

STATE OF VERMONT
ORANGE COUNTY

FILED
SEP 28 2006
ORANGE SUPERIOR COURT

PROGRESSIVE PLASTICS, INC.,)

Plaintiff,)

v.)

PEERLESS INSURANCE COMPANY and)
THE NETHERLANDS INSURANCE)
COMPANY,)

Defendants.)

Orange Superior Court
Docket No. 186-9-03 Oecv

DECISION

Cross-Motions for Summary Judgment

Plaintiff-Employer Progressive Plastics, Inc. (PPI) and its workers' compensation insurance carrier Defendant-Insurer Peerless Insurance Company (Peerless) disagree over whether certain individuals should be characterized as PPI's employees for purposes of the Workers' Compensation Act.¹ Based on their opposing views, PPI claims that Peerless over-billed premiums and Peerless claims that PPI under-paid them. PPI also claims that Peerless improperly "classified" certain employees which further inflated premiums, refused to provide reasonable explanations for its premium calculations, and wrongfully terminated the insurance contract.

PPI has filed a partial summary judgment motion seeking a declaratory ruling on the legal issue of whether certain "home assemblers" are employees under the Act. Peerless has filed a cross summary judgment motion on that issue and seeks summary judgment on all counts.

Undisputed Facts

Plaintiff PPI is a manufacturing business in Williamstown with approximately 28 employees. During the relevant period of the claims in this suit, which is June 15, 2000 to August 12, 2003, Defendant Peerless provided workers' compensation insurance to PPI. There were three full annual policies provided by Peerless (6/15/00-6/15/01, 6/15/01-6/15/02, 6/15/02-6/15/03), and a fourth until August of 2003 when Peerless canceled PPI's insurance for nonpayment of a premium at issue in this case.

At the beginning of each policy year, the number of employees for the year was estimated, and a premium paid based on the estimate. Following the end of the policy year, an audit was done to determine the exact number of covered employees during the year, and a premium adjustment was made based on the outcome.

¹ Peerless Insurance Company is a trade name of The Netherlands Insurance Company.

PPI arranged with a certain number of individuals to do home assembly of certain plastic items, which PPI then incorporated as components into its other manufacturing work. PPI paid these home assemblers by the piece, or bagful of pieces. The home assemblers did the work off site and not during regular work hours. Prior to the relevant period, these home assemblers had never been included as PPI workers in calculating PPI's premium, either at the estimating or adjusting stage. For the first year of the relevant period (6/15/00-6/15/01), Peerless determined, as a result of its audit, to charge a premium for the home assemblers, but did not do so because of its own significant delay after the audit before a bill would have been sent.

For the second year of the relevant period (6/15/01-6/15/02), Peerless did its end-of-year adjustment, and sent a bill to PPI for the final adjusted premium. PPI requested an explanation of the amount. Peerless said it was due to inclusion of home assemblers, but did not provide support for its claimed premium with a calculation. When PPI did not pay, Peerless threatened to cancel the insurance. PPI paid under protest. On August 12, 2003, Peerless canceled its workers' compensation coverage of PPI, which subsequently arranged substitute coverage.

There were approximately eight people who did home assembly for PPI. Some had day jobs, two as full time employees for PPI, and one as an independent toolmaker who made and sold items to PPI and other manufacturers. They did home assembly in addition. Another did home assembly to supplement disability income, together with her husband who did it as his only work. One, who had a separate day job, did home assembly with her husband, who was blind. For her, it was supplementary to her day job, and for him, it was his only work.

For a very short period of time (1-2 weeks), when the process was first being researched and developed, some assembly of the units was done at PPI during work hours by one or two employees. Once the process was worked out, the assembly work was done by the home assemblers off site, and no such work was done by employees of PPI at its facility. At some point, PPI stopped the use of home assemblers when it put into operation, as part of its regular manufacturing operation, a machine that did the assembly work previously done by the home assemblers.

PPI provided each home assembler with a bag of plastic parts consisting of two pieces that needed to be snapped together. The home assembler picked up the bag at PPI,² took it home, and worked at snapping the pieces together on his or her own time. No one from PPI supervised the work. When the home assemblers had finished all the pieces in a bag, they returned the bag to PPI and were paid for the number of pieces done. PPI inspected the assembled units upon receiving them. There was no timetable imposed by PPI for starting or finishing the work. Some home assemblers did a lot of work, and others did only a little.

When some of the home assemblers began, someone from PPI showed them how to snap the two pieces together. At least one person learned it from watching a relative who did it at home. They could do the work in the manner they wished. One home assembler, on his own, devised a simple tool that made the work go faster. He shared information about the device with

²Occasionally, a PPI employee dropped off a bag at a home assembler's house by specific arrangement when it was convenient for the person to do so.

some, but not all, other home assemblers and with PPI. When PPI later gave a bag of parts to a new home assembler, PPI showed the new person how the tool worked. When the work stopped altogether, a home assembler who had used the device threw it away.

PPI required all home assemblers to register with the Secretary of State as separate business entities with their own trade names. Some had registered prior to doing home assembly work for PPI, and even had separate types of work that they performed under the name of their separate business entities (e.g., lawn care, toolmaking), and some only registered when they learned that PPI expected them to do so. PPI required them to sign a statement that they were sole proprietors. PPI did not withhold taxes or issue W-2's, but reported payments to them on IRS 1099 forms.

Jim Johnson was a full time employee who worked for some period of time as quality manager for PPI. In this job, he spent time on the shop floor. Later, he gradually assumed more and more responsibility, ultimately resulting in his promotion to General Manager in May of 2001. Peerless classified him in the governing class and charged PPI accordingly. PPI claims he should have been classified as clerical staff, a position that involves no exposure to floor operations, and carries a lower premium for workers' compensation. Beginning in May of 2001 when he became General Manager, he worked out of an office separate from floor operations and his duties included customer relations and marketing. The facts do not establish that his duties as General Manager did not also include having a presence on the shop floor.

Conclusions

PPI claims that it was not required by law to provide workers' compensation coverage for the home assemblers. Peerless claims that they qualified as "employees" and do not qualify for an exclusion from that definition, and that therefore Peerless was at risk for covering them and entitled to collect a premium for them.

Both parties seek a declaration of whether the home assemblers were "employees," and if so, whether they qualified for an exception for "sole proprietors." In the suit, PPI seeks remedies for breach of contract, breach of the covenant of good faith and fair dealing and fiduciary duty, consumer fraud, and violation of insurance trade practices. Peerless has counterclaimed for a remaining amount of premium it claims is due.

Declaration of status of home assemblers, and classification

The parties dedicated the lion's share of the briefing to the issue that appears to divide them most fundamentally: whether the "home assemblers" are "employees" subject to the Act, supporting a higher insurance premium, or "sole proprietors," or otherwise not "employees" subject to the Act, supporting a lower insurance premium. Among other things, PPI argues that the analyses of whether the employees are independent contractors and whether they are sole proprietors are completely separate inquiries.

The Workers' Compensation Act is integral to the relationship between the parties. As the Vermont Supreme Court explained in *DeGray v. Miller Bros. Construction Co., Inc.*; 106 Vt.

259 (1934), the Act defines a special relationship among the employer-insured, the insurer, and an employee-claimant.

The liability of an insurance carrier under the provisions of our Compensation Law is more than that of an indemnitor; it is a primary liability to an injured employee. The law puts the burden of insurance upon the employer. No insurance company is required by law to insure the liability of an employer. It comes into the transaction voluntarily. But when it does insure such liability of the employer to pay compensation awarded under the provisions of our act, it thereby assumes the entire liability of the employer to pay such compensation. The measure of its liability under its policy and the statute is the employer's liability to injured employee under the act.

Id. at 279 (essentially describing requirements of 21 V.S.A. § 693); see also *Morrisseau v. Legac*, 123 Vt. 70, 77 (1962) (“The workmen’s compensation act is a part of the insurance carrier’s contract.”). The Commissioner of Labor wields direct enforcement authority over insurance companies, as well as employers, who fail to comply with the provisions of the Act, 21 V.S.A. § 688, and may compel an employer to acquire insurance involuntarily from an authorized insurer, *id.* § 689. Several other provisions of the Act directly affect the parties’ relationship. See, e.g., 21 V.S.A. §§ 694–700. Section 700 specifically permits an employer-insured to have the department of banking, insurance, securities, and health care administration (BISHCA) “examine the policy to determine whether the proper assignment has been made as to classification, rates and advance premium charged.” Regulations of both the Department of Labor and BISHCA may further control the insurance relationship.

The parties do not disagree that the insurance contract at issue covers “the entire liability of the employer” as required by the Act. They disagree over the requirements of the Act in relation to home assemblers, and in turn the calculation of premiums. In their briefing, they urge remarkably conflicting interpretations of the Act, resulting in different premium calculations.

After consideration of the Act and the role of the Commissioner of Labor in administering its provisions concerning coverage and rates, the court concludes that it lacks subject matter jurisdiction to resolve the legal issue upon which Plaintiff seeks declaratory relief: whether the “home assemblers” are subject to coverage under the Act. See 5A Wright and Miller, *Federal Practice and Procedure: Civil 2d* § 1393 at 773 (“subject matter jurisdiction . . . may be asserted by the court itself”).

The interpretation of the Act “must be done in the first instance by the Commissioner.” *Travelers Indemnity Co. v. Wallis*, 176 Vt. 167, 174 (2003); see also *DeGray*, 106 Vt. at 268 (“it was the intent of the Legislature that the commissioner of industries shall have original jurisdiction to hear and determine all controverted questions of fact and law arising in the administration of the act”). The issue of whether the “home assemblers” are covered employees “arises out of” the Act and the obligations it creates, not the contract of insurance alone. It appears, therefore, that such a determination must be made by the Commissioner. 21 V.S.A. § 606. Neither party has demonstrated that the Superior Court has jurisdiction to interpret the Act on its own as it relates to coverage issues. The issue in this case differs from the typical Superior

Court case in which there is an injured claimant, and the question is whether there are common law claims not precluded by remedies available under the Act. In this case, there is no claimant. The issue is solely one of coverage, which determines the related contractual obligation for payment of premiums. It appears that the parties' exclusive recourse on this issue is to the Commissioner pursuant to 21 V.S.A. § 606.

Peerless also seeks a ruling on whether employee Jim Johnson was properly classified for workers' compensation purposes by Peerless. On the current record, the court cannot determine whether this issue arises out of the Act or arises out of the insurance contract alone. The court will not rule on this issue without a persuasive showing that it is within the court's subject matter jurisdiction.

Accordingly, both parties' requests for declaratory relief are denied on the grounds that this court does not have subject matter jurisdiction. The denial is without prejudice to seek to reopen upon a showing that this court does have jurisdiction.

Counts 1-3 and Counterclaim

On the record before the court, it appears that the "employee" and "classification" issues, over which the court concludes it does not have subject matter jurisdiction, must be addressed as predicate to resolution of any contract claims. Therefore, the contract claims are dismissed at this time, but without prejudice to renew the claims after those issues have been resolved.

Counts 4 and 5: The Consumer Fraud and Insurance Trade Practices Act claims

Peerless's summary judgment motion also seeks rulings on two legal issues related to PPI's Consumer Fraud Act claim (count four) and Insurance Trade Practices Act claim (count five): 1) whether a business entity, as opposed to a private consumer, may advance a claim under Vermont's Consumer Fraud Act, and 2) whether PPI has an implied right of action under Vermont's Insurance Trade Practices Act. PPI has not explained the factual allegations ostensibly supporting either claim in any detail, though both appear to relate to Peerless's allegedly unreasonable refusal to explain its premium calculations and "wrongful termination" of the insurance contract. The court is unable to determine on the current record whether these claims may involve subsidiary issues arising out of the Act. The Act has provisions specifically affecting the cancellation, 21 V.S.A. § 696, and nonrenewal, *id.* § 697, of policies, and there may be relevant regulations. The basis for Peerless's summary judgment motion on these two counts, however, is whether PPI is entitled to assert a claim. These grounds do not arise out of the Act and may be decided by the court.

Consumer Fraud Act

Peerless contends that a business entity may not assert a private claim under the Consumer Fraud Act because only individual non-business consumers are entitled to pursue such

relief.³ 9 V.S.A. §§ 2451–2480n (the Consumer Fraud Act). A harmed “consumer” has a private right of action under the Consumer Fraud Act. 9 V.S.A. § 2461(b). Since 1997, “consumer” has been defined specifically to include “a person who purchases, leases, contracts for, or otherwise agrees to pay consideration for goods or services not for resale in the ordinary course of his or her trade or business but for the use or benefit of his or her business or in connection with the operation of his or her business.” 9 V.S.A. § 2451a(a). “Person” is not defined specifically in the Consumer Fraud Act; its general definition, which includes corporations, therefore applies. See 1 V.S.A. § 128.

Thus, since 1997, if not before, “consumer” includes a corporation that uses the subject good or service in the conduct of its business, but not for resale. See *State v. International Collection Serv., Inc.*, 156 Vt. 540, 543 (1991) (stating in dicta that the pre-amendment definition of “consumer” excluded business victims). PPI, therefore, is a “consumer” for purposes of 9 V.S.A. § 2461(b). This conclusion is consistent with the Vermont District Court’s analysis in *Ascension Technology Corp. v. McDonald Investments, Inc.*, 327 F.Supp.2d 271, 275–76 (2003).

Insurance Trade Practices Act

Peerless argues that the Insurance Trade Practices Act, 8 V.S.A. §§ 4721–4726 provides only for administrative enforcement of its requirements, and does not support a private right of action. PPI concedes that there is no express statutory right of action. See *Wilder v. Aetna Life & Casualty Ins. Co.*, 140 Vt. 16, 19 (1981) (noting that the Act does not create a private right of action). PPI argues, nonetheless, that there is an implied right of action based on jurisprudence that has developed since the *Wilder* decision. PPI suggests that the Vermont Supreme Court found an implied right of action in the statutes specifically regulating insurance premium financing companies, 8 V.S.A. §§ 7001–7011, and would come to a similar conclusion under the more general Insurance Trade Practices Act as well. See *Carr v. Peerless Ins. Co.*, 168 Vt. 465, 473–74 (1998) (applying the analysis in *Cort v. Ash*, 422 U.S. 66 (1975), to find an implied right of action to enforce a specific requirement of 8 V.S.A. § 7009).

This issue may be addressed most effectively under Restatement of Torts (Second) § 874A (tort liability for violation of legislative provision). See *Dalmer v. State*, 174 Vt. 157, 168 (2003) (applying Section 874A and citing, among others, *Carr*). The court’s discretion to modify the law by inferring a right of action for violation of a statute must be exercised “cautiously and soundly.” Restatement § 874A cmt. d. Absent dispositive legislative intent, the essential considerations under Section 874A are whether a civil remedy “is consistent with the legislative provision, appropriate for promoting its policy and needed to ensure its effectiveness.” Restatement § 874A cmt. h. In this case, several factors strongly advise against an implied right of action.

First, the specificity of the statute at issue is important. Restatement § 874A cmt. h(1). In contrast to the specific statutory requirement and violation at issue in *Carr*, PPI only makes the most general allegations about the nature of any statutory violations by Peerless. PPI

³ In its opposition to Peerless’s motion, PPI briefed other issues related to the Consumer Fraud Act claim. There was some discussion of those other issues at oral argument. However, none of those issues were raised in Peerless’s summary judgment motion and they will not be addressed now.

suggests that it has claims based on: misrepresentations regarding insurance policies, the sale of unsuitable policies, and the failure to comply with filed rates and forms. PPI's generalized claims are consistent with some of the broadly stated standards in the Insurance Trade Practices Act. However, as in *Carr*, rights of action are implied more readily when a statute prescribes specific conduct by a specific actor. PPI points to no such specific statutory requirement of the Insurance Trade Practices Act that Peerless allegedly violated.

Second, BISHCA, which is responsible for the regulation of insurance companies in general, has specific authority to enforce the Insurance Trade Practices Act. 8 V.S.A. § 4726. PPI has offered no justification of any need for private enforcement in addition to that provided by BISHCA. In other words, it has not shown that a private civil remedy is "needed to ensure [the Act's] effectiveness." Restatement § 874A cmt. h. It has not attempted to demonstrate that private enforcement would complement, rather than conflict with, administrative enforcement. See Restatement § 874A cmt. h(3). If the legislature intended a private right of action, it easily could have written one into the statute, as it did in the Consumer Fraud Act.

Third, PPI has not explained why the panoply of available tort and contract law claims is not sufficient to provide a remedy for whatever unique harm it believes it has suffered because of any alleged violation of the Insurance Trade Practices Act. See Restatement § 874A cmt. h(2).


The court declines to find an implied right of action in the Insurance Trade Practices Act in these circumstances.

Order

For the foregoing reasons,

- 1) Plaintiff's request for declaratory relief on the issue of whether the "home assemblers" are subject to the Workers' Compensation Act, and Defendant's request for declaratory relief on the issue of whether Jim Johnson was classified correctly by Defendant, are denied on the grounds of lack of subject matter jurisdiction, but without prejudice to seek to reopen upon a showing of subject matter jurisdiction;
- 2) Counts 1, 2, and 3 of Plaintiff's Complaint and Defendant's Counterclaim are dismissed without prejudice, based on lack of subject matter jurisdiction, subject to renewal;
- 3) Defendant's motion for summary judgment is denied on Count 4, as Plaintiff qualifies as a "consumer" under the Consumer Fraud Act; and
- 4) Defendant's motion for summary judgment is granted on Count 5, as Plaintiff cannot assert a private action based on the Insurance Trade Practices Act.

Dated this 28th day of September 2006.



Mary Miles Teachout
Superior Court Judge