

STATE OF VERMONT
WASHINGTON COUNTY

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State of Vermont Agency of)
Natural Resources,)
Plaintiff,)
v.)
Stonington Insurance Co., et al.,)
Defendants.)

Washington Superior Court
Docket No. 811-12-02 Wncv

SUPERIOR COURT
WASHINGTON COUNTY

DECISION

Summary Judgment Motions relating to Bradford Oil

In its August 2, 2007 decision, the court ruled on several summary judgment motions addressing the issue of liability to the State on its petroleum cleanup fund (Fund) claims against Defendant-Insurers. The court concluded that Northern Security Insurance Company has liability under the policy insuring Springfield Realty Corporation, Stonington Insurance Company has liability under the policy insuring S.R. Young, Inc., and Stonington has liability under the policy insuring Bradford Oil Company. In this decision, the court rules on the three remaining summary judgment motions, which address Northern Security's third-party claim against Bradford Oil, and whether Stonington is obligated to defend Bradford Oil against that claim.

The court ruled on several of the issues necessary to the resolution of these motions in the August 2, 2007 decision. For the court's analysis of those issues and the background facts of this case, see the August 2, 2007 decision.

Northern Security's Third-Party Claim against Bradford Oil

In 1981, Bradford Oil began leasing and operating the gas station at which the leaking underground storage tanks later were discovered. The Young family operated the gas station beforehand. Following the State's 10 V.S.A. § 1941(f) complaint against Northern Security and other insurers, Northern Security filed a third-party complaint against Bradford Oil seeking statutory contribution or indemnification pursuant to 10 V.S.A. § 6615(i), contractual indemnification pursuant to a clause of the lease, and implied indemnification.

Based largely on Bradford Oil's characterization of the State's claim against Northern Security, Bradford Oil argues that, as a matter of law, there can be no statutory or subrogated claim by Northern Security against it. Bradford Oil posits that there is an "apples to oranges" disconnect between Northern Security's putative liability as an insurance company and Bradford Oil's status as a non-insurance party." Bradford Oil's Summary Judgment Motion at 3 (filed Nov. 16, 2006).

According to Bradford Oil, the State's direct claim against an insurance company to

recoup Fund expenditures is distinct from any underlying liability of that insurance company's insured. In this case, for instance, the State has asserted that Northern Security's insured, Springfield Realty, has liability for the petroleum contamination under 10 V.S.A. § 6615 but the State has never pursued that claim directly against Springfield Realty (as it has never pursued such a claim directly against Bradford Oil). Instead, it has pursued Northern Security directly pursuant to 10 V.S.A. § 1941(f). With no actual claim of any kind against Northern Security's insured, reasons Bradford Oil, Northern Security can never become subrogated to its insured's rights. Similarly, with no 10 V.S.A. § 6615 claim against Northern Security's insured, there can be no basis for contribution or indemnification under 10 V.S.A. § 6615(i); Northern Security is not a responsible party under 10 V.S.A. § 6615.

The court is not persuaded by Bradford Oil's characterization of the State's direct claim against an insurer under 10 V.S.A. § 1941(f). The court's view is evident in its analysis of the statute-of-limitations issues resolved in the August 2, 2007 decision, which includes the following:

The State's direct claim for reimbursement, 10 V.S.A. § 1941(f), allows it to stand in the shoes of the insured and seek coverage from the insurer. Section 1941(f) does not create a new cause of action per se; rather, it allows the State to pursue the cause of action that otherwise is available only to the insured. For purposes of determining how the limitations statutes apply, this case essentially presents the same circumstances as if the State first sued the insured, and the insured then sued the insurer for coverage.

State v. Stonington Ins. Co., No. 811-12-02 Wncv, Decision at 8 (Aug. 2, 2007). The section 1941(f) claim is predicated on the underlying liability of the insured; it is not divorced from it.

Springfield Realty has underlying liability for environmental contamination as a potentially responsible party under 10 V.S.A. § 6615. If it did not have underlying liability, then there would be no coverage for the State to pursue. Section 1941(f) allows the State to assume the insured's position in making a claim under the policy; it does not otherwise alter the dynamics of the coverage analysis or the nature of the claim to the insurer.

The State's claim against an insurer pursuant to 1941(f) does not affect the availability of subrogation, or the availability of a statutory claim for contribution or indemnity pursuant to 10 V.S.A. § 6615(i). Such claims are not, as a matter of law, unavailable to Northern Security in this case.

Stonington's Duty to Defend and Indemnify Bradford Oil

Stonington filed a cross-claim for declaratory judgment against Bradford Oil to determine its obligations to Bradford Oil in relation to Northern Security's third-party claim; Bradford Oil filed a counterclaim to the same effect.

Stonington maintains that it has no obligation to defend or indemnify Bradford Oil because the State's direct claim against it and Northern Security are time-barred and, therefore,

Northern Security can have no claim against Bradford Oil. Stonington also argues that there is no coverage for pollution or, if it applies, the Vermont pollution endorsement is "claims-made" in nature and no claim was made within the applicable policy period. Stonington also argues that it has been prejudiced by the lengthy delay in the State's "interest" in Bradford Oil, and that there is no coverage for "owned property" under the owned-property exclusion. Bradford Oil argues that the absolute pollution exclusion in the policy is void, the statute of limitations issue does not affect the duty to provide a defense, and the owned property exclusion does not apply to the claim against Bradford Oil.

The court determined in the August 2, 2007 decision that the absolute pollution exclusion is void and the policy therefore provides occurrence-based coverage for property damage, including that related to pollution. Bradford Oil was obligated to provide notice of the claim subject to the notice-prejudice rule. There does not appear to be any genuine dispute that Bradford Oil's claim to Stonington was either timely according to the express policy terms or sufficient to comply with the notice-prejudice rule.

The question of whether the State's claim against Northern Security is time-barred does not have any obvious effect on Stonington's duty to defend Bradford Oil against Northern Security's claim. Even if a claim is later found to be time-barred, the insured nevertheless may be entitled to a defense. In any event, in the August 2, 2007 decision, the court ruled that the State's claim against Northern Security is not time-barred.

As the court also ruled, the extent to which the owned-property exclusion limits coverage, if at all, will be determined on the facts in the damages phase of the case.

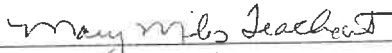
Northern Security's third-party claim against Bradford Oil is "potentially covered" under Bradford Oil's policy with Stonington. *Blake v. Nationwide Ins. Co.*, 2006 VT 48, ¶ 12, 180 Vt. 14 (quoting *City of Burlington v. Nat'l Union Fire Ins. Co.*, 163 Vt. 124, 127 (1994)). Stonington, therefore, has a duty to defend Bradford Oil. The extent of coverage will be determined in the damages phase of this case.

ORDER

For the foregoing reasons:

- a) Bradford Oil's November 16, 2006 summary judgment motion is denied;
- b) Stonington's November 15, 2006 summary judgment motion is denied, and Bradford Oil's January 17, 2007 summary judgment motion is granted, on the issue of Stonington's duty to defend Bradford Oil against Northern Security's third party claim;

Dated at Montpelier, Vermont this 15th day of November 2007.



Mary Miles Teachout
Superior Court Judge