STATE OF MICHIGAN

COURT OF APPEALS

LEGION INSURANCE COMPANY,

Plaintiff-Appellee,

v

VIGILANT INSURANCE COMPANY,

Defendant-Appellant,

and

CHUBB GROUP OF INSURANCE COMPANIES,

Defendant.

UNPUBLISHED
June 20, 1997

No. 184462
LC No. 93-456512-CK

Before: Saad, P.J., and Corrigan and R.A. Benson,* JJ.

PER CURIAM.

Defendant Vigilant Insurance Company appeals as of right from a judgment granting summary disposition to plaintiff Legion Insurance Company ("Legion") in this contribution action under a contract of insurance, and from an order awarding mediation sanctions including costs and attorney fees.[1] We reverse the trial court's summary disposition order and remand for trial.

Vigilant insured Mark Greenbain, a psychiatrist, between May 1977, and April 1984. Legion insured Greenbain from May 1984, until April 1989. Ida Coffey treated with Greenbain for five years and nine months while Greenbain was insured by Vigilant, and for four years and three months, while Greenbain was insured by Legion. Ida then treated with another psychiatrist, Alan Beneson, for approximately one month before committing suicide on August 19, 1988. On December 20, 1989, Greenbain was sued for malpractice with respect his services rendered to Ida. The basic theory of liability was that Greenbain negligently medicated Ida (both overmedicating and improperly medicating). The suit was later amended to name the second psychiatrist, Beneson, who was also insured by plaintiff.

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* Circuit judge, sitting on the Court of Appeals by assignment.

Greenbain informed Legion of the suit, and Legion retained an attorney in May, 1989, to defend the claim. *Vigilant was not informed of its potential liability until August 1992*. When Vigilant was finally notified about the case, it requested additional information and copies of discovery materials from Legion. Legion refused to provide the information without payment for the materials "and/or" a commitment from Vigilant to contribute toward the costs of defense. Vigilant thus failed to either provide a defense or to decline to defend or indemnify.

The malpractice claim was settled on the eve of trial, in early April, 1993, for a total of $650,000 – with $150,00 apportioned to the second psychiatrist, and $500,000 apportioned to Greenbain. Legion then filed this case against Vigilant to recover a portion of the settlement paid (for Greenbain) and a portion of the litigation costs of the defense. The trial court ordered Vigilant to pay a portion of the settlement based on the parties' respective coverage periods (57 ½% and 42 ½%), and one-half of all litigation expenses incurred by plaintiff in providing Greenbain's defense. The trial court also awarded plaintiff the full amount of costs and attorney fees sought as mediation sanctions.

I

Vigilant first contends that the trial court erred in finding that, because Vigilant breached its *duty to defend*, it was estopped from presenting evidence to show that the alleged malpractice in the underlying action did not occur during its coverage term. Although this a close issue, on the peculiar facts of this case, we agree. Under Michigan law, the duty to defend is separate and distinct from the duty to indemnify. *Allstate Ins Co v Elassal*, 203 Mich App 548, 556, n 3; 512 NW2d 856, n 3 (1994). Therefore, although an insurer who breaches the duty to defend becomes liable for all "foreseeable damages flowing from the breach," *Stockdale v Jamison*, 416 Mich 217, 224; 330 NW2d 389 (1982), overruled in part by *Frankenmuth Mut Ins Co v Keeley*, 433 Mich 525; 447 NW2d 691 (1989), we cannot conclude here -- where Vigilant received delayed notification of the suit, and received no information in response to its request to plaintiff for information once it learned of the suit -- this should preclude Vigilant from presenting evidence contesting that timing of the malpractice and whether the malpractice occurred during the period it insured Greenbain.

In general, estoppel may be used to prevent an insurer that denies coverage of a claim on a particular basis from later presenting additional defenses to liability. *Smit v State Farm Ins Co*, 207 Mich App 674, 679-680; 525 NW2d 528 (1994). Specifically, an insurer may be estopped from presenting substantive defenses in two situations: (1) where the insurer refused to defend its insured and the defenses which the insurer later seeks to raise were or should have been raised in the underlying defense and (2) where the inequity of broadening the insurer's liability is outweighed by the inequity suffered by the insured because of the insurer's actions. *Smit*, 207 Mich App at 680-681.

Here, although we have not been provided with the record in the underlying malpractice case, it is obvious that Vigilant did not participate in the case until the last few days before it was settled. Thus, it is unclear whether Vigilant formally attempted to raise in that case the defense that the malpractice occurred outside of its coverage period. However, it is evident from the record in *this* case that, in the underlying case, Legion repeatedly refused and in our view, improperly refused to respond to Vigilant's

requests for information and documentation, absent Vigilant's agreement to assist with the costs of defense. In other words, Legion was, or should have been, well aware of Vigilant's position that the malpractice did not occur during its coverage period.[2] Accordingly, where, as here, the settlement has been paid, and the remaining dispute is between the competing insurers on the same risk but at different time periods -- an insurer's initial failure to defend due to incomplete and late information should not preclude it from disputing its coverage which is dependent on the timing of the liability-inducing occurrence.

As noted above, the duty to defend and the duty to indemnify are separate and distinct in Michigan. *Allstate Ins Co v Elassal,* 203 Mich App 548, 556, n 3; 512 NW2d 856, n 3 (1994); *Vanguard Ins Co v Clarke*, 181 Mich App 36, 43; 448 NW 2d 754 (1989), rev'd on other grounds 438 Mich 463; 475 NW2d 48 (1991). The result urged by plaintiff here would subvert any meaningful distinction between these two duties, and would create an irrebuttable presumption that, upon failure to defend, the insurer is always obligated to indemnify its insured. See *Sentinel Ins Co v First Ins of Hawaii*, 875 P2d 894, 911-912 (Hawaii, 1994). We conclude, as did the Supreme Court of Hawaii, that, "equity requires that the consequences of an insurer's breach of its duty to defend must be considered on a case by case basis." *Id.*, 875 P2d at 911-912.

Therefore, although our ruling should not be interpreted as an endorsement of Vigilant's practice of non-defense, on the limited facts of this case, Vigilant should be permitted to present evidence related to the timing of the malpractice, as a defense to liability. See *Detroit Edison v Michigan Mutual,* 102 Mich App 136, 146; 301 NW2d 832 (1980); *Sentinel Ins Co v First Ins of Hawaii*, 875 P2d 894, 911 (Hawaii, 1994).

II

Vigilant also contends that the trial court erred in preventing it from challenging the reasonableness of that portion of the total settlement allocated to Greenbain (i.e. vis-à-vis the second psychiatrist). We agree. Although Vigilant stipulated to the reasonableness of the total settlement ($650,000), it did not stipulate to the reasonableness of the $500,000 settlement figure for Greenbain. In general, a defendant may challenge the reasonableness of the settlement as allocated to its insured, the good faith of its insured in reaching the settlement, or its insured's liability on the underlying claim. See *Elliott v Casualty Ass'n of America*, 254 Mich 282, 288; 236 NW 786 (1931); *Detroit Edison v Michigan Mutual,* 102 Mich App 136, 146; 301 NW2d 832 (1980).

Vigilant also challenges the trial court's decision to allocate the settlement based on the length of coverage without hearing evidence related to the timing of the malpractice. Because this case will be remanded on the issue of liability, this issue on appeal is moot.

III

Vigilant also argues that the trial court erred in ordering it to pay one-half of the litigation costs Legion incurred *prior* to the point when Vigilant was notified about the malpractice claim. We agree. Vigilant's duty to defend was triggered when it received notice of the malpractice claim. See *Auto-*

Owners Ins Co v City of Clare, 446 Mich 1, 10; 521 NW 2d 480 (1994). Because Vigilant did not have a contractual obligation to defend Greenbain until it was notified of the malpractice claim, plaintiff can only recover *post*-notification litigation expenses under the theory of equitable subrogation. See *Commercial Union v Medical Protective Co*, 426 Mich 109, 119; 393 NW2d 479 (1986).

We are not impressed with Legion's argument that it can recover the pre-notification expenses as a matter of equity, on the theory that plaintiff incurred litigation expenses in protecting a fund common to both plaintiff and Vigilant. See *Foremost Life Ins Co v Waters (On Rem)*, 125 Mich App 799, 805; 337 NW2d 29 (1983). The equitable "common fund" doctrine is designed to compensate a party who has alone borne the burden and expense of litigation which has benefited others, when permitting that party to retain the benefit of the litigation would unjustly enrich that party at the plaintiff's expense. *Id.; Abston v Aetna Casualty Ins Co*, 131 Mich App 26, 31; 346 NW2d 63 (1983). Here, because Greenbain did not notify Vigilant of the litigation as required by the insurance contract, any "enrichment" enjoyed by Vigilant prior to notification was not unjust. See *id*, 131 Mich App at 32.

IV

The remaining issues raised by Vigilant relate to the mediation sanctions awarded to plaintiff. Because this case is being reversed and remanded, the award of mediation sanctions is vacated and the related arguments are rendered moot.

Reversed and remanded for resolution of the issue of Vigilant's liability for the underlying malpractice settlement. We do not retain jurisdiction.

/s/ Henry William Saad
/s/ Maura D. Corrigan
/s/ Robert A. Benson

[1] The second defendant, Chubb Group of Insurance Companies, was dismissed from the appeal by stipulation on April 21, 1995.

[2] It is undisputed that Greenbain treated Ida with increasing doses of medication. Vigilant's offer of proof (in response to plaintiff's motion in limine in this case) relied upon the plaintiff's decedent's expert's deposition testimony in the underlying malpractice case, that until the point at which Ida had been on the medication "between seven and ten years," she could have been weaned off it. The expert opined that, after that time, she had "crossed the Rubicon" and would have to remain on some type of tranquilizers. This provides substantial support for Vigilant's position that the malpractice did not occur until after Legion was on the risk and Vigilant was off the risk.