

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

PART 39

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THE TRUSTEES OF PRINCETON UNIVERSITY,

Plaintiff,

Index No. 650202/06

-against-

NATIONAL UNION FIRE INSURANCE COMPANY OF
PITTSBURGH, PA and AMERICAN INTERNATIONAL
GROUP, INC.,

Defendants.
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Helen E. Freedman, J.S.C.:

Motions with sequence numbers 001 and 002 are consolidated for joint disposition.

In this insurance coverage dispute, the Trustees of Princeton University (“Princeton”) sue American International Group, Inc. (“AIG”) and AIG’s wholly owned subsidiary, National Union Fire Insurance Company of Pittsburgh, PA (“National Union”), seeking reimbursement of costs that Princeton incurred defending a lawsuit in New Jersey (the “New Jersey lawsuit” or the “underlying action”). That lawsuit, *Robertson v. Princeton University*, Docket No. C-99-02 (N.J. Chancery Div., Mercer Cty. 2002), brought by trustees of and other individuals related to a foundation that supports the Woodrow Wilson School Public and International Affairs, alleges that Princeton University misappropriated trust funds from the Woodrow Wilson School.

In motion 001, National Union and AIG move to dismiss the complaint pursuant to CPLR 3211(a)(1) and (a)(7) on the grounds the insurance policy’s \$5 million equitable relief claim sub-limit and the “insured versus insured” exclusion preclude advancing more than the \$5 million in

defense costs already paid.¹

Princeton has already paid out \$15 million in legal fees, thereby exhausting the limit of liability under the Not-for-Profit Policy (the “Policy”) executed by Princeton and National Union. Princeton seeks a judgment against National Union declaring it is entitled to defense costs up to the \$15 million limit and asserts claims for breach of contract, breach of fiduciary duty, and breach of the implied covenant of good faith and fair dealing. Princeton also claims National Union and AIG violated the New Jersey Consumer Fraud Act by issuing promotional materials promising coverage and then refusing coverage here. Princeton cross moves for partial summary judgment pursuant to CPLR 3211(c), CPLR 3212, and CPLR 2215 as to liability on the declaratory judgment and breach of contract claims.

In motion 002, National Union and AIG seek an order that Exhibit 10 of the Megan A. Adams Affidavit that Princeton submits in support of its cross motion be stricken pursuant to CPLR 4547 because it contains a settlement offer from the president of AIG Domestic Claims. Princeton opposes striking Exhibit 10, contending that it is relevant to its breach of the implied covenant of good faith and fair dealing claim and that it is the insurers who have put the settlement offer at issue.

For the reasons stated below, the insurers’ motion to dismiss is granted in part and denied in part. Princeton’s cross motion for partial summary judgment as to liability is granted, and the insurers’ motion seeking an order striking Exhibit 10 is granted.

¹National Union initially disclaimed coverage based on the “insured versus insured” exclusion in a letter dated November 6, 2002. However, it later amended its position and offered to pay ten percent of defense costs because the “insured versus insured” exclusion is narrower in scope than typical “insured versus insured” exclusions. In August 2006, National Union agreed to pay fifty percent of defense costs subject to the \$5 million sublimit for equitable relief claims and with reservation of rights and defenses. On November 3, 2006, National Union submitted its final payment to Princeton for a total payment of \$5 million.

The Underlying Action:

Charles and Marie Robertson established the Robertson Foundation (the “Foundation”) in 1961 to fund and support the graduate program of the Woodrow Wilson School of Public and International Affairs. The Foundation’s mission statement says it is “to strengthen the Government of the United States and increase its ability and determination to defend and extend freedom throughout the world by improving the facilities for the training and education of men and women for government service.” The Foundation aims to prepare students for careers in government and foreign service, particularly in international relations and affairs. Since its inception, the Foundation’s endowment has increased from \$35 million to \$600 million. A seven member board of trustees comprised of three family appointed trustees (the “Family Appointed Trustees”) and four university appointed trustees (the “University Appointed Trustees”) govern the Foundation.

At a June 2002 Foundation board meeting, the Family Appointed Trustees rejected the University Appointed Trustees’ proposed investment strategies and accused the majority university trustees of breaching fiduciary duties. The actions at this meeting prompted Princeton to notify National Union of a potential claim. On July 17, 2002, the Family Appointed Trustees (William Robertson, Katherine Ernst, and Robert Halligan) and the donors’ surviving children who do not serve on the board (John Robertson and Anne Meier) filed an action against Princeton, the University Appointed Trustees, and the Robertson Foundation in the Chancery Division of the Superior Court of New Jersey in Mercer County. The complaint in the underlying action alleges that Princeton and the University Appointed Trustees abused their majority interest, breached fiduciary duties, and misappropriated more than \$100 million by using the Foundation’s assets to support Princeton’s general interests rather than to advance the Foundation’s mission.

The Verified First Amended Complaint contains twelve causes of action. Plaintiffs claim the University Appointed Trustees breached fiduciary duties, committed ultra vires acts, and violated gift restrictions. Plaintiffs claim Princeton also breached fiduciary duties and violated gift restrictions and that Princeton aided and abetted the University Appointed Trustees' breach of fiduciary duties and commission of ultra vires acts. The Complaint contains promissory estoppel and cy pres claims against both Princeton and the University Appointed Trustees. Plaintiffs bring the ninth through twelfth causes of action against Princeton for fraud, negligent misrepresentation, breach of the duty to disclose, and breach of fiduciary duty owed to the Robertson Family.

In addition to monetary relief, plaintiffs seek injunctive relief and an accounting of the Robertson Foundation's finances including Princeton's use of Foundation assets. Specifically, plaintiffs seek to amend the Robertson Foundation's certificate of incorporation and by-laws to remove Princeton's control over the board. Plaintiffs also seek reimbursement or return of allegedly improper expenditures believed to be more than \$100 million, assets purchased with Foundation funds, and assets commingled with and transferred to the Princeton investment portfolio, and they seek punitive damages and court costs.

The New Jersey court has already determined that the plaintiffs have standing to bring direct and derivative claims. *Robertson v. Princeton University*, C-99-02 (Chancery Division Mercer County, N.J. June 20, 2003).

The Policy:

On July 1, 1998, National Union first issued to Princeton the Policy that was in effect at the time the New Jersey plaintiffs commenced the underlying action.

The insureds under the Policy include the "Organization" and individual insureds. The

“Organization” includes the Trustees of Princeton University and its subsidiaries and affiliates that are listed in the Endorsements. A “Subsidiary” is defined as an organization in which Princeton owns more than 50% of the voting interest, and Endorsement 9 lists the Robertson Trust and Woodrow Wilson Trust as two subsidiaries. “Individual insureds” include past, present or future directors, officers, trustees emeritus, department heads, faculty members, employees, and volunteers of the Organization.

Clause 1 of the Policy states that the insurer agrees to provide three types of coverage: Coverage A for “Individual Insured Insurance,” Coverage B for “Organization Indemnification Reimbursement Insurance,” and Coverage C for “Organization Entity Coverage.” All three coverage descriptions state that the “policy shall pay on behalf of the Organization Loss arising from a Claim first made against the Organization during the Policy Period... Insurer shall, in accordance with and subject to Clause 8, advance Defense Costs of such Claim prior to its final disposition.”

Item 4 of the Renewal Declarations provides that the aggregate limit of liability for Coverages A, B, and C is \$15 million.

Claims under the Policy include written demands for monetary relief or civil, criminal, regulatory or administrative proceedings seeking monetary or non-monetary relief. Loss arising under a Claim includes damages, judgments, settlements, and Defense Costs. Defense Costs include reasonable and necessary fees, costs and expenses consented to by the Insurer (including premiums for any appeal bond, attachment bond or similar bond, but without an obligation to apply for or furnish any such bond) resulting solely from the investigation, adjustment, defense and appeal of a Claim against the Insureds.

Clause 5 of the Policy states that “Defense Costs are part of Loss and as such are subject to the Limit of Liability for Loss.” The Policy’s Defense Provision provides that “The Insurer does not assume

any duty to defend.”

Clause 8 provides that the Insurer is not obligated to defend a claim after the limit of liability is exhausted. In the event the insurer has not assumed the defense of a Claim, Clause 8 provides that the “Insurer shall advance nevertheless, at the written request of the Insured, Defense Costs prior to the final disposition of a Claim.” However, Clause 8 obliges the insureds to return advance payments in the event and to the extent the Policy does not cover such Loss.

Clause 8 also states that “Only ... Defense Costs which have been consented to by the Insurer shall be recoverable as Loss under the terms of this policy. The Insurer’s consent shall not be unreasonably withheld.” The insurer may withhold consent to “Defense Costs, or any portion thereof, to the extent such Loss is not covered under the terms of this policy.”

Endorsement 5 dated July 1, 1998 amended the definition of “Loss” to include defense costs related to the defense of actions “seeking injunctive or equitable relief, regardless of whether or not monetary damages are also sought in the same action, provided however, that Loss shall not include the costs of compliance with any such equitable or injunctive relief.” Endorsement 5 further provides:

It is hereby understood and agreed that the Limit of Liability for the coverage provided by this endorsement will be \$5,000,000 per Policy Year, which is part of, and not in addition to, the Limit of Liability stated in Item 4 of the Declarations page. However, for Claims that involve multiple allegations, the \$5,000,000 sublimit will only apply to the portion of the Claim which is related to the equitable or injunctive relief allegations.

The “insured versus insured” exclusion is stated in Clause 4(f) as amended in Endorsement

6. It states:

The Insurer shall not be liable to make any payment for Loss in connection with a Claim made against an Insured...

(f) which is brought by or on behalf of the Organization against any Individual Insured; provided however, this exclusion shall not apply to any derivative Claim made on behalf of the Organization by a member or any other such representative party if such action is brought and maintained independently of and without the solicitation of or assistance of, or active participation of or intervention of any Individual Insured or the Organization or any Affiliate thereof.

Contentions:

The thrust of the insurers' argument is that based on the "insured versus insured" exclusion, the New Jersey action is not covered. To the extent some claims are covered, coverage is limited to \$5 million based on the equitable relief claim sublimit. Specifically, AIG and National Union contend that the "insured versus insured" exclusion bars advancement of additional funds to defend claims against the individual University Appointed Trustees because the action is brought on behalf of the Robertson Foundation, a "subsidiary" of the "Organization." Since the Family Appointed Trustees in the underlying action are "individual insureds" under the Policy and the New Jersey lawsuit was commenced with their "assistance" and "active participation," defendants aver the exclusion's exception for "any derivative Claim made on behalf of the Organization" does not apply. Defendants also argue that the exclusion applies to claims brought by the Robertson descendants who do not serve on the board but who may vote for trustees because they are "derivative in nature" in that the plaintiffs bring the claims "as descendants of Charles and Marie Robertson." With respect to the remaining claims (the direct claims by the Robertson descendants who do not serve on the board and all claims against Princeton), defendants contend that the \$5 million sublimit applies and bars advancement of additional funds because the claims in the underlying action are "equitable in nature." Defendants further contend that Princeton's claims for breach of fiduciary duty and of the covenant of good faith and fair dealing should be dismissed because the insurers' position is reasonable, the

insurer does not owe the insured a fiduciary duty other than its contractual duties, and the causes of action duplicate the breach of contract claim. National Union and AIG contend that the consumer fraud claim is meritless because the insurers issued the allegedly misleading promotional material on which this claim is based after Princeton purchased the Policy.

Princeton contends the Policy, which provides that National Union shall advance defense costs prior to final disposition, obliges National Union to advance \$15 million in defense costs rather than unilaterally allocate covered and non-covered claims during the pendency of the New Jersey action. Princeton contends that the “insured versus insured” exclusion does not apply because that exclusion is intended to bar coverage of collusive suits, and no collusion exists here. At most, Princeton contends the exclusion only applies to claims brought by Family Appointed Trustees on behalf of the Foundation against the University Appointed Trustees and not to direct claims or the claims brought against Princeton. Princeton avers that the equitable relief claim sublimit does not limit National Union to \$5 million in defense costs because the underlying action seeks to recover more than \$100 million in damages. Princeton contends that it has properly asserted claims for breach of fiduciary duty and breach of the covenant of good faith and fair dealing because the insurers’ position is neither based on a reasonable interpretation of the Policy nor consistent with representations made in promotional materials. Princeton further contends that to state a claim under New Jersey’s Consumer Fraud statute, no direct reliance upon advertisements is required, and that at least some of the misleading brochures were issued before Princeton purchased the Policy.

Coverage:

An insurer’s broad duty to defend is triggered when the allegations in the underlying complaint suggest a reasonable possibility of coverage. *Automobile Ins. Co. of Hartford v. Cook*, 7

N.Y.3d 131 (2006). When the insurer wishes to exclude certain claims from coverage, “it must do so in clear and unmistakable language.” *Seaboard Sur. Co. v. Gillette Co.*, 64 N.Y.2d 304 at 311 (1984). Exclusions are construed strictly and narrowly, and ambiguities are resolved against the insurer. *See L.C.S., Inc. v. Lexington Ins. Co.*, 371 N.J. Super. 482 at 491 (App. Div. 2004); *Belt Painting Corp. v. TIG Ins. Co.*, 100 N.Y.2d 377 at 383 (2003). To relieve itself of the duty to defend based on an exclusion, the insurer has the burden of demonstrating that the allegations cast the underlying pleadings wholly within the exclusion, that the exclusion is subject to no other reasonable interpretation, and that no legal or factual basis exists that would potentially obligate the insurer to indemnify the insured. *Frontier Insulation Contractors, Inc. v. Merchants Mut. Ins. Co.*, 91 N.Y.2d 169 (1997).

The purpose of the “insured versus insured” exclusion is to prevent collusive lawsuits that corporations bring against their officers and directors to recoup consequences of business mistakes, effectively transforming liability insurance into business loss insurance. *See Bodewes v. Ulico Cas. Co.*, 336 F.Supp.2d 263, 272-277 (W.D.N.Y. 2004). Although there is no indication that the New Jersey lawsuit is collusive, the Policy clearly provides that claims brought on behalf of the Organization, which includes subsidiaries such as the Robertson Foundation, against individual insureds are excluded. Because the New Jersey action is brought “with the assistance of” and “active participation of” individual insureds, the Family Appointed Trustees, the derivative claim exception is inapplicable. However, the exclusion must be construed narrowly and strictly, and thus it only applies to the claims explicitly brought on behalf of the Robertson Foundation against individual insureds. The New Jersey Court identified the derivative claims explicitly brought on behalf of the Robertson Foundation in the Complaint as the breach of fiduciary duty and commission of ultra vires

acts claims. National Union may not extend the application of the exclusion to additional claims because it deems them “derivative in nature.”

Because the exclusion only applies to two of twelve claims in the underlying action, the next issue is whether National Union is obligated to furnish all defense costs subject to recoupment of the uncovered claims or whether apportionment of the covered and non-covered claims is appropriate before the underlying action is resolved.

The insurer’s duty to pay defense costs arises when the insured incurs the expenses. Where coverage is disputed, insurers are required to make contemporaneous interim advances of defense expenses subject to recoupment in the event it is ultimately determined the Policy does not cover the claim. *See National Union Fire Ins. Co. of Pittsburgh, PA v. Ambassador Group, Inc*, 157 A.D.2d 293 (1st Dept. 1990). Where the underlying action contains covered and non-covered claims, the insurer is permitted to apportion claims. However, the insurer is not entitled to apportion claims at the expense of the insureds’ defense of the underlying action, and if the insurer cannot allocate during the underlying action, it must pay all defense costs as incurred subject to recoupment. *See Federal Ins. Co. v. Kozlowski*, 18 A.D.3d 33 (1st Dept. 2005); *Gon v. First State Ins. Co.*, 871 F.2d 863 (9th Cir. 1989). *SL Industries, Inc. v. American Motorists Insurance Co.*, 128 N.J. 188 (1992), upon which National Union relies, found that while the insurer is not required to apportion claims to a degree of scientific certainty, the insurer must advance costs for both covered and non-covered claims where defense costs may not be practically apportioned.

Here, since the derivative claims against the University Appointed Trustees are excluded, National Union may be able to allocate between the covered and non-covered claims consistent with this decision if apportionment is feasible. However, because Princeton’s expenditures have already

far exceeded the \$15 million limit, and the “insured versus insured” exclusion only applies to two claims in the underlying action, apportionment is unlikely to affect the insurer’s ultimate financial obligation.

National Union also seeks to limit the amount of coverage for covered claims to \$5 million because the underlying claims are “equitable in nature.” The sublimit appears in Endorsement 5, which expands the definition of “Loss” to include defense costs related to the defense of actions “seeking injunctive or equitable relief, regardless of whether or not monetary damages are also sought in the same action.” While National Union interprets the equitable relief sublimit to apply to the entire underlying action because all of the claims are “equitable in nature,” Princeton asserts that the sublimit applies only to claims that seek equitable relief and not those seeking monetary damages. The distinction between legal and equitable claims generally turns on the type of relief sought. Equitable relief includes non-monetary remedies and is available when monetary damages will not provide adequate compensation or when a party will suffer irreparable harm absent the equitable relief. *See 423 South Salina St. Inc. v. Syracuse*, 68 N.Y.2d 474 at 483 (1984). *See also Blacks Law Dictionary* p. 1297 (7th ed. 1999). Legal relief includes compensatory money damages, court costs, and punitive damages. *See Zorba Contractors, Inc. v. Hous. Auth. of the City of Newark*, 362 N.J. 124 at 138 (2003). Endorsement 5 specifically distinguishes claims seeking equitable relief from claims seeking monetary damages. Thus, the equitable relief sublimit does not apply to the claims seeking money damages or return of funds. Although the New Jersey plaintiffs filed the underlying action in Chancery Court, that court hears legal claims that are ancillary to the equitable claims. *See Lyn-Anna Props., Ltd. v. Harbor View Dev. Corp.*, 678 A.2d 683, 692 (N.J. 1996). Plaintiffs themselves added claims for substantial monetary relief after initially filing the action in

Chancery Court. Neither the “insured versus insured” exclusion nor the equitable relief sublimit apply to the claims seeking to recover more than \$100 million from Princeton.

Endorsement 5 provides that “for Claims that involve multiple allegations, the \$5,000,000 sublimit will only apply to the portion of the Claim which is related to the equitable or injunctive relief allegations.” Since the language contemplates apportionment, National Union may allocate between claims seeking equitable relief and claims seeking monetary relief if apportionment is feasible.

Breach of Fiduciary Duty, Breach of Implied Covenant of Good Faith and Fair Dealing, and New Jersey Consumer Fraud Act:

An insurance contract does not give rise to a special relationship of trust or confidences unless special circumstances exist that might give rise to a fiduciary relationship. *Bates v. Prudential Ins. Co. of America*, 281 A.D.2d 260 (1st Dept. 2001). Princeton does not allege that National Union made any affirmative effort to gain Princeton’s trust nor does it point to any special circumstance that suggests its relationship with National Union was outside the ordinary contractual relationship between an insured and an insurer. Princeton’s reliance on *Griggs v. Bertram*, 88 N.J. 347 (1982) to illustrate a special circumstance is misplaced. That case involved the insurer’s duty to timely notify the insured of the results of its investigation so that the party seeking coverage can properly defend itself. Here, there is no allegation of untimely correspondence that harmed Princeton’s ability to defend itself in the underlying action. Thus, the breach of fiduciary duty claim is dismissed.

The covenant of good faith and fair dealing is implied in every contract. When the alleged breach of the implied covenant of good faith and fair dealing is intrinsically tied to the damages allegedly resulting from the breach of the insurance contract, those claims are redundant. *See Levi*

v. Utica First Ins. Co., 12 A.D.3d 256 (1st Dept. 2004). Here, Princeton argues that National Union breached the implied covenant of good faith and fair dealing by unreasonably withholding benefits owed under the Policy and compelling Princeton to institute this lawsuit to obtain coverage. These examples of alleged bad faith arise from National Union's refusal to advance more than \$5 million in defense costs and duplicate the breach of contract claim. *See Berlin Medical Assocs. V. CMI New Jersey Operating Corp.*, 2006 WL 2162435 (N.J. Super. Ct. App. Div. 2006)(finding breach of the covenant of good faith and fair dealing and breach of contract claims redundant where the same allegations supported both claims). Princeton seeks the same amount to compensate it for the alleged breach of the implied covenant of good faith and fair dealing and for breach of contract. National Union's interpretation of its policy provisions is not so unreasonable as to constitute bad faith. Thus, the breach of the implied covenant of good faith and fair dealing claim is dismissed.

Since the breach of the covenant of good faith and fair dealing claim is dismissed, Exhibit 10, the August 24, 2006 letter from Michael A. Rossi, Esq. to Michael W. Smith containing AIG's settlement offer, is irrelevant. Additionally, that letter includes a "statement made during compromise negotiations," and would likely be inadmissible under CPLR 4547. Although the insurers raised the issue of the amount of defense costs that National Union has already advanced, the insurers did not place their settlement offer in issue. Thus, Exhibit 10 is stricken.

In order to recover under the New Jersey Consumer Fraud Act, a private individual or entity must show not only an act of fraud upon the marketplace, but that it suffered an "ascertainable loss" caused by the unlawful conduct. N.J. Stat. Ann. § 56:8-19; *Thiedemann v. Mercedes-Benz USA, LLC*, 183 N.J. 234 (2005). While the attorney general need not establish that defendants' promotional materials directly caused a specific loss, an individual seeking to invoke the private

remedies afforded by the statute must demonstrate a specific ascertainable loss. *Thiedemann v. Mercedes-Benz USA, LLC*, 183 N.J. 234 (2005). Princeton has not alleged that the promotional materials about the “insured versus insured” exclusion that were apparently issued after Princeton signed the Policy were directly responsible for any “ascertainable loss.” Thus, it has not stated a claim under the New Jersey Consumer Fraud Act, and that claim is dismissed.

Conclusion:

Based on the foregoing, Princeton’s cross motion for partial summary judgment with respect to the breach of contract claim and claim seeking a declaratory judgment is granted as to liability. The claims for breach of fiduciary duty, breach of covenant of good faith and fair dealing, and violation of the New Jersey Consumer Fraud Act are dismissed, and Exhibit 10 is stricken.

Accordingly, it is

ORDERED that defendants’ motion to dismiss is granted to the extent that the second, third, and fourth causes of action for breach of the implied covenant of good faith and fair dealing, breach of fiduciary duty, and violation of the New Jersey Consumer Fraud Act, respectively, are dismissed, and is denied to the extent that the first and fifth causes of action for breach of contract and declaratory judgment, respectively, remain, and it is further

ORDERED that Princeton’s motion for partial summary judgment as to National Union’s liability for the first and fifth causes of action is granted, and it is further

ORDERED that Exhibit 10 of the Megan Adams Affidavit is stricken, and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Parties are directed to appear for a conference on May 8, 2007 at 9:30 a.m. in Room 208 to inform the Court how they wish to proceed.

DATED: April 10, 2007

ENTER:

Helen E. Freedman, J.S.C.

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