

FILED

JAN 07 2004

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

LARRY W. PROFFER, CLERK
CHARLESTON, SC

American Automobile Insurance Co.,)
)
 Plaintiff,)
)
 v.)
)
 Arnold H. Valentine, Lewis H. Wade, and)
 Michael Requa)
 Defendants,)
)
)
 Christopher Holroyd, Gillian Holroyd,)
 American AVK Co., Mary Gunnels,)
 William Gunnels, Mary Parker, Stylon)
 of Charleston, Nancy Stanley, Jr., James)
 E. Wise, Mark Buxton, Oakland Club, and)
 Lazer Construction Company,)
 Defendant- Intervenors.)

EOD
1-7-04

C.A. No. 2:00-2952-23

FINDINGS OF FACT
AND
CONCLUSIONS OF LAW

Plaintiff American Automobile Insurance Company ("AAIC") brought this matter seeking a declaration pursuant to 28 U.S.C. § 2201 that it does not have to indemnify Defendant insurance agents for damages obtained against them in underlying legal actions related to their sales of insurance to Defendant Intervenors. Pursuant to Rules 39 (c) and Rule 52 (a) of the Federal Rules of Civil Procedure, the court tried the case before an advisory jury from November 12-17th. The court – having heard the arguments, read the briefs of counsel, and considered the evidence including testimony of live witnesses, deposition testimony, and exhibits—now enters a declaration in favor of Defendants Arnold H. Valentine, Lewis H. Wade, and Michael Requa.

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I. BACKGROUND

A. **Factual History**

Defendants Requa, Valentine, and Wade are insurance agents who sold, to various individuals and businesses, health care coverage for medical expenses and other benefits financed by these employee/claimants contributions (premiums) paid into the International Workers's Guild Health & Welfare Trust Fund ("the Fund"). The Fund was administered by the Fidelity Group, Inc. The Fidelity Health Care Plan was established by numerous entities and made health care coverage available through the Fund. Entities responsible for establishing the Fidelity Plan have since been sued in numerous actions for failure to pay policy claims. Defendants Requa, Valentine, and Wade have also been named as defendants in various suits for their alleged involvement in the sale of the Fidelity Plan. Plaintiff in this case, AAIC, insures the insurance companies which sponsor Defendants Requa, Valentine, and Wade, as well as the individual Defendant agents themselves.

There are five underlying lawsuits: three state-court actions and two federal actions. Defendant Intervenor Christopher Holroyd, Gillian Holroyd, and American AVK Co. brought suit against Defendant Michael Requa in the Court of Common Pleas, Charleston County, South Carolina. The trial in the Holroyd case commenced December 17, 2001, and the jury returned a verdict for the Holroyds for causes of action in negligence, negligent misrepresentation, and breach of fiduciary duty. State court plaintiffs Linda Jarrell and L & L Parts and Service, Inc., brought suit against Defendant Lewis Wade in the Court of Common Pleas, Hampton County, South Carolina for breach of fiduciary duty and negligence. State court plaintiff Lazer Construction Company, Inc., also brought a state court action against Arnold H. Valentine,

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individually and doing business as Financial Benefits, Inc., in the Court of Common Pleas, Anderson County, South Carolina. Lazer Construction obtained a verdict against Defendant Valentine in the sum of \$130,000 actual damages and \$70,000 punitive damages.

In federal court, Tamara Michelle Truel and Robert Truel brought suit against Fidelity Group, Inc, National Association of Business Owners and Professionals, International Workers Association, IWG Health and Welfare Fund, John Branham, Michael Requa, and Martin Giedler. Finally Mary B. Gunnells and other named representatives brought an action on behalf of all persons similarly situated against various defendants, including Fidelity Group, Inc., Michael Requa, Arnold Valentine, and Lewis Wade.

B. Procedural History

In an Order dated March 31, 2003, the Court denied the motions of Plaintiff American Automobile Insurance Co. ("AAIC") and Defendant Intervenors Christopher Holroyd for summary judgment, concluding that AAIC had a duty to defend Defendants Arnold H. Valentine, Lewis H. Wade, and Michael Requa in the underlying actions but concluding that certain genuine issues of fact remained as to the "Insolvency" exclusion, argued by AAIC, such that the Court could not conclude, as a matter of law, whether or not AAIC had a duty to indemnify the Defendants.

At a status conference on June 4, 2003, the Court ordered the parties to submit such motions and memoranda as would give an opportunity to resolve, as a matter of law, those issues which no longer involved genuine issues of fact. Accordingly, the parties filed various motions

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for summary judgment.¹ The court granted in part and denied in part these motions, finding that there were still genuine issues of fact on several of the policy exclusions, and whether there was a sufficient causal connection between the exclusions and the resultant losses.

The Plaintiff AAIC somewhat surprisingly requested a jury trial in this matter. The court empaneled a jury with some trepidation due to the nature and complexity of the case. For the same reasons, the court elected, without objections from the parties, to seat the jury as an advisory jury pursuant to Fed. R. Civ. Pro. 39 (c).² Accordingly, the case was tried before this advisory jury beginning on November 12, 2003.

Having carefully observed this jury throughout the trial, the court is convinced that its earlier concerns were unfounded. The jury was extremely attentive, thoughtful, and deliberate. Notwithstanding an arguably imperfect verdict form, the jury's conclusions were consistent and well-grounded. The jury's verdict properly resolved the factual issues in favor of the Defendants based on the evidence. At trial and in her deposition, Plaintiff's witness and AAIC's corporate spokesperson, Elizabeth DelRosario, concluded that the alleged nature of the plan as a MEWA

¹These motions included Plaintiff American Automobile Insurance Co.'s ("AAIC") Second Motion for Summary Judgment and Motion for Summary Judgment as to Defendant Requa's Counterclaim; Defendant Intervenors Christopher Holroyd's, Gillian Holroyd's, and American AVK Co.'s ("Holroyd Defendant Intervenors") Motion for Summary Judgment; Mary Gunnells's, William Gunnells's, Mary Parker's, Stylon of Charleston's, Nancy Stanley, Jr.'s, James E. Wise's, Mark Buxton's and Oakland Club's ("Gunnells Defendant Intervenors") Motion for Summary Judgment; Defendant Requa's Motion for Summary Judgment; and Lazer Construction Company, Inc.'s Motion for Summary Judgment.

² This rule provides that "[i]n all actions not triable of right by a jury the court upon motion or of its own initiative may try any issue with an advisory jury or, except in actions against the United States when a statute of the United States provides for trial without a jury, the court, with the consent of both parties, may order a trial with a jury whose verdict has the same effect as if trial by jury had been a matter of right."

did not cause the underlying claims. (DelRosario Dep. at 117-18). Additionally, Ms. DelRosario concluded that the alleged nature of the plan as one unlicensed to do business in the state of South Carolina did not cause the underlying claims. (DelRosario Dep. at 115). Ms. DelRosario testified that the losses directly resulted from the negligence of, and the failure to do due diligence by, the Defendant agents. (Tr. at 50-51).

II. DISCUSSION

A. Findings of Fact

1. Insurance agents Valentine, Wade, and Requa all obtained errors and omissions insurance from Plaintiff AAIC. (Complaint at 2).
2. The errors and omissions policies of Plaintiff AAIC provided that AAIC would pay damages resulting from “[a]ny act, error, or omission of the insured . . .” with certain exclusions. (Policy at 1, 9).
3. The policy excluded coverage for any claims
 - a. “arising out of the insolvency, receivership, bankruptcy, liquidation, or financial inability to pay of any organization in which the insured has (directly or indirectly) placed the funds of a client or account or in which any person has invested as a result of consultation with an insured.” (Policy at 11).
 - b. “arising from or contributed to by the placement of coverage with Multiple Employer Welfare Arrangements (MEWA) as defined in the Employee Retirement Income Security Act of 1974 (ERISA) and any amendments thereto.” (Policy at 11).
 - c. “arising from or contributed to by the placement of a client’s coverage or

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funds directly or indirectly with any organization which is not licensed to do business in the state or jurisdiction with authority to regulate such business.”

(Policy at 12).

4. Plaintiff established that the Fund was insolvent, or in receivership, bankruptcy, liquidation, or financial inability to pay of any organization in which Defendants placed funds.
5. Plaintiff established that the Defendant agents placed coverage with a Multiple Employer Welfare Arrangement (“MEWA”).
6. Plaintiff established that Defendant agents placed coverage or funds directly or indirectly with an organization not licensed to do business in the state of South Carolina by an entity with the authority to regulate such business in the state.
7. Notwithstanding that Plaintiff established that the Fund was insolvent, that the agents placed coverage with a MEWA, and that the agents placed coverage with an organization not licensed to do business in South Carolina, the court finds that none of these was the proximate cause of the losses.

B. Conclusions of Law

1. The court has jurisdiction over this matter pursuant to 28 U.S.C. § 1332.
2. The court tried this matter with an advisory jury pursuant to Federal Rules of Civil Procedure 39 (c). The court now enters findings and conclusions of law pursuant to Federal Rule of Civil Procedure 52 (a).
3. In determining the applicability of an exclusion of an insurance policy, under South Carolina law, the insurance company bears the burden of establishing the exclusion.

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Boggs v. Aetna Casualty and Surety Co., 252 S.E.2d 565, 568 (S.C. 1979).

4. Under South Carolina law, "an insurer must show a causal connection between a loss and an exclusion before the exclusion will limit coverage under the policy." *South Carolina Ins. Guaranty Ass'n v. Broach*, 353 S.E. 2d 450, 451 (S.C. 1987); *see also Johnson v. South State Insurance Co.*, 341 S.E. 2d 793, 794 (S.C. 1986).
5. Where an exclusion in a contract of insurance excludes injuries "arising out of" a situation, the insurance company must prove the excluded activity caused the injuries. *McPherson v. Michigan Mutual Ins. Co.*, 426 S.E.2d 770, 771 (S.C. 1993).
6. The language "arising out of" in an insurance exclusion should be narrowly construed, and *not* broadly construed to connote "causal relation to," "incident to," "flowing from," or "having connection with." *Id.* (emphasis added).
7. In determining the causes of an insured's loss, if there were two or more causes of the damage, the law considers the "proximate cause" as the actual cause of the loss. *Lesley v. America Sec. Ins. Co.*, 199 S.E. 2d 82, 85 (S.C. 1973).
8. In insurance cases, proximate cause means the dominant cause, or the efficient cause - the cause that sets the other causes in motion- although other and incidental causes may be nearer in time to the result and may operate more immediately in producing the loss. *Id.*
9. Where covered and non-covered perils join to cause a loss, and the covered peril is the efficient and dominant cause, there is coverage under the policy. *See Lee R. Russ & Thomas F. Segalla*, 10 Couch on Insurance §§ 148:60, 148:61 (3d ed. 1998). Thus, coverage can exist in the face of exclusions if the "efficient proximate cause" of the

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loss was a covered risk. *See* 11 Couch on Insurance § 153:96.

10. Plaintiff has failed to meet its burden of establishing that the proximate cause of the claims against Defendants Valentine, Wade, and Requa was the insolvency, receivership, bankruptcy, liquidation, or financial inability to pay of any organization in which Defendants placed funds.
11. Plaintiff has failed to meet her burden of establishing that the proximate cause of the claims against Defendants Valentine, Wade, and Requa was the placement of coverage with a MEWA.
12. Plaintiff has failed to meet her burden of establishing that the proximate cause of the claims against Defendants Valentine, Wade, and Requa was the placement of clients' coverage or funds directly or indirectly with any organization that is not licensed to do business in the state of South Carolina by an entity with the authority to regulate such business.
13. Because Plaintiff has failed to meet her burden of proving that the proximate cause of the claims against Defendants was one of these three exclusions, Plaintiff has a duty to indemnify Defendants for damages in the underlying actions.


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III. CONCLUSION

It is, therefore,

DECLARED, for the foregoing reasons, that Plaintiff has a duty to indemnify Defendants for damages in the underlying actions.

AND IT IS SO DECLARED.


PATRICK MICHAEL DUFFY
UNITED STATES DISTRICT JUDGE

January 5th, 2004
Charleston, SC

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