northern Security argues that coverage is not available under the commercial property part because, among other things, there has been no relevant "cause of loss" (such as fire, explosion, windstorm, etc.) to trigger coverage. The State has not responded to Northern Security's argument and appears to have waived any claim under this coverage part.

Conclusion

The court concludes that the State is entitled to summary judgment on the issue of Northern Security's liability for reimbursement to the Fund under the commercial liability part of the policy insuring Springfield Realty. Northern Security is entitled to summary judgment on the issue of liability under the commercial property part of that policy.

II. The Stonington/S.R. Young Policy

The State seeks reimbursement from Stonington based on a policy held by S.R. Young. The policy purports to exclude pollution coverage altogether. However, the State argues that the policy should be treated as including pollution coverage because the insurer did not obtain proper regulatory approval to issue a policy excluding pollution coverage.

Stonington argues that the pollution exclusion is valid despite the lack of compliance with filing and approval requirements and, therefore, the policy provides no coverage whatsoever for the property damage at issue. Stonington also argues that the State's claim is barred by the applicable statute of limitations. Stonington argues alternatively that it did not receive timely notice of the claim, and the "owned property" exclusion applies.

A. Pollution Coverage

This occurrence-based policy provides coverage for property damage with a limit of $1,000,000 per occurrence. However, the policy contains what the parties refer to as an "absolute pollution exclusion," meaning that there is no coverage for property damage resulting from pollution. See Policy § I.A.2.f. There is no dispute that Stonington never sought nor received regulatory approval for this exclusion as required by 8 V.S.A. § 4201. The issue now is what effect that violation has on the availability of pollution coverage in this case. The State argues that the unapproved exclusion should be replaced with the ISO Vermont pollution endorsement form actually approved for use at the time, or the exclusion simply should be considered void and deleted from the policy. Stonington argues that the violation should have no effect on the terms of the policy as between it and its insured. In the alternative, Stonington argues that the approved ISO Vermont pollution endorsement should apply.

A policy of liability insurance is required to be filed with the commissioner of the department of banking, insurance, securities, and healthcare administration (BISHCA) and "shall not be issued or delivered unless approved by him." 8 V.S.A. § 4201. "Such policy shall not be so issued or delivered if it contains a provision contradictory, in whole or in part, to any of *the provisions* of sections 4201–4203 and 4205–4209 of this title; nor shall any endorsements or attached papers vary, alter, extend, be used as a substitute for, or in any way conflict with *such provisions*." 8 V.S.A. § 4204 (emphasis added). An unapproved policy is, in the statutory parlance, "illegal."

The statute addressing how illegal policies should be construed provides:

> A policy issued in violation of *such provisions* shall be held valid, but shall be construed as provided in *such provisions*. When a provision in such policy is in conflict with *such provisions*, the rights, duties and obligations of the insurer, the policyholder and the beneficiary shall be governed by *such provisions*.

8 V.S.A. § 4208 (emphasis added). That is, a policy with an illegal exclusion generally will be treated as valid. However, the illegal exclusion nevertheless will be governed by "such provisions." As a matter of statutory interpretation, the court concludes that the expression "such provisions" in section 4208 refers to the same "such provisions" referred to in section 4204,

namely, those of sections 4201–4203 and 4205–4209. A policy complying with section 4201 necessarily will not have an unfiled and unapproved exclusion. The only way to treat a policy that does have an unfiled and unapproved exclusion as valid and as governed by section 4201 is to treat the unapproved exclusion as void.

Stonington never filed the absolute pollution exclusion with BISHCA and never received approval to issue it in a policy. The parties appear to agree that had Stonington done so, the Commissioner, based on the history of relevant interactions with ISO, may have been unlikely to approve it as written. In any event, under 8 V.S.A. § 4208, the policy remains valid, but the pollution exclusion must be treated as void.

Stonington argues that the reasoning in *Maska U.S., Inc. v. Kansa Gen. Ins. Co.*, 198 F.3d 74 (2d Cir. 1999), suggests that the exclusion should remain valid. The *Maska* panel concluded in dicta that the reference to "such provisions" in 8 V.S.A. § 4208 was "clearly" limited to the required conditions of section 4203 and thus a policy not complying with the "filing requirements" of 4201 is not subject to the construction rule at section 4208. See *Maska*, 198 F.3d at 78–80 (addressing this issue briefly in dicta after noting that it was not preserved for review). The panel then noted that the Vermont Supreme Court might conclude that an unapproved exclusion is valid. As set out above, this court disagrees with the *Maska* panel's interpretation of 8 V.S.A. § 4208. Additionally, the issue only arose in *Maska* because the insurer in that case was not an ISO member. Stonington was an ISO member at the relevant time.

Stonington argues in the alternative that the illegal pollution exclusion should be replaced with the ISO form Vermont pollution endorsement that was approved for use in Vermont under 8 V.S.A. § 4201. This argument finds some support in *Gerrish Corp. v. Universal Underwriters Ins. Co.*, 947 F.2d 1023 (2d Cir. 1991). In *Gerrish*, the policy issued to the insured excluded pollution coverage; it had regulatory approval in that form at the time of issuance in the sense that it had been approved previously and BISHCA had never withdrawn the approval. A few months before the insurer issued the Gerrish policy, however, ISO sought and received approval for a new endorsement form providing pollution coverage. The *Gerrish* panel reasoned that ISO was acting as agent for its members, including the insurer at issue, and therefore the newly approved form automatically was incorporated into the policy at issue in the case.

As it applies to this case, *Gerrish* is not persuasive for at least three reasons. First, the effect of the *Gerrish* panel's reasoning was to add pollution coverage to an otherwise apparently fully approved policy that did not have it previously. Those are not the facts of this case, where the policy contains an unapproved exclusion and importing the ISO endorsement would limit the coverage available in the approved portion of the policy. Second, the *Gerrish* panel did not explain why—and this court is not persuaded that—the mere approval of a form endorsement by the regulator necessarily means that the parties to any particular insurance contract intended that form to become a part of a specific contract. Regardless of ISO's role as agent of its member-insurers, only the specific insurer and insured are parties to their insurance contract. Most importantly, however, the *Gerrish* panel simply did not address 8 V.S.A. § 4208 at all.

The absolute pollution exclusion is void as unapproved under 8 V.S.A. §§ 4201, 4208.

The policy provides coverage for property damage resulting from pollution on an occurrence basis. The claims-made ISO form Vermont pollution endorsement is not a part of this policy.

B. Statute of Limitations

Stonington argues that the six-year statute of limitations at 10 V.S.A. § 8015(1) applies to this case and that the statute began to run on the date that the State first learned of the contamination at the site. The State argues that the six-year statute of limitations at 12 V.S.A. § 511 applies and that the statute began to run no earlier than the date that S.R. Young applied for reimbursement to the Fund.

The State's direct claim for reimbursement, 10 V.S.A. § 1941(f), allows it to stand in the shoes of the insured and seek coverage from the insurer. Section 1941(f) does not create a new cause of action per se; rather, it allows the State to pursue the cause of action that otherwise is available only to the insured. For purposes of determining how the limitations statutes apply, this case essentially presents the same circumstances as if the State first sued the insured, and the insured then sued the insurer for coverage.

The limitations period applicable to the underlying 10 V.S.A. § 6615 claim against the insured is that set out at 10 V.S.A. § 8015. In this case, there is no limitations issue with regard to this claim because S.R. Young accepted liability shortly after the State's cause of action against it possibly could have accrued.

The limitations period at 12 V.S.A. § 511 would have begun to run if Stonington had denied the coverage claim prior to being sued. The claim was never submitted to Stonington, however, until this lawsuit was filed in December 2002. The notice terms of the contract thus control whether the claim was made in a timely fashion, not section 511.

C. Timeliness of Notice under the Policy

Stonington argues that notice was not given in a timely fashion. In an occurrence policy the timeliness of notice generally is subject to the notice-prejudice rule. See *Cooperative Fire Ins. Ass'n v. White Caps, Inc.*, 166 Vt. 355, 362 (1997). Stonington argues that notice in this case came several years after its insured and the State were aware of the property damage at issue and most of the clean-up was complete, and this is, as a matter of law, prejudicial. The State argues that the delay in notice should be excused due to Stonington's misleading use of the void pollution exclusion and, in any event, the notice-prejudice rule requires the insurer to prove prejudice as a matter of fact and Stonington has not done so.

The issue of prejudice is predominantly a factual matter and Stonington has not come forward with evidence showing prejudice. Stonington claims that, with much of the clean-up complete at the time that the complaint was filed, it necessarily has been deprived of the abilities to limit damages generally by becoming involved in the clean-up and to prove its insured's proportional responsibility. It has not, however, come forward with any evidence supporting these arguments, and they are not obviously or necessarily correct. Its argument that the State

incurred unnecessary and excessive costs does not defeat the coverage obligation, but can be addressed at the hearing on damages as discussed below.

Notice was not untimely under the terms of the policy.

D. The Owned Property Exclusion

Stonington argues that at least some of the property damage in this case is excluded from coverage by the owned-property exclusion, which essentially limits coverage to third-party property damage. See Policy § I.A.2.j. Generally speaking, this is not a significant liability issue in this case. The predominant property damage in this case relates to the groundwater, which is third-party, not first-party, property damage. To the extent that first-party property damage may be involved in this case, this issue may be raised in the damages phase of this case.

Conclusion

The court concludes that the State is entitled to summary judgment on the issue of Stonington's liability for reimbursement to the Fund under the CGL policy insuring S.R. Young.

III. The Stonington/Bradford Oil Policy

Bradford Oil's policy with Stonington is substantially similar to S.R. Young's policy with Stonington, and the rulings in Part II above apply here to that extent. The statute of limitations issue differs, however, because Bradford Oil never accepted underlying liability for the pollution in this case and the State never brought any action against Stonington vis-à-vis Bradford Oil's policy until its first amended complaint, which was filed on March 24, 2004.

The limitations issue is whether the State satisfied the six-year limitations period at 10 V.S.A. § 8015 with regard to the underlying claim for liability against Bradford Oil. Under 10 V.S.A. § 8015 the limitations period begins to run when the State discovers the violation or when a continuing violation ceases, whichever comes later. "Violation" is defined as "noncompliance with one or more of the statutes specified in section 8003 of this title, or any related rules, permits, assurances, or orders." 10 V.S.A. § 8002(9). There is no dispute that the State had notice of the petroleum contamination prior to July 25, 1996, when the USTs were removed from the site. Stonington argues that the limitations period began to run on that date. The State argues that a violation continues as long as contamination requiring remediation remains, and that the limitations period still has not begun to run because the need for remediation continues to the present.

Liability under 10 V.S.A. § 6615 is contingent on, among other things, proof of a "release

or threatened release." 10 V.S.A. § 6615(c). Therefore, there is a continuing violation for purposes of 10 V.S.A. § 8015(2) so long as there is an ongoing release or threatened release for purposes of 10 V.S.A. § 6615. "Release" is defined as "any intentional or unintentional action or omission resulting in the spilling, leaking, pumping, pouring, emitting, emptying, dumping, or disposing of hazardous materials into the surface or groundwaters, or onto the lands in the state . . . ." 10 V.S.A. § 6602(17). In the circumstances of this case, there is a continuing violation for purposes of the applicable limitations period so long as spilling, leaking, emitting, etc., of petroleum, or the threat thereof, is present.

The removal of the leaking USTs alone does not prove that all relevant spilling and leaking, etc., immediately stopped. Stonington has the burden of proving its statute-of-limitations defense. See *ANR v. Towns*, 173 Vt. 552, 553 (2001). It has not come forward with evidence sufficient to prove that the State's underlying claim against Bradford Oil is barred by 10 V.S.A. § 8015.

Conclusion

The court concludes that the State is entitled to summary judgment on the issue of Stonington's liability for reimbursement to the Fund under the CGL policy insuring Bradford Oil.

IV. The Great American Policies

Both S.R. Young and Bradford Oil held policies with Great American providing coverage in excess of underlying $1,000,000 limits. Great American argues that there is no justiciable controversy with regard to these policies because there is no meaningful allegation that the underlying damages will reach $1,000,000. That is, there is no indication in the evidence that the amount of damages could reach an amount sufficient to trigger coverage under these policies. The State argues that judicial economy supports resolving this issue now, in case for some reason damages eventually do exceed $1,000,000.[3]

The court already has ruled that there is coverage from which reimbursement to the Fund is appropriate in the Northern Security policy insuring Springfield Realty and in the Stonington policies insuring S.R. Young and Bradford Oil. Currently, the damages alleged by the State are several hundred thousand dollars below the $1,000,000 limit of any one of these policies. Additionally, the State has not alleged that it has any reasonable expectation that damages will exceed $1,000,000.

In these circumstances, the court perceives no controversy sufficient to support the State's claims against Great American. "Declaratory relief is available only when there is an actual or justiciable underlying controversy; otherwise, 'a declaratory judgment is merely an advisory opinion which we lack the constitutional authority to render.'" *Hunters, Anglers and Trappers Ass'n of Vermont, Inc. v. Winooski Valley Park Dist.*, 2006 VT 82, ¶ 18 (quoting *Doria*

[3] The State also argued that there is "drop-down" coverage that would apply if Stonington is determined to have no liability in this case. The court need not resolve this issue because the court has ruled that Stonington has liability.

v. Univ. of Vt., 156 Vt. 114, 117 (1991)).

Great American is entitled to summary judgment on this issue.

V. Damages and Prejudgment Interest

The State argues that it is entitled to deference with regard to the reasonableness of disbursements from the Fund, and that Defendant-Insurers have the burden of proving that the disbursements were arbitrary or capricious. The State seeks summary judgment for damages in the specific amount of $572,565, arguing that Defendant-Insurers are unable to prove that the Fund's disbursements were arbitrary or capricious. Defendant-Insurers argue that the State should be required to prove its damages, and that the extent of damages is disputed as a matter of fact.

This case is not an appeal from an administrative decision for which the agency is entitled to deference. As this case relates to damages, it is an ordinary civil action between the State, in the shoes of the insureds, and the insurers. The State must prove its damages. The facts related to the extent and reasonableness of damages are genuinely disputed and summary judgment therefore is not appropriate.

Similarly, the State is not entitled to prejudgment interest as of right. Prejudgment interest as of right generally is available when damages are liquidated or readily ascertainable. *Bull v. Pinkham Eng'g Assoc.*, 170 Vt. 450, 463 (2000). The damages in this case are not liquidated or readily ascertainable. The amount of disbursements from the Fund is readily ascertainable, but to determine the amount of damages, the State must prove that those disbursements were reasonably incurred as a matter of fact. The reasonableness of the disbursements is seriously and genuinely disputed by Defendant-Insurers in a manner revealing that the actual amount of damages to which the State may be entitled is not readily ascertainable.

Summary

For the foregoing reasons:

a) summary judgment for liability is granted to the State on the issue of liability under 10 V.S.A. § 1941(f) with regard to the Northern Security policy insuring Springfield Realty, and the Stonington policies insuring S.R. Young and Bradford Oil;

b) summary judgment is granted to Great American on the issue of liability under 10 V.S.A. § 1941(f) to the State with regard to its policies insuring S.R. Young and Bradford Oil;

c) summary judgment is denied with regard to the State's claim for damages of $572,565;

and

d) summary judgment is granted to Northern Security and Stonington with regard to the State's entitlement to prejudgment interest as of right.

ORDER

As a consequence,

1) Great American's Motion for Summary Judgment is granted,

2) Bradford Oil's Motions for Summary Judgment remain pending,

3) All other Motions for Summary Judgment are denied (based on the denial as to damages), and

4) A status conference will be scheduled.

Dated at Montpelier, Vermont this 27th day of July 2007.

____
Mary Miles Teachout
Superior Court Judge