Long v. Medical Mutual Ins. Co. of Maine, Docket No. 452-7-05 Wncv
(Teachout, J., June 19, 2007)

STATE OF VERMONT
WASHINGTON COUNTY

Raymond Long, M.D.,	)	
Plaintiff,	)	**Washington Superior Court**
	)	**Docket No. 452-7-05 Wncv**
v.	)	
	)	
Medical Mutual Ins. Co. of Maine,	)	
Defendant.	)	

DECISION
Defendant's Motion for Summary Judgment

Plaintiff-Insured Raymond Long, M.D., seeks in this case to be reimbursed for attorney fees incurred when he was represented by his attorney in two administrative disciplinary proceedings. He claims reimbursement based on the terms of an endorsement under his professional liability policy with Defendant-Insurer Medical Mutual Insurance Company of Maine. Insurer has filed a motion for summary judgment arguing that there is no coverage as the claims were untimely.[1] Insurer also argues that, in any event, by retaining his own counsel, Dr. Long violated the terms of the policy, relieving Insurer of any potential liability for coverage. Because the court concludes that Insurer properly denied Dr. Long's claims as untimely, it is not necessary to address the issue of his independent retention of counsel.

Dr. Long was insured from September 10, 2001 to September 10, 2005 under a series of one-year claims-made policies with Insurer. The policies are substantially similar, if not identical. The primary coverage was for professional liability claims. Also included was an endorsement entitled Physician Administrative Defense (PAD) Coverage Endorsement, which provided coverage for defense costs related to "administrative disciplinary proceedings." The policy numbers for years 1, 2, and 3 were 03365-01, 03365-02, and 03365-03; the policy number for the fourth year was 002836.

During the 4 year period, Dr. Long received notice of two administrative matters of the type covered under the PAD endorsement. The first was a "credentialing matter," of which he received notice on December 31, 2002, three months into year 2. Without notifying Insurer, Dr.

[1] Dr. Long initially argued that Insurer's summary judgment motion was premature because more discovery was needed. Additional discovery has since taken place, and the issue before the court is predominantly a legal one. The summary judgment motion is not premature.

Long retained Attorney McQuesten in December 2002 to represent him in the credentialing matter. He later received actual notice of a separate "Medical Board matter" on April 30, 2004, seven months into year 3. Attorney McQuesten also represented him in the Medical Board matter. The credentialing matter was resolved in April 2004, and the Medical Board matter was resolved as of March 22, 2005.

Dr. Long first notified Insurer in a letter dated March 22, 2005, during year 4, from Attorney McQuesten, in which he requested reimbursement for Dr. Long for the attorney fees incurred in the resolution of both matters. The claims for both matters were denied, and this case ensued. Insurer-Defendant has moved for summary judgment, claiming that there is no coverage for the claims under the PAD.

Insurer argues that Insured failed to comply with conditions precedent to coverage, namely to provide immediate notice to the Insurer during the policy year in which Insured received notice of each administrative matter. Insurer argues that the policy endorsement is "claims-made" in nature, and under a claims-made policy, coverage is for claims for which notice is given to both the insured and the insurer during the policy period, so that the lack of timely notice to Insurer during the year of notice to the Insured of each claim bars coverage. Dr. Long, citing *Cooperative Fire Ins. Ass'n v. White Caps, Inc.*, 166 Vt. 355 (1997), argues that failure to give immediate notice does not defeat coverage, and that late notice is sufficient notice unless the insurer is actually prejudiced by the delay. He argues that in this case there is no prejudice.[2] Insurer responds that the so-called "notice-prejudice" rule only applies to "occurrence" policies.

In *White Caps*, the Vermont Supreme Court adopted the general principle that an insured's notice of the claim to the insurer later than required by the policy generally will not operate to bar coverage absent proof by the insurer that the lateness prejudiced its ability to investigate and defend the claim. The Court reasoned that the policy provision requiring an insured to notify the insurer "immediately," even though stated as a condition precedent, does not operate to define whether coverage exists. The reasonable expectation of the insured under the contract terms was that coverage exists for occurrences as defined by coverage provisions; the purpose of the notice requirement is to facilitate the insurer's investigation and defense of the claim for the mutual benefit of the insurer and the insured. Thus, such a provision should not operate to bar coverage automatically. Coverage should be barred, concluded the Court, only if the lack of compliance with the notice provision prejudiced the insurer. The policy at issue in *White Caps* was identified generally as an "occurrence" policy. *Cooperative Fire Ins. Ass'n v. White Caps, Inc.*, 166 Vt. 355, 363 n.2 (1997). The Court specifically declined to address whether the notice-prejudice rule also would apply to a claims-made policy. *Id.*

In a typical occurrence policy, coverage is for insured events that occur during the policy period. The notice of the claim to the insured and the insurer need not take place during the policy period; the critical fact is whether the "occurrence" was during the policy period. "In the case of a 'claims-made' policy, however, notice itself constitutes the event that triggers coverage." *Matador Petroleum Corp. v. St. Paul Surplus Lines Ins. Co.*, 174 F.3d 653, 659 (5th Cir. 1999). Coverage is for claims for which notice is given during the policy period, even if the

[2] The factual issue of prejudice is outside the scope of Insurer's summary judgment motion.

events giving rise to it occurred earlier. Policy terms govern the nature of notice required, and may define notice as notice to the insured only, or notice to the insurer as well as the insured.

In this case, both the main policy for professional liability and the PAD Endorsement for defense costs for administrative matters were claims-made in nature in each of the four policy years. Page 1 of the main professional liability policy, after the Declarations page, starts with a paragraph under a heading of "Important Policy Information" that reads as follows:

> This is a non-assessable claims-made policy. Except to such extent as may otherwise be provided herein, the coverage of this policy is limited generally to liability for only those claims which arise from MEDICAL INCIDENTS occurring subsequent to the retroactive date stated on the Declarations Page and which are first made against the INSURED while the policy is in force.

The first significant paragraph under the "Physicians Administrative Defense Coverage Endorsement" (PAD) states as follows:

> The Company agrees with the NAMED INSURED, in consideration of the payment of premium and in reliance upon the statements in the Declarations and the Application, which are attached hereto and made a part hereof, and subject to the insuring agreements, definitions, exclusions and conditions of this endorsement, that the Company shall pay, on behalf of the INSURED, any DEFENSE COSTS and CONSULTATION EXPENSES incurred by the INSURED, which arise out of the defense of an INSURED EVENT instituted against the INSURED during the endorsement period referred to in Item 2 of the Declarations. . . .

For each of the four policy years, Item 2 of the Declarations page defines the endorsement period as the one year of the policy period, e.g., 9/10/03- 9/10/04. A proceeding is instituted against the insured when the insured first received notice of it. PAD Endorsement § II.A.

Thus, the credentialing matter potentially could have been covered under the year 2 policy, and the Medical Board matter potentially could have been covered under the year 3 policy. Notice was not given to the Insurer, however, until year 4. Insurer argues that coverage should be denied because under the "conditions" section of the endorsement, it is a "condition precedent to the protection afforded by this endorsement" that the Insured "shall immediately. . .advise the Company," and Insurer argues that this condition operates to define the scope of coverage.

Dr. Long argues that the PAD Endorsement can be interpreted reasonably to provide coverage so long as the administrative disciplinary proceeding arose after the "retroactive date" and the insured provides notice to the insurer "immediately," subject to the notice-prejudice rule. He argues that to the extent that the policy is ambiguous in these regards, it should be interpreted

in his favor. Section IV.I of the PAD Endorsement only excludes claims of which the insured "was aware prior to the inception date of this endorsement." Nothing in the PAD Endorsement or elsewhere in the policy defines "inception date." It is reasonable, suggests Dr. Long, for an insured to expect that the "inception date" is the "retroactive date" on the declarations page. The retroactive date on each of the successive policies is September 10, 2001.

Insurer's argument that a condition requiring notice to the insurer as a condition precedent to coverage operates to define the scope of coverage is the same argument that was rejected by the Court in *White Caps*, albeit with reference to an occurrence policy. 166 Vt. At 361. There is no question that in a claims-made policy, notice is more integral to coverage than in an occurrence policy.

Nonetheless, policy terms must be interpreted in a manner consistent with the nature of the agreement as expressed in the policy and in light of the reasonable expectations of the ordinary insurance consumer. *Id.* The court must interpret the policy according to its terms and the intent of the parties as expressed in its terms. Policy provisions should be read together and viewed as an integrated whole. *Waters v. The Concord Group Ins. Co.*, 169 Vt. 534, 536 (1999). Ambiguities are strictly construed against the insurer, which is in the better position to avoid the ambiguity. *ANR v. U.S. Fire Ins. Co.*, 173 Vt. 302, 308 (2001). However, the insurer should not be deprived of unambiguous provisions in a policy for its benefit. The proper focus is on the reasonable expectations of the parties, considering the policy in its entirety "with an eye toward its general purpose." *State Farm Mutual Automobile Insurance Co. v. Roberts*, 166 Vt 452, 460-61 (1997). An important question in this case is whether or not policy terms are clear that notice to the insurer is a requirement that affects scope of coverage.

The terms of the PAD are clear that for insured to be entitled to have defense costs covered for an administrative disciplinary matter, notice of the matter to the insured during the policy year was required. The question this case presents is whether it was clear that coverage required that during the same policy year the insured received notice, the insured was required to give notice *to the insurer* in order to receive the benefits of coverage. The conspicuous absence of any mention of the importance of notice to insurer in the introductory paragraphs quoted above from both the main liability policy and the PAD endorsement could create the impression that while notice to the insured is critical, notice to the insurer may not be. The analysis depends on what a reasonable insured, sitting down to review the terms of his or her policy, would understand about the relationship between the notice requirements set forth in the policy and coverage.

The type of insurance the consumer was purchasing provides context. The insurance purchased under the PAD was that when an insured physician was faced with an administrative disciplinary matter, he or she was entitled to be represented in the matter by an attorney provided by the insurance company. In this context, notice to the insurer serves to alert the insurer to the obligation to provide for defense counsel for a pending administrative matter. The insurer cannot provide a defense if the insured does not notify the insurer.

While the language of the PAD Endorsement is not as clear as it could be in stating prominently that notice to the insurer during the same policy year that the insured receives notice

of an administrative matter is a critical element to scope of coverage, nonetheless, the policy does specify that such notice must be immediate.

First, the introductory paragraph quoted above provides that the basic coverage agreement is "subject to the insuring agreements, definitions, exclusions and conditions of this endorsement." There are three provisions in the policy that serve to alert the insured that immediate notice is required for coverage of defense costs in administrative matters.

One is Exclusion I: "This endorsement does not apply. . .to any CLAIM based on an INSURED EVENT involving an INSURED, of which INSURED EVENT said INSURED was aware prior to the inception of this endorsement." The phrase "inception of this endorsement" could be either the first date of the policy period for the particular year, such as 9/10/03 for year 4, or it could be the first date the insurer began its series of yearly policies with the insurer, such as 9/10/01, which corresponds to the Retroactive Date on the Declarations Page. Support for the latter interpretation may be found in the fact that for the first three years, the policy number was the same, with an addition for pertinent year: 03365-01, 03365-02, and 03365-03. Because of the undefined ambiguous phrase "inception of this endorsement," this is Insurer's weakest basis for claiming no-coverage, and would not succeed on its own. Insurers have the burden to prove entitlement to exclusions, and ambiguities are resolved in favor of insureds. Insurer had the opportunity to be clear in drafting the policy. It would have been easy to substitute the phrase "inception of this endorsement" with "the endorsement period referred to in Item 2 of the Declarations." On its own, the exclusion as written would not entitle Insurer to summary judgment on its argument that policy terms support denial of coverage.

The second pertinent provision is the first Condition, which, as the introductory paragraph quoted above provides, is a condition of the coverage agreement: "The INSURED shall immediately, as a condition precedent to the protection afforded by this endorsement, advise the Company. . ." of formal notice of a matter, of knowledge that a proceeding is being contemplated or an investigation is being conducted, or of any incident or circumstance likely to give rise to a defined "insured event." While it is true that the language is similar to that in *White Caps*, the particular nature of the type of insurance must be considered in interpreting whether this condition is primary to scope of coverage, or supplementary to the parties' duties. In this case, the benefit for which insured was paying was that if there was going to be an administrative disciplinary proceeding against him, he was entitled to have a lawyer provided by the Insurer. The Insurer cannot provide one without receiving notice of the matter, and cannot become involved to provide the most effective representation possible, for which it is financially responsible, without having the earliest possible knowledge of the matter in order to have a chance to shape its development. This is reinforced in the second condition, "Duties of Insured," in which the insured is obligated to provide the insurer with both information and a certain level of involvement. Thus, notice is important to the actual benefit the insurer is obligated to provide for the insured, and to the insurer's opportunity to provide it efficiently and effectively. Thus there is a factual distinction between this type of insurance, and the type of insurance involved in *White Caps*.

Finally, under Condition G, the insured "agrees to be represented by ATTORNEYS. . .appointed or approved by the Company, within its sole discretion, as a prerequisite to coverage

under this endorsement. . . . If the INSURED should utilize or permit other ATTORNEYS, not assigned by the Company to intervene in the defense of said ADMINISTRATIVE DISCIPLINARY PROCEEDING without prior written consent of the Company, the Company shall immediately be relieved of any further responsibility to pay any legal fees associated with said proceeding." The bargain is that, having paid the premium for the endorsement, the insured is entitled to representation, but choice of lawyer is up to the Insurer, who can then choose someone it deems competent and able to do the work effectively and at reasonable cost within the framework of the premium structure. Again, for the terms of this arrangement to work, the Insurer needs to have immediate notice of the existence of the administrative matter.

A reasonable insured, having consulted the policy with reference to an impending administrative disciplinary matter, and seeking to determine the scope of coverage, and taking into account the four corners of the agreement, would be on clear notice that immediate notice to the Insurer was a prerequisite to coverage for defense costs. The policy does not entitle an insured to select his or her own lawyer without notice to and approval of the insurer, and then later send a bill for fees. Coverage requires the insured to provide immediate and contemporaneous notice to the insurer.

Dr. Long argues that failure to apply the notice-prejudice rule would be unjust, suggesting hypothetical circumstances in which, for instance, an insured might receive notice of an insured event on the last day of an endorsement period and make the claim to the insurer on the next day, after the end of the policy period. The implication is that an overly technical imposition of a deadline for notice in such a case would be unfair; thus, the notice-prejudice rule should apply generally in all claims-made policies. It is true that an overly technical imposition of a deadline under those circumstances could defeat the purpose of the bargain made in the insurance agreement, but in that event, if notice were found to be soon enough after the last day of the policy year to meet the standard of "immediate," a forfeiture could be avoided.

In any event, the facts of this case are not analogous to those hypothesized. Dr. Long notified Insurer of the credentialing claim a few years after the end of the endorsement period in which he received notice of it, and he notified Insurer of the Medical Board matter about six months after the end of the endorsement period in which he received notice of it, in both events, after the matters had been fully resolved by counsel of his own choosing. Dr. Long did not miss the opportunity for coverage merely by a few hours or days. Applying the notice-prejudice rule in these circumstances would give Dr. Long the benefit of an occurrence policy that he did not bargain for, and that is not consistent with the terms of his claims-made PAD endorsement.

ORDER

For the foregoing reasons, Insurer's motion for summary judgment is *granted*..

Dated at Montpelier, Vermont this __ day of July 2007.

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Mary Miles Teachout
Superior Court Judge