PANTROPIC POWER PRODUCTS v. FIREMAN'S FUND

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ORDER

THIS CAUSE came before the Court upon Defendant's Motion for SummaryFinal Judgment (DE #21), and Plaintiff Pantropic's Cross-Motion forSummary Judgment (DE #33).[1] Upon considerationof the Motions, responses, and the pertinent portions of the record, thefollowing Order is entered.

BACKGROUND

Plaintiff brings this action for declaratory relief against itsinsurance provider. Plaintiff purchased an Employment-Related PracticesLiability Insurance Policy ("EPLI") from Fireman's Fund on June 24,1998.[2] The policy provided for the payment of damages and the defenseof claims arising from wrongful employment practices on or after theretroactive date of July 1, 1993. This was a "claims-made" policy, whichlimited coverage to claims first made against the insured during thepolicy period and reported to the insurer "as soon as practicable afterthe claim is made (but in no event more than 60 days following the end ofthe policy period)."[3] Pursuant to the policy terms, a claim is "firstmade" against the insured when "the insured receives written notice fromthe claimant . . . alleging that the insured has committed a wrongfulemployment practice;" claims arising from "the same wrongful employmentpractice or series of similar or related wrongful employment practices"are deemed to be a single claim for the purpose of notice provision.[4]The "policy period" is defined as the period the "policy is in effectfrom the inception date showing the Declarations."[5] The First Policyhad an inception date of July 1, 1998; Plaintiff renewed its coverage andentered a second policy, which had an inception date of July 1, 1999.

On November 12, 1998, David Flores, an employee of Pantropic, filed anadministrative charge of sexual harassment against Pantropic. Followingan investigation, the Florida Commission on Human Rights issued aDismissal and Notice of Rights, and Flores filed a civil complaintagainst Pantropic on September 3, 1999. The Complaint accused Pantropicof retaliation and negligent retention in addition to the priorallegations of sexual harassment raised in his administrative charge.Pantropic reported the Flores suit to Fireman's Fund on September 17,1999. After an investigation of the claim, Defendant denied coveragebased on the insured's failure to report the claim within sixty days ofthe expiration of the policy period in which the claim was first made.The present declaratory action ensued. Plaintiff asserts entitlment tocoverage and a defense to the Flores suit, and avers that Defendant wasnot prejudiced by untimely notice of the claim. Plaintiff further seeksan award of attorney's fees.

The parties agree that the dispute may be resolved as a matter of lawbased on the record;[6] accordingly, each side has moved for summaryjudgment. Defendant asserts that the Flores claim was first made againstthe insured on November 12, 1998, when Flores filed his administrativecharge, and as such, the claim would onlybe covered if it was reportedto the insurer within sixty days of the end of the policy period. BecausePlaintiff first reported the claim on September 17, 1999 — sixteendays too late — the claim is not covered. Plaintiff contends that,because two of the claims, for retaliation and negligent retention, werefirst made in September of 1999 and promptly reported within the samepolicy period, these claims are covered; accordingly, Defendant must atleast provide a defense for the entire Complaint.[7] Plaintiff furtheravers that Defendant was not prejudiced by the untimely notice of thecomplaint; impliedly, Plaintiff concludes therefrom that Fireman's Fundwas obligated to defend against the Flores suit.

DISCUSSION

Claims-Made Policies

The Court must construe the disputed policies in a manner consistentwith the purpose of claims-made policies and which preserves theirprimary benefits to the parties. See, e.g., City of Harrisburg v.International Surplus Lines, Ins. Co., 596 F. Supp. 954, 961 (M.D.Pa.1984). With a claims-made insurance policy, the insurer undertakes a morelimited risk than an insurer who issues an occurrences policy; insurerstypically charge higher premiums for occurrence policies to compensatefor their exposure to indefinite future liability. See, e.g., NationalUnion Fire Ins. Co. of Pittsburgh v. Baker & McKenzie, 997 F.2d 305, 306(7th Cir. 1993). Occurrence policies cover acts which occur in the lifeof the policy, irrespective of when the claims are asserted against theinsured. In comparison, a claims-made policy only protects the insuredagainst claims made and reported during the policy period. See St. PaulFire & Marine Ins. Co. v. Barry, 438 U.S. 531, 565 n. 3(1978). Inessence, coverage is "triggered" by the insured's discovery of a claimand the provision of notice to the insurer within the policy term. SeeUnited States Fire Ins. Co. v. Fleekop, 682 So.2d 620, 622 (Fla. Dist.Ct. App. 1996). "[I]f the claim is not reported during the policyperiod, no liability attaches." Gulf Ins. Co. v. Dolan, Fertig & Curtis,433 So.2d 512, 515 (Fla. 1983) (cited in United Nat'l Ins. Co. v.Jacobs, 754 F. Supp. 865, 868-69 (M.D.Fla. 1990)).

Plaintiff seeks a declaration that Defendant was not prejudiced by thelate notice, if in fact notice was untimely. Plaintiff thus advancesapplicability of the "notice-prejudice" rule to this claims-made policy,and avers that it would be impossible for this Court to "guess" how theFlorida Supreme Court would rule on this issue. However, the supremecourt has rejected applicability of the rule to claims-made policies,observing that any extension of the reporting period would "negate[] theinherent difference between the two contract types."[8] See Gulf Ins.Co., 433 So.2d at 515. Florida law thus clearly counsels that the Courtmay not impose such an extension, as it would in effect expand the scopeof coverage, and permit the insured to enjoy a benefit for which he hasnot given consideration. The Court'spresent inquiry is thus limited towhether the first policy period ended

before Pantropic reported the claimon September 17, 1999; or whether, as Plaintiff avers, the policy periodwas continued by Plaintiff's renewal of coverage under the SecondPolicy.

The parties dispute whether the first and second policies were discreteand separate contracts, or whether the renewal policy continued theoriginal coverage as one policy.[9] Plaintiff contends that "manycourts regard the renewed or renewal contract as though it were merely acontinuation or extension of the original contract."[10] Plaintiff didnot provide support or examples of such courts; regardless, Plaintiff'sassertion does not bear on the ultimate question of whether renewalextended the Policy Period and thus expanded the scope of coverage. Thecontract clearly contemplates that each policy runs for a separate andfinite period, running from the date of inception to the date ofexpiration. This is evidenced on the declaration page, which identifiesan inception date of July 1, 1998, and an expiration date one year lateron July 1, 1999. Further, coverage limits are defined with respect toeach Policy Period: "The limits apply separately to each consecutiveannual policy period."[11] Plaintiffs argument is directly contradictedby the unambiguous contractual language.

Plaintiffs characterization of the second policy as a renewal is of nolegal import. The Court surmises that Plaintiff raises this argument tosupport its contention that Pantropic bargained for and receivedcontinuous, uninterrupted coverage.[12] Plaintiff urges the Court notto interpret the policy in a manner that permits gaps in coverage, as itwas clearly Pantropic's intention to maintain continuous coveragethroughout the two policy periods. Unmistakably, the two policies didprovide for continuous coverage, so that claims raised between July 1,1998 and July 1, 2000, would be covered, provided that Pantropic timelynotified the carrier of the claim. The policy unambiguously limits theinsurer's exposure to those claims reported "as soon as practicable . . .but in no event more than 60 days following the end of the policyperiod." The Flores claim did not fall into cracks between the twopolicies, nor was the coverage illusory. Had Pantropic reported the claimduring the policy period in which it was asserted against Pantropic,Defendant would have been obligated to defend the claim.

As a last resort, Plaintiff invokes the specter of ambiguity, allegingthat the policy is unclear as to when the insured must purchase anextended reporting period to maintain coverage. Plaintiff argues that anambiguity is created in the policy by its inclusion of "nonrenewal" asone of the circumstances requiring the purchase of an extended reportingperiod to maintain coverage, where the contract is silent on the effect ofrenewal on the insured's maintenance of coverage. Plaintiff draws supportfrom Helberg v. National Union Fire Insurance Co., 657 N.E.2d 832(Ohio Ct. App. 1995), wherein the court found conflicting policy language,which created an ambiguity that was accordingly construed in favor of theinsured. The policy contained language under the Exclusion Sectioncontemplating a single policy period, which the insured couldcontinuously renew. The effect of that section was to exclude coverage ofany claim about which the insured knew before the effective date of thefirst policy issued. The Helberg court could not reconcile this sectionwith the notice provision of the contract, which limited coverage toclaims made and reported during the policy period. See id. at 834. Nosuch conflict exists in the policy under consideration, and the Helbergholding is inapplicable to the present dispute.[13] Plaintiff's attemptto create ambiguity where none exists is unavailing.

Retaliation and Negligent Retention

Having determined that the claims asserted by Flores in hisadministrative charge were not covered by the First Policy, the Courtnext considers whether the two additional allegations asserted in thecivil suit were covered by the renewal Policy; if so, Defendant wasobligated to defend Plaintiff against not only these two claims, but theentire suit. Plaintiff asserts that the two additional claims were firstmade on September 3, 1999, upon the filing of Flores's civil compliant,and timely reported days later. Plaintiff further argues that theadditional claims by their definition could not have come into existenceuntil after Flores filed the administrative charge; thus, Plaintiffconcludes, the additional claims could not have been previously assertedagainst Pantropic. Defendant argues that the claims arose from the samewrongful practice, or series or related wrongful employment practice, andare accordingly deemed to be a single claim, which was first made whenFlores filed his administrative charge. Plaintiff devotes none of itsdiscussion to the issue of whether the wrongful employment practicesalleged in the additional claims are related to those employmentpractices previously alleged, such that the aggregate of claims "will bedeemed to be a single claim" as proscribed in the policy.

The relatedness of the claims must be considered in the context of thetype of insurance at issue. Plaintiff characterizes Employment RelatedPractices Liability Insurance Policies ("EPLI") as "a recent creation ofthe insurance industry designed to meet the shortcomings in standardliability policies for employment practice claims such as, inter alia,workplace discrimination, wrongful termination, and sexual harassmentclaims."[14] The Court is further guided by the import placed on promptnotice of potential claims, which allows the insurer to anticipate theextent of its exposure and plan for the defense of such claims. Theprudent insurer, when setting aside resources for the defense of awrongful employment practice suit, must anticipate that a claimant willraise all possible claims. In this context, relatedness is broadlyconstrued, such that claims that are causally connected, or which arisefrom similar factual circumstances, are "related" for purposes of theprovision of notice. See Paradigm Ins. Co. v. P&C Ins. Sys., Inc.,747 So.2d 1040, 1042 (Dist. Ct. App. Fla. 2000) (drawing support fromanalyses applied by various courts in determining that two separate actsof negligence were "related" for purpose of notice provision). Thefactual circumstances giving rise to the Flores allegations sharetemporal proximity and involve the same individuals. Also, the allegedacts of retaliation and negligence occurred not in a vacuum but as aconsequence of the prior acts of harassment. The Court concludes that thefactual circumstances alleged are sufficiently related for purposes ofthe notice provision of the policy.

Nor is it obvious, as Plaintiff insists, that the additional claims didnot come into existence until after Flores filed his administrativecharge. Plaintiff argues that, because these claims stem from the filingof the administrative charge, Defendant has demanded the impossible byexpecting notice of this claim before it even happened. The FloresComplaint clearly alleges that he made repeated internal complaints tohis employer before seeking agency intervention. In his administrativecharge, Flores alleged that he had been subject to harassment for almostseven months preceding his

complaint; that he "objected to the harassmentin excess of twenty times;" and that the employer failed to takecorrective action. Additionally, the Complaint alleges that "Flores andothers complained about Diaz, Dana and Willis' sexual harassment of himto managers and to the human resources department, and Flores filed acharge of discrimination with EEOC alleging that he was harassed."[15]Flores alleges that Pantropic retaliated against him not only for filingthe administrative charge but also for making an internal complaint. Anemployee's participation in his employer's internal investigation isprotected activity under the opposition clause of Title VII see EEOC v.Total Sys. Serv., Inc., 221 F.3d 1171, 1174 (11th Cir. 2000);accordingly, Flores's internal complaints, prior to his filing of theEEOC charge, could form the basis of his retaliation claim.

CONCLUSION

Based on the foregoing, it is hereby ORDERED AND ADJUDGED thatDefendant's Motion for Final Summary Judgment be, and the same is, herebyGRANTED. It is further ORDERED that Plaintiff's Cross-Motion for SummaryJudgment is DENIED.

This case is CLOSED. All pending Motions are DENIED as MOOT.

DONE AND ORDERED.

1. The individual Plaintiffs, Miguel Diaz, Jeff Dana, and JohnWillis, seem to have abandoned the suit. They are not named in theAmended Complaint, nor have they participated in the action since thefiling of the original complaint in state court.

2. The facts herein are undisputed and are derived from the JointPretrial Stipulation filed on April 4, 2001.

3. Employment Related Practices Liability Insurance, Claims Made Basis— Defense Within Limits, ¶ I(C) ("What We Cover: When ClaimsAre Covered") (hereinafter "First Policy").

4. Id. at I(D).

5. Id. at VIII(E) (Definitions).

6. The parties reserve for trial the question of whether the costs andfees incurred by Pantropic in the defense of the Flores suit werereasonable, should the Court declare Defendant liable for suchexpenditures.

7. Where part of a complaint falls within the scope of the insured'scoverage, and part does not, Florida law requires the insurer to defendagainst the entire complaint. See Tire Kingdom, Inc. v. First SouthernIns. Co., 573 So.2d 885, 887 (Fla. Dist. Ct. App. 1990).

8. Accord Paint Shuttle, Inc. v. Continental Casualty Co.,733 N.E.2d 513, 522 (Ind. Ct. App. 2000) ("The notice provision of a `claims made' policy is not simply the part of the insured's duty tocooperate, it defines the limits of the insurer's

obligation. . . . Ifthe insured does not give notice within the contractually required timeperiod, there is simply no coverage under the policy.").

9. Plaintiff contends, without further explanation or legal support,that this question is the "crux of the legal dispute" presentedherein.

10. Pantropic's Response & Memorandum of Law in Opposition toFireman's Fund Motion for Summary Judgment, at 16.

11. Policy, at IV(A) (bold in original); Declaration Page, Item 3.

12. Plaintiff implies that it paid a specific renewal premium toensure continuous coverage, thereby suggesting that Pantropic gaveadditional consideration to alter a term of the contract — thepolicy period — from one year to two. However, Luis Botas,Pantropic's president, testified that he paid the usual premium uponrenewal.

13. The Court expresses no opinion as to whether the Florida courtswould adopt the holding of this Ohio appellate decision.

14. Pantropic's Cross-Motion for Summary Judgment, at 1.

15. Flores Complaint ¶ 49 (Plaintiff's appendix 45) (emphasisadded).