[J-48-2009][M.O. - Baer, J.]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

AMERICAN AND FOREIGN INSURANCE COMPANY, ROYAL INSURANCE CO. OF AMERICA, SAFEGUARD INSURANCE COMPANY AND ROYAL INDEMNITY COMPANY,	:	No. 88 MAP 2008
Appellants	:	Appeal from the Order of the Superior Court at No. 1098 MDA 2006 dated 5/5/08 reversing the Order of the Susquehanna County Court of Common Pleas, Civil Division, at No. 2001-939, dated 6/13/06
v.	:	ARGUED: May 13, 2009
JERRY'S SPORT CENTER, INC., JERRY'S SPORT CENTER NORTHEAST, INC., BONITZ BROTHERS, INC., OUTDOOR SPORTS HEADQUARTERS, INC., SIMMONS GUN SPECIALITIES, INC., NATIONAL ASSOC. FOR THE ADVANCEMENT OF COLORED PEOPLE, NATIONAL SPINAL CORD INJURY ASSOC., AMERICAN INTERNATIONAL INSURANCE COMPANY, DOE CORPORATION 1-15	:	
Appellees	:	

CONCURRING OPINION

MR. JUSTICE SAYLOR **DECIDED: August 17, 2010**

I join the majority opinion, subject only to a few modest differences in reasoning. In particular, I am not fully in accord with the majority's depiction of litigation risk assessments by insurers. See Majority Opinion, slip op. at 23-25. Additionally, I

question the majority's supposition that it would be unjust to provide a party restitution where it acts "in part to protect its own interest[s]." Id. at 30.[1] I also believe there is a better case to be made for the application of traditional contract-law principles to govern rights reservations (as contrasted with the bright-line rule implemented by the majority) than is developed by Appellants in their brief.

For instance, some courts have construed a reservation-of-rights letter as an implied-in-fact contract,[2] whereby a new agreement is created on the insurer's proposed terms if an insured fails to object to a reservation-of-rights notice and accepts the insurer's defense. See, e.g., United Nat'l Ins. Co. v. SST Fitness Corp., 309 F.3d 914, 919-21 (6th Cir. 2002). Moreover, at least one commentator has advocated for treating a reservation-of-rights letter as an interim settlement of an unliquidated claim, i.e., a claim subject to a good faith dispute, which would allow an insurer to obtain reimbursement of defense costs if, among other things, the insured acquiesces in, and accepts the benefits of, the insurer's performance after receiving a reservation-of-rights notice. The rationale is that, under legal principles governing offer and acceptance, an insured cannot accept the insurer's performance, while simultaneously rejecting a condition the insurer attached to it. See, e.g., Jerry, supra note 1, at 62, 69, 71-72. Furthermore, it reasons, at least to me, that a reservation-of-rights notice could be

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[1] See Robert H. Jerry, II, The Insurer's Right to Reimbursement of Defense Costs, 42 ARIZ. L. REV. 13, 55-56 (2000) ("[I]n any contractual relationship, a party performs its contractual duty not only to further its own interests, which is why the party entered into the contract in the first instance, but also to protect its own interests, given that nonperformance of contractual duties exposes the party to remedies for breach. Denying restitution whenever a purpose of a party's actions is to benefit the party's own interests emasculates restitution in all contractual contexts, given that some element of self-benefit always exists whenever a party undertakes to perform contract duties.").

[2] See BLACK'S LAW DICTIONARY 144 (3d pocket ed. 2006) (defining an "implied-in-fact contract" as "[a] contract that the parties presumably intended as their tacit understanding, as inferred from their conduct and other circumstances.").

viewed as an accord and satisfaction,[3] particularly where, as here, there appears to be a good-faith dispute as to policy coverage and the insured fails to reject the conditions set forth in the reservation-of-rights letter. See 16 SUMM. PA. JUR. 2D Commercial Law §8:4 (2010) (describing the general requirements for an accord and satisfaction, which include the same elements for a valid contract, and noting that an "accord and satisfaction may be implied from the circumstances"); id. §8:7 ("The compromise of a good-faith dispute over the respective rights of the parties or the terms of their agreement may constitute sufficient consideration for an accord and satisfaction.").

Ultimately, however, I support the majority's policy judgment that an insurer should be required to ground a reservation of rights in a specific policy provision. In this regard, the insurer is obviously in the most superior position to anticipate the possibility of a future reservation and to account for it at the time of policy issuance.[4] In addition, having already selected an insurer, the insured faced with a reservation-of-rights letter after the commencement of third-party litigation is at a disadvantage. In such circumstances, I believe there is too great a potential for the insured to simply capitulate to insurer demands in the hopes of avoiding losses. Cf. Shoshone First Bank v. Pac. Employers Ins. Co., 2 P.3d 510, 516 (Wyo. 2000). Although mechanisms may exist to

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[3] See RESTATEMENT (SECOND) OF CONTRACTS §281(1) (1981) ("An accord is a contract under which an obligee promises to accept a stated performance in satisfaction of the obligor's existing duty. Performance of the accord discharges the original duty.").

[4] See generally Tex. Ass'n of Counties County Gov't Risk Mgmt. Pool v. Matagorda County, 52 S.W.3d 128, 135-36 (Tex. 2000) ("Requiring the insurer, rather than the insured, to choose a course of action is appropriate because the insurer is in the business of analyzing and allocating risk and is in the best position to assess the viability of its coverage dispute. On balance, insurers are better positioned to handle this risk, either by drafting policies to specifically provide for reimbursement or by accounting for the possibility that they may occasionally pay uncovered claims in their rate structure.") (citations omitted).

curb or prevent coercive practices by insurers,[5] a policy-based approach facilitates advanced notice and informed decision making by insureds; mitigates against a loss of bargained-for benefits through an insured's inaction or silence; and may alleviate litigation costs associated with coverage disputes. See Excess Underwriters at Lloyd's, London v. Frank's Casing Crew & Rental Tools, Inc., 246 S.W.3d 42, 47 (Tex. 2008) ("The potentially protracted coverage/reimbursement litigation likely to follow would be at the insured's expense, even though the insured purchased insurance for the very purpose of hedging the risk and expense of future litigation.").

[5] For instance, the insured could presumably: reject the insurer's reservation-of-rights letter, thereby forcing the insurer to either refuse to defend the claim or continue to defend the insured under the terms of the policy until resolution of the declaratory judgment action, see, e.g., 44 AM. JUR. 2D Insurance §1416 (2010); treat the insurer's reservation-of-rights notice as a repudiation of the policy, thus entitling the insured to, inter alia, immediately seek remedies for breach of contract, see 13 Pa.C.S. §2610; and/or institute a bad faith action against the insurer, particularly where the insurer is attempting to discharge a claim that is not the subject of a good faith dispute through less than full performance. See 42 Pa.C.S. §8371.