State of Vermont, Agency of Natural Res. v. OneBeacon Am. Ins. Co., No. 485-7-07 Wncv (Crawford, J., Nov. 5, 2009)

STATE OF VERMONT
COUNTY OF WASHINGTON

STATE OF VERMONT, AGENCY
OF NATURAL RESOURCES

v. WASHINGTON SUPERIOR COURT
DOCKET NO.: 485-7-07 Wncv

ONEBEACON AMERICA
INSURANCE CO.

DECISION ON DEFENDANT'S SECOND MOTION FOR SUMMARY JUDGMENT AND PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

This case concerns the State's claim for environmental cleanup costs incurred at a service station site in Lyndon, Vermont. It is brought against OneBeacon as insurer of the owner pursuant to 10 V.S.A. § 1941(f), which authorizes the Agency of Natural Resources ("ANR") to seek reimbursement to the Petroleum Cleanup Fund "to the extent covered, when there is insurance coverage."

Both parties have filed motions for summary judgment.[1] The essential facts are undisputed.

UNDISPUTED FACTS

I. The Contamination of the Site and the Cleanup Efforts

On June 16, 1998, petroleum contamination was discovered in soil and groundwater at the Lyndonville Texaco service station located at [redacted street address] in Lyndon, Vermont. The discovery occurred during the removal of three underground storage tanks. When the tanks were taken out of the ground, it was discovered that the tanks had developed holes and that gasoline or similar products had leaked into the

[1] OneBeacon's first motion for summary judgment was denied on 11/17/08. It concerned only the statute of limitations issue, specifically, whether this case is governed by 12 V.S.A. § 511 (6 years from the date of discovery) or 10 V.S.A. § 8015 (6 years from the date of discovery of the violation or 6 years from the date a continuing violation ceases). By decision dated 11/1/7/08, this court ruled that 10 V.S.A. § 8015 applies. In applying section 8015, the court ruled "[b]ecause ANR alleges that the violation is continuing, the motion for summary judgment is denied."

surrounding soil. Two tanks were removed entirely. A third was filled with cement and left in place.

The Texaco station was owned by C.N. Brown Company, a Maine corporation. C.N. Brown reported the contamination to ANR on June 29, 1998. C.N. Brown hired Environmental Compliance Services ("ECS") to investigate and design a plan for the cleanup and restoration of the site.

On January 28, 1999, ECS submitted a site investigation report documenting contamination at the site. The ECS report concludes that petroleum contamination was principally due to releases from the 3 underground tanks. OneBeacon denies that *all* of the contamination came from the 3 tanks but agrees that some portion of the contamination is fairly attributable to leaks in the 3 tanks.

On March 5, 1999, C.N. Brown made a payment of $10,000 for remediation at the site. Thereafter, the costs of remediation have been paid from the Petroleum Cleanup Fund. The PCF is a fund maintained by ANR at the State treasury for the purpose of paying cleanup costs associated with underground storage tanks. The fund holds fees collected from service station operators and other businesses which own and use underground tanks. Once an operator has paid the initial "deductible" amount of $10,000, the State is obligated to pay cleanup costs out of the PCF.

The 1999 report from ECS noted the presence of contamination along the route of a proposed water and sewer line project planned by the Village of Lyndonville. This contamination was attributed to the three tanks removed from the C.N. Brown service station. Beginning in July 1999, ANR disbursed funds from the PCF to pay for cleanup costs incurred by the municipality.

After additional investigation, ECS, C.N. Brown, and ANR entered into a Petroleum Cleanup Fund – Pay for Performance Agreement" on May 15, 2001. Since 2001, ANR has reimbursed C.N. Brown for the various stages of work described in the agreement. The total paid to date from the PCF is $575,908.85. The work is not complete. C.N. Brown takes issue with some of the claimed costs for reasons not relevant to the summary judgment issues. The disputes include claims that the contamination and resulting cleanup work were not solely attributable to the three tanks removed in 1998 and that the contamination may have come from other sources. OneBeacon also challenges the reasonableness of some of the cleanup measures.

II. Insurance Services Organization

Since 1980, OneBeacon (or its predecessor, Commercial Union Insurance Co.) has contracted with the Insurance Services Organization ("ISO") to file proposed insurance forms and make other required submissions to the Vermont Department of Banking and Insurance. At all times relevant, ISO has acted as agent for OneBeacon before the Vermont insurance regulator. ISO files proposed changes and endorsements

with the regulator (now the Vermont Department of Banking, Insurance, Securities and Health Care Authority ("BISHCA"), which accepts or rejects the proposed changes.

III. The Insurance Policy

OneBeacon's predecessor, Commercial Union Insurance Co., issued a commercial insurance policy (CMR 586864) to C.N. Brown for the period January 1, 1998 through January 1, 1999 (the "Policy"). The policy includes both first-party property protection for fire and other losses and third-party protection through a commercial general liability policy ("CGL").

The liability coverage was issued on CGL form CG 00 01 1093. This form contains a pollution exclusion which is expressed in language which excludes the current claim. The CGL form CG 00 01 1093 was approved for use in 1993 and thereafter by BISHCA.

The exclusion for pollution claims in the 1993 form provides:

2. Exclusions.

This insurance does not apply to: . . .

(f) Pollution

(1) "Bodily injury" or "property damage" arising out of the actual, alleged, or threatened discharge, dispersal, seepage, migration, release or escape of pollutants:

(a) At or from any premises, site or location which is or was at any time owned or occupied by, or rented or loaned to, any insured; . . .

(2) Any loss, cost or expense arising out of any:

(a) Request, demand or order that any insured or others test for, monitor, cleanup, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of pollutants; or

(b) Claim or suit by or on behalf of a governmental authority for damages because of testing for, monitoring, cleaning up, removing, containing, treating, detoxifying or neutralizing, or in any way responding to, or assessing the effects of pollutants.

Pollutants means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste.

In 1996, ISO filed revised policy provisions concerning pollution claims with the Vermont Department of Banking, Insurance and Securities. These included an *endorsement* entitled "Vermont Changes – Pollution" (CG 01 54 01 96) as well as changes to the pollution *exclusion* which still appeared in the main body of the CGL policy.[2] ISO filed these changes on behalf of many insurers for whom it acts. In the majority of cases, the changes carried a proposed effective date of March 1, 1996. Four companies, including Commercial Union, requested an effective date of June 1, 1996.

The "Vermont Changes – Pollution" endorsement provided for a limited amount of pollution coverage on a claims-made basis only. This limited protection had been a special feature of Vermont policies since 1984. Since it was provided on a "claims-made" basis, it applies only to claims made during the policy year. In this case, the State is not claiming coverage under the endorsement.

The policy exclusion for pollution in the CGL policy remained largely unchanged in the 1996 revision. There was one change: the accidental discharge of "fuels, lubricants or other operating fluids" from mobile equipment such as a truck is not excluded. This is not a change which affects the coverage applicable to this case. There is no claim in this case for contamination due to a discharge from mobile equipment. In all other respects, the pollution exclusion remained unchanged from the 1993 version. The language of the pollution exclusion in both the 1993 and the 1996 versions would—if approved by BISHCA and used by OneBeacon—exclude the types of claims made in this case.

When OneBeacon issued the Policy for the 1998 calendar year, it used the 1993 form. It did not use the 1996 form.

OneBeacon has relied upon the pollution exclusion as a basis for the denial of coverage under the terms of the Policy.

ANALYSIS

The central issue is whether OneBeacon properly excluded insurance coverage for the State's claim. The State contends that the exclusion is ineffective because OneBeacon used the 1993 CGL form to provide coverage in 1998. The State contends that because OneBeacon used an outdated form, it cannot rely upon the pollution exclusion contained in that form. OneBeacon argues, in the alternative, that the 1993 form was still approved and appropriate for use in 1998, and that since both the 1993 and

[2] The "give and take" between the pollution exclusion and the limited Vermont pollution endorsement is a long story which has been told elsewhere. *Gerrish Corp. v. Universal Underwriters Ins. Co*., 754 F.Supp. 358 (D.Vt. 1990), aff'd, 947 F.2d 1023 (2d Cir. 1991). Briefly, commencing in 1984, and as a result of negotiations between the insurance industry and the state regulators, Vermont commercial general liability policies contained the same exclusion present in this case as well as a "claims made" endorsement which provided "claims made" coverage with a specific aggregate limit. The 1996 CGL policy filed by ISO on behalf of Commercial Union and other insurers includes both the exclusion and the Vermont pollution endorsement. No "claims made" pollution endorsement is attached to the 1993 form issued to C.N. Brown in this case. It makes no difference to the outcome of this case because the State is not claiming coverage under that provision.

the 1996 forms excluded pollution coverage, there is no basis for creating coverage out of thin air.

PRIOR VERMONT DECISIONS

Coverage cases related to the pollution exclusion have been arising in Vermont for about two decades. The court will review these decisions in search of accepted principles.

1. *Gerrish Corp. v. Universal Underwriters Ins. Co*., 754 F.Supp. 358 (D.Vt. 1990), aff'd, 947 F.2d 1023 (2d Cir. 1991).

The two *Gerrish* cases stand as the *paterfamilias* of the pollution exclusion coverage cases. At the trial level, Judge Parker held that the submission of an ISO form containing the pollution endorsement modified the CGL form previously filed. ISO was held to be an agent of the insurer whose submissions could expand coverage to include the "claims made" pollution coverage. *Gerrish* is an example of a case in which the filing of amended policy provisions increased coverage for insurance customers. The Second Circuit affirmed this analysis, holding "[t]he contract of insurance formed between Gerrish and Universal, therefore, included the ISO pollution endorsement." *Gerrish*, 947 F.2d at 1029.

2. The Second Circuit returned to these issues in *Maska U.S., Inc. v. Kansa General Ins. Co*., 198 F.3d 74 (2d Cir. 1999). The court rejected the argument that the inclusion of an absolute pollution exclusion in violation of the requirements of the Department of Banking and Insurance voided the exclusion as against public policy. The reason was relatively narrow: the regulator's policy of refusing to approve policies containing a pollution exclusion had not been submitted to the APA rulemaking process and did not have the force of law. The claim that failure to submit the policy form to the regulator alone voided the exclusion was not preserved and therefore not reached on appeal. The court followed *Gerrish* in amending the coverage provided by an ISO member to comply with the ISO filings, specifically, the "claims made" pollution endorsement which had been omitted from the original policy.

3. The Vermont Supreme Court has not directly addressed the issue of the enforceability of a policy provision which violates the insurance regulations. In *Agency of Natural Resources v. Glens Falls Ins. Co*., 169 Vt. 426, 430 (1999), the Court noted that the trial court had ruled that the failure to file a pollution exclusion voided that provision of the policy. This issue was not appealed, however, and appears to have been accepted without question by the parties.[3]

[3] In *Agency of Natural Resources v. United States Fire Ins. Co*., 173 Vt. 302 (2002), the Court rejected the argument that language in the "Vermont Changes – Pollution" endorsement excluding cleanup expenses imposed by government mandate applied to costs originally paid by the PCF for which the State sought reimbursement. This is also a pollution coverage case, but it does not involve the use of policy provisions not approved by the insurance regulator.

4. There is at least one available coverage decision on point by a Vermont superior court—as it happens, the Washington Superior Court.

In *State of Vermont, Agency of Natural Resources v. Stonington Ins. Co*., No. 811-12-02 Wncv (Vt. Super. Ct. Aug. 2, 2007), available at http://www.vermontjudiciary.org/TCDecisionCvl/2007-9-7-2.pdf, Judge Teachout held that a pollution exclusion which had not been filed with and approved by the regulator was void. Her decision addresses the statutory requirement at 8 V.S.A. § 4201 that no liability policy issue without filing and approval by the regulator. The statute contains 8 sections containing various substantive requirements, including regulatory approval. 8 V.S.A. §§ 4201–4203 and 4205–4209. The decision interpreted 8 V.S.A. § 4204 ("illegal provisions") as rendering void an exclusion which issued in violation of the filing and approval requirement in section 4201.

The *Stonington* decision rejected the approach of the Second Circuit in *Gerrish* and *Maska* in which the court essentially reformed the insurance contract and incorporated the ISO terms on file with the regulator. These terms included the special Vermont pollution "claims made" *endorsement* which is by now all too familiar to the reader. Instead, the court excised the offending exclusion and enforced the full "occurrence" based coverage, which was more favorable to the insured and the State than that afforded by the "claims made" endorsement.[4]

INSURANCE COVERAGE IN THIS CASE

The parties agree on all facts necessary for a decision on the coverage issue. These are:

1. In 1993, BISHCA approved the policy language later used by OneBeacon when it issued the Policy for the 1998 policy year. The apparent omission of the "Vermont Changes – Pollution" endorsement from the Policy changes nothing because the State is not claiming coverage under that provision.

2. In 1996, ISO—on behalf of OneBeacon and other insurers—amended the terms of the pollution exclusion in a minor way not relevant to this claim. The change related only to "mobile equipment." Otherwise, the pollution exclusion continued in effect—modified, of course, by the special Vermont endorsement.

3. In 1998, OneBeacon issued the Policy on the 1993 rather than the 1996 version of the CGL form.

[4] This tour of decisions relating to the pollution exclusion must also include *Hardwick Recycling & Salvage v. Acadia Ins. Co*., 177 Vt. 421 (2004) (cleanup costs are "damages" within the meaning of the CGL policy); *State v. CNA Ins. Co*., 172 Vt. 318 (2001) (insurer bears the burden of proof on whether environmental harm is the result of an "occurrence"). See also *Vt. Gas Systems v U.S.F.&G. Co*., 805 F.Supp. 227 (D.Vt. 1991) and *Village of Morrisville v. U.S.F. & G. Co.,* 775 F.Supp. 718 (D.Vt. 1991).

There are several possible responses to the problem posed by these events. One is to adopt the "agency" reasoning which appears in the *Gerrish* and *Maska* decisions. Under these principles, ISO is authorized to act as agent on behalf of OneBeacon. An ISO filing corrects and supplements any unapproved policy language. The ISO filing in 1996 would correct the later use of the 1993 policy form. The insured would receive the benefit of the additional coverage for "mobile equipment" even though that coverage was not provided in the 1993 form.

Another response is to adopt ANR's position and sanction OneBeacon for issuing a policy in a form no longer approved by BISHCA. Under this theory, the pollution exclusion would be excised from the policy because it did not contain the language adopted in 1996 which provides for "mobile equipment" coverage.

A third response would be to void the policy altogether since an earlier version of the CGL form—no longer approved for use—was employed by the carrier. The premium would be returned and C.N. Brown would be without liability insurance for the 1998 calendar year. Neither party supports this remedy.

A fourth response would be to conclude that the regulator's approval process permits the carrier to use either a current form or any past form which has not been specifically disapproved by the regulator. This is the position supported by OneBeacon. The court rejects this proposition as contrary to the purpose of the ISO filing process. Once made, a change to policy language remains in place until it is changed or withdrawn. This process is addressed in Rule 7 of the BISHCA regulations for the filing of rates and policy forms.[5] This regulation, in place since 1986, reads in relevant part, "[a]ll revisions and modifications . . . shall apply indefinitely . . . until it is replaced or withdrawn." The court interprets the regulation's requirement that a change "shall apply indefinitely" to mean that the new language replaces the previous form. The process of amendment and approval of new language leaves only one current version in place for use; it does not allow for the accumulation of years of conflicting policy forms.

A fifth response would be to note with concern the apparent violation of the regulatory process but to conclude that the remedy sought—the removal of an exclusion which had been previously approved for use in a form almost identical to that used in the Policy—is an unjustified response which is neither authorized by statute nor

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[5] Rule 7 provides: **Reference adoption(s) of rates, and supplementary rate information of an advisory or service organization, or other insurer**
In lieu of filing independent rates or supplementary rate information an insurer may adopt, with or without deviation or modification, rates and supplementary rate information of an advisory or service organization with which it is affiliated, or of another insurer. All revisions and modifications must be readily identifiable and shall apply indefinitely, unless there is a pre-established termination date specified in the insurer's filing; or until it is replaced or withdrawn. If the filing is a subject of Prefiling, Prior Approval, or File and Use, the filer shall support its submission with a statistical exhibit(s) and/or a full and complete explanation of the deviation from, or modification to, the rates and supplementary rate information being adopted.

commensurate with the wrong. This is the approach which this court will adopt for the following reasons.

This is not the first time an insurer has made use of an unauthorized form. Nor is it the first time that, as a consequence, an insured—or a governmental agency—has sought to strike an exclusion from a policy. The majority position taken by courts around the United States is that the use of an unauthorized form does not permit the court to rewrite the insurance contract by voiding exclusions or other policy language.

For example, in *F.D.I.C. v. American Casualty Co*., 975 F.2d 677 (10th Cir. 1992), the court concluded that the provisions of a state insurance statute which requires approval by the regulator in the same manner as Vermont's law did not require the court to strike an unapproved exclusion in a director's and officer's liability policy.

> [W]e do not believe that the Oklahoma legislature intended that otherwise lawful exclusions be voided simply for failure to comply with section 3610. Voidance of exclusion to an insurance policy is a severe penalty which alters the very terms of the deal between the parties. It requires the insurer to provide coverage for uncontracted risk, coverage for which the insured has not paid.

Id. at 683; see also *Great Lakes Container Corp. v. National Union Fire Ins. Co*., 727 F.2d 30 (1st Cir. 1984) (pollution exclusion not void in unapproved policy because no APA rulemaking adopted such a remedy; different result might be required if insurer made an unapproved change reducing coverage in a previously approved policy); *Roland v. Transamerica Life Ins. Co.*, 570 F.Supp.2d 871, 880 (N.D.Tex. 2008) ("Absent financial damage to [insured] as a result of [insurer's] use of an unapproved form, such use offers [insured] no cause of action."); *Penn America Ins. Co. v. Miller*, 492 S.E.2d 571 (Ga. Ct. App. 1998) (unapproved exclusion valid absent "clear evidence showing the Commissioner would not have approved" it); *Progressive Mutual Ins. Co. v. Taylor*, 193 N.W.2d 54 (Mich. Ct. App. 1972) (unapproved exclusion voidable, not void); *Cage v. Litchfield Mutual Ins. Co*., 713 A.2d 281 (Ct. Super. Ct. 1997) (collecting cases, and explaining that "the imposition of a monetary fine or a penalty other than voidance is sufficient to protect the efficacy" of the regulatory requirement of filing and approval).

A minority of states has adopted ANR's position. In *Hawkins Chemical, Inc. v. Westchester Fire Ins. Co*., 159 F.3d 348 (8th Cir. 1998), the Eighth Circuit followed Minnesota law to void a total pollution exclusion which lacked an exception required by the regulator for "hostile fire." Other courts have voided unapproved exclusions. See, e.g., *Aetna Ins. Co. v. Word*, 611 So.2d 266, 268 (Ala. 1992); *American Mutual Fire Ins. Co. v. Illingworth*, 213 So.2d 747 (Fla. Dist. Ct. App. 1968). Similarly, the Washington Court of Appeals has ruled that a provision limiting coverage that was specifically disapproved by the insurance commissioner is unenforceable, regardless whether it complied with Washington law otherwise. *Credit General Ins. Co. v. Zewdo*, 919 P.2d 93, 99 (Wash. Ct. App. 1996).

There are important exceptions to the majority position. A policy which fails to comply with statutory requirements concerning the mandatory scope and nature of the coverage will be revised to meet these requirements. See *Feeley v. Allstate Insurance Co.,* 178 Vt. 642 (2005) (voiding a policy exclusion not permitted by the UM/UIM statute, 23 V.S.A. § 941).

A policy which fails to comply with regulatory requirements may also be subject to revision. "Illegal policies" are governed by 10 V.S.A. § 4208. Illegal policies are policies issued without filing and approval by the regulator. See 10 V.S.A. § 4204. Section 4208 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.

In other words, a policy will be construed in such a way that it remains in force (valid) and complies with statutes or regulations which set specific requirements for the coverage. The insurance regulator is also not without teeth in the case of an "illegal" policy. For "willful" violations, 8 V.S.A. § 4209 authorizes a nominal administrative penalty and, more significantly, the revocation of the license to operate in the Vermont insurance market.

In considering the problem presented by the use of an outdated policy form, the court is also guided by general principles of insurance contract construction.

> In construing an insurance policy, we read disputed terms according to their plain, ordinary, and popular meaning. Because a policy is prepared by the insurer with little effective input from the insured, we construe insurance policies in favor of the insured, in accordance with the insured's reasonable expectations for coverage based on the policy language.

Hardwick Recycling & Salvage, Inc. v. Acadia Ins. Co., 177 Vt. 421, 431 (2004) (citations omitted). This common law rule of interpretation is consistent with the rule of construction provided by 10 V.S.A. § 4208. It anticipates that a certain amount of common sense will be brought to bear by the court and that in doubtful cases, the insured will be favored.

In applying these general principles to the particular problem, several points become immediately evident. The language of the pollution exclusion is unambiguous. Both the 1993 and the 1996 policy forms exclude the type of claim brought in this case. The parties' expectations, especially the expectations of the insured, must be defined within the scope of unambiguous contract language. There is no indication in the Policy or in the other materials submitted by the parties that the insured ever harbored an expectation that the pollution claim would be covered. To the extent that there is

evidence, it is to the contrary. The correspondence between OneBeacon and C.N. Brown indicates that C.N. Brown expected to pay the first $10,000 in cleanup costs before tendering the rest of the work to the PCF. See Cover Letter of Fax from C.N. Brown to Pike Conway Dahl, dated Nov. 16, 1998 ("There will be no claim submitted for this clean-up. Our goal is to satisfy the deductible for the State of Vermont Clean-up fund.").

The language of the Policy which operates to exclude the pollution claim was approved for use by the regulator in 1993 and in 1996. In applying 10 V.S.A. § 4208, the court is required to construe the policy as required by "such provisions," namely the statutes and supporting regulations which guide the work of the insurance department. Enforcing policy language which the department has previously approved on two occasions is consistent with this statutory goal. The result would be very different if the "illegal policy"—the one which issued on a form no longer sanctioned by the department—provided *less* coverage than that provided in the approved form. In that case, section 4208 would support a construction which would provide at least as much coverage for the insured as the approved form.

In this case, the insurer's failure to include a revised policy provision which adds "mobile equipment" coverage is irrelevant to the parties' dispute. No one contends that the omission of coverage for "mobile equipment" limited the claims in this case. No claim is made for pollution due to a leaky truck or bulldozer. No one contends that the substance of the 1993 policy violates public policy or the requirements of BISHCA in any other manner. Both versions of the CGL policy, including the pollution exclusion, were filed and accepted for use during their respective periods. Finally, there is no evidence that the insured was denied coverage for pollution which it had any reason to anticipate it would receive. Setting aside the minor and irrelevant issue of "mobile equipment" coverage, C.N. Brown received the same coverage under the 1993 version of the policy which it would have received if the correct 1996 version had been used.

To strike an exclusion only because it issued on an out-of-date form no longer approved for use by the regulator is a remedy greatly disproportionate to the insurer's offense. Such a remedy is not authorized by statute or by the BISHCA regulations. Existing case law as well as 10 V.S.A. § 1048 authorizes at most the revision of a policy so that the insured receives the benefit of the correct form, including any expansion in coverage or other more favorable provision. In this case, the change between the 1993 and 1996 versions of the pollution exclusion added no coverage and made no other changes which are relevant to the insured's claim. The court will not strike the pollution exclusion to create coverage where none would have existed if the insurer had used the correct 1996 version of the form.

In short, the court concludes that the pollution exclusion is enforceable and excludes coverage from OneBeacon for the State's claim. There is no reason to reach the remaining legal issues because the absence of insurance coverage defeats the State's claim for reimbursement from OneBeacon.

CONCLUSION

For these reasons, the court grants Defendant's second motion for summary judgment and denies Plaintiff's motion for summary judgment. The court has issued a judgment order in favor of the Defendant.

Dated:

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Geoffrey Crawford,
Superior Court Judge