

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No.: 31737

WILLIAM E. WEHNER, JR., et al.,

Plaintiffs/Appellants,

v.

TRAVELERS CASUALTY & SURETY CO., et al.,

Defendant/Appellants,

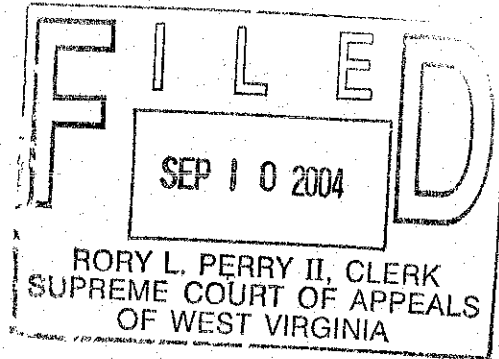
v.

NEW HAMPSHIRE INSURANCE COMPANY, et al., and

Third-Party Defendants/Appellees,

PENNSYLVANIA NATIONAL MUTUAL INSURANCE CO.

Third-Party Defendants/Appellants.



FROM THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA,
THE HONORABLE ROBERT B. STONE, JUDGE

CIVIL ACTION NO.: 93-C-216

REPLY BRIEF FOR APPELLANT TRAVELERS CASUALTY & SURETY COMPANY

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And The Standard Fire Insurance Company*

INTRODUCTION & SUMMARY

Appellee New Hampshire Insurance Company (hereafter "New Hampshire") has submitted a brief to this Court which fundamentally and studiously ignores well-settled insurance law principles. Further, New Hampshire would cleverly overlook the obvious implications of a special "Named Insured" endorsement, by suggesting that a standard form "Persons Insured" provision better reflects the intent of the parties to the insurance policies. Additionally, New Hampshire magnifies the circuit court's error by entirely misconstruing the purpose of an "additional insured" endorsement. Finally, New Hampshire argues at length about "all-risk" insurance, a concept which is primarily pertinent only to property insurance, and, correspondingly, disregards the "comprehensive" and "all-risk" character of Comprehensive General Liability and Umbrella Excess policies. Travelers is constrained to reply.¹

ARGUMENT

I. New Hampshire Erroneously Relies On Contract Law Cases Rather Than Insurance Law Cases.

As evidence of the absurdity of their argument, New Hampshire opens their brief by inviting this Court to rewrite the landscape of insurance law interpretation by disingenuously relying on contract law construction principles. In fact, New Hampshire specifically cites nine cases (many of which were decided in the early 20th century), that are entirely based upon contract law interpretation and in no manner whatsoever concern insurance policy interpretation. See, N.H. Br. at 12-14. To the contrary, this Court has recognized for over fifteen years that special rules apply to insurance policies since they are "contracts of adhesion, offered on a take-

¹ Travelers' principal brief was filed with this Court on July 7, 2004. New Hampshire's responsive brief was not filed until August 20, 2004, six weeks later. Travelers will not make an issue of the timeliness of New Hampshire's submission.

it-or-leave-it basis, often sight unseen until the premium is paid and accepted, full of complicated, almost mystical, language.” See, Nat’l Mut. Ins. Co. v. McMahon & Sons, Inc., 177 W. Va. 734, 741 n.6, 356 S.E.2d 488, 495 n.6 (1987). These unique rules for insurance policy interpretation were even recently reaffirmed at length by this Court last term. Horace Mann Ins. Co. v. Adkins, 599 S.E.2d 720, 2004 W. Va. LEXIS 113, 12-15 (June 30, 2004) (“ambiguous terms . . . are to be strictly construed against the insurance company and in favor of the insured”; “exclusions are liberally construed in favor of the insured in order to provide . . . the measure of coverage . . . contemplated when purchasing the subject policy”; “ambiguous policy provisions which would largely nullify the purpose of indemnifying the insured . . . will be severely restricted”; “[a]n insurer wishing to avoid liability . . . must make exclusionary clauses conspicuous, plain, and clear . . .”). This “interpretive rubric” embodies the restrictive nature that this Court has repeatedly applied in construing standardized insurance policies in favor the insured. Id. at 16.

II. New Hampshire Creatively Misinterprets *D’annunzio V. Security Connecticut Life Insurance Co. To Support Restricting Coverage.*

Like everything else in their brief, New Hampshire abuses the principle that “[a] policy should never be interpreted so as to create an absurd result” Syl. Pt. 2., D’Annunzio v. Security Connecticut Life Insurance Co., 186 W. Va. 39, 410 S.E.2d 275 (1991). New Hampshire attempts to apply this principle in a manner that would defeat coverage when the literal language of the policy clearly affords coverage. In stark contrast to this application, courts that have endorsed this principle have only applied it to permit coverage, when the literal meaning of the policy would otherwise prevent indemnification to the insured. See, Riffe v. Home Finders Assoc., Inc., 205 W. Va. 216, 517 S.E.2d 33 (1996).

III. New Hampshire's Deceptively Narrow Focus Upon The "Persons Insured" Provision Of The Primary Policy Defies The Clear Language Of The "Named Insured" Endorsement.

New Hampshire's reliance on subsection (a) of the standardized "Persons Insured" provision of the primary liability policy as evidence of the parties intent to restrict coverage is completely at odds with the evidence. This argument of course completely disregards the clear language of the special typewritten "Named Insured" endorsement, which sets forth the persons and entities who are "Named Insureds" under the policy as "All Sigma Phi Epsilon, Inc., Members and Pledges." In light of the fact that New Hampshire's authority explicitly instructs a consideration of all a contract's parts, N.H. Br. at 14, the omission of any discussion of the "Named Insured" endorsement while drawing a conclusion as to the parties intent is wholly irrational. Moreover, New Hampshire's illogical contention conflicts with the undisputed evidence that premium paid for the coverage was based directly on the number of fraternity members. The circuit court even recognized that applying such a provision in the face of the "Named Insured" endorsement would render the coverage illusory. See Order at 9 ¶ 12. Therefore, any construction of the policy without reference to the intent to include "members and pledges" as "named insureds" is utterly irreconcilable. Further, the aforementioned "Persons Insured" provision may not even be applicable because the Declarations designates the Named Insured as a corporation, as opposed to "an individual." See Trav. Br. at 41.

IV. New Hampshire, Like The Circuit Court, Utterly Abominates The Fundamental Function Of The "Additional Insured-Club Members" Endorsement.

Obviously, the objective sought by this endorsement is to add coverage, albeit for limited purposes, to those not otherwise insured. In spite of this purpose, New Hampshire and the circuit court obscurely treat this provision as some sort of explanatory restriction on the basic coverage

of named insureds. However, there is no language in this endorsement that articulates a restriction or limit upon Named Insureds already covered under the basic terms of the primary general liability policy. Accordingly, this endorsement would only have relevance if the members added were not already covered. By applying an "additional insured" endorsement to "members and pledges" already insured under the primary policy, the purpose of specifically adding them under the special typewritten "Named Insured" endorsement is defeated. Moreover, New Hampshire imparts no explanation for adding "members and pledges" to the special "Named Insured" endorsement if the intent was to add restricted coverage to those individuals through the "additional insured-club members." endorsement. In fact, if New Hampshire had intended to explain the scope of coverage to "members and pledges" as "Named Insured", it certainly could have expressed this objective unmistakably on the "Named Insured" endorsement.

V. To The Extent That "All-Risk" Insurance Has Application In This Case, These Policies Certainly Provide "All-Risk" Liability Coverage.

In its brief, New Hampshire devotes four pages to a discussion that these policies cannot be construed as "all-risk." N.H. Br. at 17-18, 23-24. At the threshold, "all-risk" is primarily a property insurance law concept. Not surprisingly, New Hampshire's "all-risk" argument is supported almost entirely with property insurance and marine insurance cases. N.H. Br. at 17-18, 23-24. Ironically, when talking about liability coverage, these policies are as "all-risk" as possible. "A Comprehensive General Liability policy' (CGL) covers loss or damage caused by any risk or peril other than those expressly excluded . . . from coverage, and any liability not clearly excluded from coverage under a general comprehensive liability policy is presumed to have been included." Eric Mills Holmes, Holmes' Appleman on Insurance Law and Practice, §

6.5 (2d ed. 2002); See also, Cal. Ins. Law & Prac., § 41.05 *quoting* George H. Tinker, Comprehensive General Liability Insurance – Perspective and Overview, 25 Fed. of Ins. Couns. Quar. 217, 229 (1975) (“[a]s used in the policy title, the word ‘comprehensive’ signifies that the policy ‘combines certain historic forms of coverage into an integrated whole, with coverage being broadly stated in a single insuring agreement and exclusions circumscribing the limitations of a broad grant.”). “The umbrella policy is more than excess coverage as it is intended to cover the insured, as its name suggests, comprehensively.” Holmes’ Appleman on Insurance, *supra*, § 2.16. “[U]mbrella policies have two functions: 1) to provide for a higher limit of liability for those losses typically covered by liability insurance -- general liability...; [and] 2) to provide for some coverage of those less common losses not typically covered by liability insurance” American Special Risk Ins. Co. v. A-Best Prods., 975 F. Supp. 1019, 1022 (D. Ohio 1997). In light of New Hampshire’s choice of using an ISO standard “Comprehensive General Liability Insurance” coverage form and including a standard “Broad Form” endorsement, the primary policy undoubtedly provides “all-risk” coverage. Correspondingly, the excess policy is also on an ISO standard “Commercial Liability Umbrella Policy” form and broadly defines coverage to comprehensively fill in the gaps of the standard CGL. Therefore, there is no credible basis for the assertion that these policies include anything less than “all-risk” liability coverage.

CONCLUSION

For the foregoing reasons, the judgment in favor of New Hampshire must be reversed.

Respectfully submitted,

By: 

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No.: 31737
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

WILLIAM E. WEHNER, JR., Administrator of the
Estate of Jennifer Wehner, NICOLE FISHER, JESSICA
LANDAU, MATTHEW KISER, SIGMA PHI EPSILON, a
national fraternal organization and association, a
Virginia corporation, and SIGMA PHI EPSILON
BUILDING ASSOCIATION, INC., a corporation,

Plaintiffs,

v.

BRETT BARRY WEINSTEIN, MARK WEINSTEIN,
SHIRLEY R. WEINSTEIN, BOSSIO ENTERPRISES, INC.,
d/b/a/ MARIO'S PIZZA, AETNA CASUALTY & SURETY
CO., a foreign corporation and THE STANDARD FIRE
INSURANCE COMPANY, a foreign corporation,

Defendants/Petitioners,

v.

AMERICAN INTERNATIONAL COMPANIES, NEW
HAMPSHIRE INSURANCE COMPANY, ESSEX
INSURANCE COMPANY, PENNSYLVANIA NATIONAL
MUTUAL INSURANCE COMPANY,

Third-Party Defendants/Respondents.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the within REPLY BRIEF FOR APPELLANT TRAVELERS CASUALTY & SURETY COMPANY has been served via first-class United States mail, postage prepaid on September 8, 2004, to the following:

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