

STATE OF MICHIGAN
COURT OF APPEALS

MARK W. DUPUIS,

Plaintiff-Appellant,

v

UTICA MUTUAL INSURANCE COMPANY,

Defendant-Appellee.

UNPUBLISHED

April 25, 2006

No. 250766

Wayne Circuit Court

LC No. 02-211653-CK

Before: Wilder, P.J., and Sawyer and White, JJ.

WHITE, J. (*concurring in part and dissenting in part*).

I join in the majority's determinations that defendant was not required to show prejudice to invoke the voluntary payment clause and that plaintiff's equitable claims were properly dismissed.

With regard to defendant's duty to defend, I respectfully dissent. Preliminarily, I note that beginning in 1991, VMI¹ purchased errors and omissions liability insurance from defendant in reliance on defendant's written representation in a solicitation brochure that:

You Stay in Business if the Insurance Company Goes Under. Many E&O policies exclude claims arising from insurance insolvencies. PIA/Utica's E&O policy includes this coverage at no extra charge.

The insolvency of American International Sureties (AIS), with whom VMI had placed coverage for several clients, brought about the petition for summary suspension filed by the Insurance Bureau against plaintiff and VMI in November 1998. When VMI notified defendant in September 1998 that AIS was refusing to timely investigate and pay on one of VMI's client's claims, defendant failed investigate or respond. Later that month, when VMI notified defendant that it appeared that AIS was going out of business while many claims were unpaid, defendant failed to investigate or respond. In November 1998, the Insurance Bureau issued the petition for summary suspension against VMI and plaintiff.

¹ Plaintiff was an officer and employee of VMI. VMI assigned plaintiff any and all claims it may have against defendant.

The question before us is whether the proceedings initiated by the Insurance Bureau triggered defendant's duty to defend. The petition filed by the Insurance Bureau requested the Commissioner of Insurance to:

1. Summarily suspend the insurance license of Various Markets, Inc. and Mark Dupuis; and
2. Issue an order for notice of hearing concerning the allegations set forth above; and
3. Designate that an administrative law judge from the Office of Legal Services preside over the hearing. [Petition, p 5.]

Following this request, the petition included sections labeled "APPLICABLE LAW" and "APPLICABLE PENALTIES." Under the latter heading, the petition stated that if the commissioner determined after a formal hearing that the allegations were true and there were violations of the statutory provisions set forth in the previous section, the commissioner "may take any or all of the actions cited below." The petition set forth three sections of the Insurance Code, authorizing various actions by the commissioner. One of the provisions quoted in the petition, MCL 500.1244, states that the commissioner "may order any of the following:"

- (a) Payment of a civil fine . . . [which] shall be turned over to the state treasurer
- (b) A refund of any overcharges.
- (c) That restitution be made to the insured or other claimant to cover incurred losses, damages, or other harm attributable to the acts of the person found to be in violation of this chapter.
- (d) The suspension or revocation of the person's license.

The next question is whether there is a "claim . . . seeking damages" under the policy. Section I of the policy states:

1. "**Claim**" means a written notice, including service of a **suit** or demand for arbitration, received by one or more insureds asking for money or services.

In Section II - Coverage, the policy states in part:

1. Coverage

On behalf of the insured we will pay for **loss** up to the Limits of Liability, in excess of the deductible, that the insured becomes legally obligated to pay as a result of having a **claim** first made against the insured during the **policy period**, or any Extended Reporting Period provided. The **loss** must arise out of negligent acts, errors or omissions in the conduct of the insured's business

* * *

With respect to the insurance afforded by this policy, we shall defend any **claim** first made during the **policy period** seeking damages to which this insurance applies even if the allegations of the **claim** are groundless, false or fraudulent. . . . Our obligation to pay is not separate from our obligation to defend.

I agree with the majority that the cases plaintiff cites involving enforcement actions by the EPA and DNR are distinguishable, but disagree that the issue whether defendant owed a duty to defend ends there.

A

Defendant’s argument that the administrative proceedings are not a “suit” is unpersuasive because under the policy’s language, “suit” is not determinative of coverage. The proper focus is whether there is a “claim . . . seeking damages.”

The policy defines “claim” as “a written notice, including service of a suit or demand for arbitration, received by one or more insureds asking for money or services.” The definition of “claim” does not refer to “damages,” but the scope of defendant’s obligation to defend contains that limitation, e.g., “. . . we shall defend any claim . . . seeking damages to which this insurance applies”

Defendant argues that the petition and the subsequent orders in the insurance commission proceedings did not include a “demand for monetary damages.” Essentially, defendant argues that restitution is an equitable form of relief, and relief on an equitable theory is not “damages.”

The critical portion of the petition labeled “APPLICABLE PENALTIES” includes a quotation of MCL 500.1244(1)(c):

(1) If the commissioner finds that a person has violated this chapter, after an opportunity for a hearing pursuant to the administrative procedures act . . . the commissioner shall reduce the findings and decision to writing and shall issue and caused to be served upon the person charged with the violation a copy of the findings and an order requiring the person to cease and desist from the violation. In addition, the commissioner may order any of the following:

* * *

(c) That restitution be made to the insured or other claimant to cover incurred losses, damages, or other harm attributable to the acts of the person found to be in violation of this chapter.

Defendant argues that the petition and the subsequent orders in the insurance commission proceedings did not include a “demand for monetary damages.” Essentially, defendant argues that restitution is an equitable form of relief, and relief on an equitable theory is not “damages,”²

² The portion of the petition labeled “APPLICABLE PENALTIES” includes a quotation of MCL (continued...)

primarily relying on *Jones v Farm Bureau Mutual Ins Co*, 172 Mich App 24, 29; 431 NW2d 242 (1988), and *Seaboard Surety Co v Ralph Williams' Northwest Chrysler Plymouth, Inc*, 81 Wash 2d 740; 504 P2d 1139 (1973).

In *Jones, supra*, 172 Mich App 29, this Court held that the term “damages” “cannot encompass strictly injunctive action,” and “a complaint seeking costs or attorney fees is not a complaint seeking money damages.” (Citation omitted). Because the suit against the insured only sought injunctive relief and did not allege an injury “which could, in any way, have required plaintiff to pay money damages,” the insurer did not have a duty to defend. *Id.*, p 29.

In *Seaboard Surety Co, supra*, 81 Wash 2d 740, the insurer agreed to defend any suit “seeking damages for [unfair competition] . . .” *Id.*, p 741. At issue was whether an action by the attorney general triggered the duty to defend. The action sought to enjoin “unfair methods of competition and unfair and deceptive acts or practices” and “to secure a judgment for penalties as provided” in the state’s consumer protection act and other statutes. *Id.* The prayer for relief asked the court to make any necessary orders to “restore to any person in interest any monies or property which may have been acquired by means of an act or conduct of [the insureds] found to be in violation of [the consumer protection act provision].” *Id.*, p 742 The court held that the complaint did not seek damages for unfair competition. However, in a subsequent case, the state’s supreme court succinctly explained the basis for the court’s earlier ruling in *Seaboard* as follows:

In denying coverage, the *Seaboard* court did not rule that “damages” cannot include sums paid in restitution; instead, the court looked to the substance of the damage claim to determine whether it constituted one *for unfair competition* as ordinarily understood. The court concluded that damages for unfair competition can only be recovered by a competitor, and that a suit brought by the State to require the return of property wrongfully withheld from *customers* did not constitute such a claim. [*Boeing Co v Aetna Cas and Sur Co*, 113 Wash 2d 869, 884; 784 P2d 507 (1990).]

(...continued)

500.1244(1)(c):

(1) If the commissioner finds that a person has violated this chapter, after an opportunity for a hearing pursuant to the administrative procedures act . . . the commissioner shall reduce the findings and decision to writing and shall issue and caused to be served upon the person charged with the violation a copy of the findings and an order requiring the person to cease and desist from the violation. In addition, the commissioner may order any of the following:

* * *

(c) That restitution be made to the insured or other claimant to cover incurred losses, damages, or other harm attributable to the acts of the person found to be in violation of this chapter.

Neither of these cases is helpful to an analysis of whether the petition in the present case asserted a “claim . . . seeking damages.” The petition sought more than injunctive relief and, therefore, *Jones, supra*, 172 Mich App 29, is not analogous. Although defendant cites *Seaboard Surety Co, supra*, 81 Wash 2d 740, in support of the proposition that restitution is not “damages,” *Boeing Co, supra*, 113 Wash App 2d 869, demonstrates that *Seaboard* was not decided on that basis.

This Court’s decisions support plaintiff’s view that in the context of an insurance policy “damages” is broadly interpreted. In *Polkow v Citizens Ins Co of America*, 180 Mich App 651, 658; 447 NW2d 853 (1989), rev’d on other grounds, 438 Mich 174 (1991), the Court rejected the insurer’s argument that “response costs necessitated by an investigation into possible environmental contamination are not damages within the meaning of the policy.” *Id.*, p 658. “What is sought here is little, if any, distinguishable from money damages.” *Id.*, p 659. “[F]rom the standpoint of the insured damages are being sought for injury to property. It is that contractual understanding rather than some artificial and highly technical meaning of damages which ought to control.” *Id.*, p 658, quoting with approval *United States Fidelity & Guaranty Co v Thomas Solvent Co*, 683 F Supp 1139, 1168 (WD Mich, 1988).

In *United States Aviex Co v Travelers Ins Co*, 125 Mich App 579; 336 NW2d 838 (1983), the insurer challenged the trial court’s order that the insurer was ““obligated to defend any claim or action, and to pay any costs of [plaintiff], for correcting chemical contamination, imposed by or resulting from a determination by a tribunal of competent jurisdiction.”” *Id.*, pp 587-588. The policy required the insurer to defend “any suit . . . seeking damages” and to pay amounts the insured became legally obligated to pay “as damages.” The insurer argued that “damages” meant compensation for injury or loss and did not include costs incurred by the insured in complying with equitable or injunctive orders. Although this Court recognized that the insurer’s argument was “persuasive and supported by decisions from several other jurisdictions,” *id.*, p 588, this Court rejected it. The Court characterized as “too narrow[.]” an interpretation that would limit damages to payments to third persons who had a legal claim for damages due to injury to property. The Court explained that it was “fortuitous” that the state “has chosen to have plaintiff remedy the contamination problem, rather than choosing to incur the costs of clean-up itself and then suing plaintiff to recover those costs.” *Id.*, p 590.³

Further, the other references to “damages” in this policy suggest that a broad meaning was intended. The term is used in several places in the definitions section of the policy:

³ Although courts in other jurisdictions have held that the term “damages” in a liability insurance policy is limited to legal damages and, therefore, no coverage exists for actions where monetary relief is requested on an equitable theory, see, e.g., *Maryland Cup Corp v Employers Mut Liability Ins Co of Wisconsin*, 81 Md App 518, 522-523; 568 A2d 1129 (1990) (Equal Opportunity Employment Commission complaints and a suit under Title VII were not claims or suits seeking damages) and cases cited therein, a recent decision discussing this issue indicates that this view has been rejected in a majority of jurisdictions. *Johnson Controls, Inc v Employers Ins of Wausau*, 264 Wis 2d 60, 121; 665 NW2d 257 (2003).

4. “Loss” means injury or *damages* sustained by one or more person arising out of a single negligent act, error or omission or series of related negligent acts, errors or omissions by one or more insureds.

* * *

12. “Suit” means a civil proceeding in which *damages* because of a loss from a negligent act, error, or omission to which this insurance applies are alleged. Suit includes:

a. An arbitration proceeding in which such *damages* are claimed and to which you must submit or do submit with our consent;

b. Any other alternative dispute resolution proceeding in which such *damages* are claimed and to which you submit with our consent. [Emphasis added.]

The term “damages” in these definitions is not consistent with an interpretation that would limit it to awards for compensation only on a legal, as opposed to equitable, basis. For example, such an interpretation would mean that there can be no “loss” unless a party making a claim is proceeding on a legal theory.

Moreover, defendant’s duty to indemnify refers to amounts that the insured becomes “legally obligated to pay as a result of having a claim” Although the duty to defend refers to a “claim . . . seeking damages,” the duty to indemnify requires the insurer to pay “for loss . . . that the insured becomes legally obligated to pay as a result of having a claim first made against the insured . . .” and does not refer to “damages.” Therefore, applying a restrictive interpretation of “damages” would mean that an insurer may have no obligation to defend a claim brought on an equitable theory (e.g., restitution, quantum meruit) but may still have an obligation to pay when a judgment is entered on that theory because the provision setting forth the duty to indemnify does not limit it to a claim seeking “damages.” The peculiarity of the outcome that would result from such a restrictive interpretation of “damages” is further support for the position that the parties did not intend this interpretation.

B

Defendant also asserts that the reference to “restitution”⁴ in the petition does not seek “damages” but a “penalty,”⁵ for which coverage is excluded. The policy provides that it “does not apply to any claim for, or arising out of”

⁴ In some contexts, “restitution” is used to denote a form of relief that is distinct from damages. The distinction is explained in detail in *Magan v Medical Mut Liability Ins Soc of Maryland*, 331 Md 535, 541-543; 629 A2d 626 (1993). The purpose of damages is to compensate the injured for losses, while the remedy of restitution is typically aimed at forcing the wrongdoer to disgorge benefits that would be unjust for the wrongdoer to retain. *Id.*, pp 541-543.

(continued...)

[p]unitive or exemplary damages, fines, penalties, taxes or any damages which are multiples of any damages assessed against an insured. If a **suit** is brought against an insured covered under this policy seeking both compensatory damages and punitive or exemplary damages, fines, penalties, taxes, or multiple of any compensatory damages, then we will defend the insured until judgment in the trial court, but without liability for such punitive or exemplary damages, fines, penalties, taxes, or multiples of any compensatory damages.

In the petition, the reference to “restitution” appears in the portion labeled “APPLICABLE PENALTIES,” which quotes MCL 500.1244(1)(c):

(1) If the commissioner finds that a person has violated this chapter, after an opportunity for a hearing pursuant to the administrative procedures act . . . the commissioner shall reduce the findings and decision to writing and shall issue and caused to be served upon the person charged with the violation a copy of the findings and an order requiring the person to cease and desist from the violation. In addition, the commissioner may order any of the following:

* * *

(c) That restitution be made to the insured or other claimant to cover incurred losses, damages, or other harm attributable to the acts of the person found to be in violation of this chapter.

Here, “restitution” is referenced in the context of compensation for losses by the victim. I conclude this is consistent with the broader meaning of the term “damages,” as discussed *supra*, rather than a “penalty,” as argued by defendant. See n 5, *supra*.

Defendant emphasizes that the reference to restitution appears under the label “APPLICABLE PENALTIES.” However, the labeling in the petition should not govern

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However, the term “restitution” is also used in a broader sense as synonymous with reparation for harm or injury. *Magan, supra*, 331 Md App 543-545. This is indicated in legal dictionaries:

At common law, *restitution* was ordinarily used to denote the return or restoration of some specific thing or condition. But 20th-century usage has extended the sense of the word to include not only the restoration or giving back of something, but also compensation, reimbursement, indemnification, or reparation for benefits derived from—or loss caused to—another. [Garner, Dictionary of Modern Legal Usage (2d ed, 1995).]

Black’s Law Dictionary (7th ed) includes in its definition of “restitution” “[c]ompensation or reparation for the loss caused to another.” It also quotes a treatise that states, “‘Restitution’ is an ambiguous term, sometimes referring to the disgorging of something which has been taken and at times referring to compensation for injury done.” (Citation omitted.)

⁵ The term “penalty” is defined as “Punishment imposed on a wrongdoer, esp. in the form of imprisonment or fine.” Black’s Law Dictionary (7th ed).

defendant's duty to defend. The substance of the allegations, not the form, determines the insurer's duty to defend. See *Michigan Educational Employees Mut Ins Co v Karr*, 228 Mich App 111, 113; 576 NW2d 728 (1998).

In support of its argument that restitution in this context is a penalty, defendant asserts that the "Michigan Insurance Bureau, as distinguished from a Court of law, arbitration or alternative dispute resolution proceeding, cannot decide or determine liability or damages." Defendant contends that judicial functions and power may not be vested in the administrative agencies such as the Insurance Bureau, and the bureau may only assess a penalty.

This argument is flawed. First, the petition invoked the power of the Commissioner of Insurance, not the Insurance Bureau. Second, to the extent that defendant is arguing that the statutory grant of authority to the commissioner to order an insurer to compensate the insureds or other claimants "for losses, damages, or other harm attributable to" the acts of the insured is an invalid delegation of power, that argument has no bearing on defendant's duty to defend. Even if defendant could demonstrate that the delegation of power in MCL 500.1244(c) is invalid, that conclusion would only mean that the request for that relief in the petition was legally unsound. But the policy requires defendant to defend "even if the allegations of the claims are groundless"

In this case, the excerpt of MCL 500.1244(1)(c) in the petition indicates that the requested "restitution" was intended "to cover incurred losses, damages, or other harm attributable to the acts of the person found to be in violation of this chapter." I conclude that this indicates that the particular sanction referenced in the petition is aimed at compensating the victim, not merely requiring the violator to disgorge the benefits that he retained. See also n 4. Therefore, I conclude that although the petition refers to "restitution," it sought compensation for the injured and, therefore, constitutes a "claim . . . seeking damages."⁶

⁶ Defendant further contends that plaintiff was not entitled to a defense for the administrative proceedings because they were "quasi-criminal" in nature and alleged fraudulent activity, and the policy excludes coverage for fraudulent or criminal conduct. The exclusion states that the insurance "does not apply to any claim for, or arising out of"

[a]ny dishonest, fraudulent, malicious, or criminal conduct committed or alleged to have been committed by or at the direction of the insured. If a **suit** is brought against the insured alleging both negligent acts, errors, or omissions for a **claim** within coverage of the policy and dishonest, fraudulent, malicious, or criminal conduct, then we will defend the insured in the trial court, but we shall not have any liability for any judgment for dishonest, fraudulent, malicious, or criminal conduct nor shall we have any further obligation to defend after judgment in the trial court.

This exclusion applies only to insureds who participated in, acted with knowledge of, or consented to such conduct.

(continued...)

I conclude that the petition alleged a claim seeking damages and therefore triggered defendant's duty to defend.⁷ I would reverse the circuit court's grant of summary disposition to defendant and remand for further proceedings.

/s/ Helene N. White

(...continued)

Defendant has not shown that it was entitled to summary disposition of plaintiff's breach of contract action because of this exclusion. Although some of the allegations in the petition refer to dishonest conduct, other allegations suggest negligent conduct. Moreover, the fact that defendant ultimately paid claims by plaintiff's clients undercuts defendant's position that the claims in the petition that were based on the same underlying conduct were excluded.

⁷ Some of plaintiff's arguments are couched in terms of his "reasonable expectation" of coverage. As explained in *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 51-63; 664 NW2d 776 (2003), the rule of reasonable expectation was improperly used to essentially rewrite unambiguous contracts. The Court in *Wilkie* rejected the rule of reasonable expectations as being inapplicable to unambiguous contracts and redundant of the rule that ambiguous contracts are to be construed against the drafter. Therefore, plaintiff's "reasonable expectations" are immaterial.