

NOT INTENDED FOR PUBLICATION IN PRINT

HARTFORD FIRE INSURANCE CO.,)
)
 Plaintiff,)
)
 vs.)
)
 GUIDE CORPORATION,)
)
 Defendant, Counter-claim)
 Plaintiff, and Cross-claim)
 plaintiff,)
)
 and)
)
 AMERICAN INTERNATIONAL)
 SPECIALTY LINES INSURANCE CO. and)
 NATIONAL UNION FIRE INSURANCE CO.)
 OF PITTSBURGH, PA., *et al.*,)
)
 Defendants and Cross-claim)
 Defendants.)

CAUSE NO. IP 01-572-C-Y/F

**In the
UNITED STATES DISTRICT COURT
for the SOUTHERN DISTRICT OF INDIANA,
INDIANAPOLIS DIVISION**

HARTFORD FIRE INSURANCE CO.,)	
)	
Plaintiff,)	
)	
vs.)	
)	
GUIDE CORPORATION,)	CAUSE NO. IP 01-572-C-Y/F
)	
Defendant, Counter-claim)	
Plaintiff, and Cross-claim)	
plaintiff,)	
)	
and)	
)	
AMERICAN INTERNATIONAL)	
SPECIALTY LINES INSURANCE CO. and)	
NATIONAL UNION FIRE INSURANCE CO.)	
OF PITTSBURGH, PA., <i>et al.</i> ,)	
)	
Defendants and Cross-claim)	
Defendants.)	

**ENTRY ON GUIDE’S MOTION FOR PARTIAL SUMMARY JUDGMENT
ON NOTICE AND COOPERATION DEFENSES (doc. no. 592)**

Guide moves for partial summary judgment against AISLIC’s and National Union’s notice and cooperation affirmative defenses, specifically AISLIC’s defenses nos. 15, 24, 25, 30, 31, 36, and 39¹ and National Union’s defenses nos. 15, 26, 29, and 52.² The background of this case has been described in the court’s previous entries on summary judgment,³ familiarity with

¹ The court assumes that defenses nos. 6 and 45 are implicated as well.

² The court assumes that defenses nos. 6 and 38 are implicated as well.

³ Entry on Guide’s Motion for Partial Summary Judgment on National Union’s Policy, June 9, 2004 (doc. no. 483); Entry on Guide’s Motion for Partial Summary Judgment Against

which is assumed for the purposes of this Entry. Only necessary or useful repetitions will be included here.

At the time of the fish-kill incident, there was in effect a “Pollution Legal Liability Select Policy” of insurance, policy no. PLS 267-5491, issued by AISLIC to Guide. There was also in effect a commercial umbrella policy of insurance, policy no. BE 701 93 82, issued by National Union to Guide that provided excess coverage to both AISLIC’s pollution policy and another primary general policy issued by Hartford Fire Insurance Company to Guide. AISLIC and National Union (the “insurers”) affirmatively pled in defense, and currently assert, that Guide failed to fulfill three conditions precedent to their contractual obligations to provide coverage and defense under the policies: Guide’s duties to provide notice, cooperation, and information. Guide now moves for summary judgment, contending that the undisputed facts show that it did not fail to comply with the conditions precedent. Summary judgment “shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c). For the reasons explained in this Entry, Guide’s motion is granted.

Hartford, AISLIC, and National Union on Certain Coverage Issues *etc.*, June 17, 2004 (doc. no. 489).

Notice

AISLIC's policy provides that "[i]t is a condition precedent to any rights afforded under this Policy that the Insured provide the Company with notice of **Pollution Conditions** and **Claims**" in the manner prescribed. AISLIC Policy, § II. "Pollution Conditions" is defined in the policy as:

. . . the discharge, dispersal, release or escape of any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, medical waste and waste materials into or upon land, or any structure on land, the atmosphere or any watercourse or body of water, including groundwater, provided such conditions are not naturally present in the environment.

Id., § VI. T. "Claim" is defined as:

. . . a written demand received by the **Insured** seeking a remedy and alleging liability or responsibility on the part of the **Insured** for **Loss**

Id., § VI. D.⁴

The policy requires that notice of claims be made in this manner:

The **Insured** shall give notice of **Claims** as soon as practicable, but in any event during the **Policy Period** or **Extended Reporting Period**, if applicable. The **Insured** shall furnish information at the request of the Company. When a **Claim** has been made, the **Insured** shall forward the following to the Company as soon as practicable:

- a. All reasonably obtainable information with respect to the time, place and

⁴ "Loss" is defined in the policy as:

. . . (1) monetary awards or settlements of compensatory damages for **Bodily Injury** or **Property Damage**; (2) costs, charges and expenses incurred in the defense, investigation or adjustment of **Claims** for such compensatory damages or for **Clean-Up Costs**; or (3) **Clean-Up Costs**.

Id., § VI. M.

circumstances thereof, and the names and addresses of the claimant(s) and available witnesses.

- b. All demands, summonses, notices or other process or papers filed with a court of law, administrative agency or an investigative body;
- c. Other information in the possession of the **Insured** or its hired experts which the Company reasonably deems necessary.

Id., § II. A. 3.

National Union's policy contains the following notice requirements:

Duties In The Event Of An **Occurrence**, Claim Or Suit

- 1. You must see to it that we are notified as soon as practicable of an **Occurrence** which may result in a claim under this policy. To the extent possible, notice should include:
 - a. how, when and where the **Occurrence** took place;
 - b. the names and addresses of any injured persons and witnesses; and
 - c. the nature and location of any injury or damage arising out of the **Occurrence**.
- 2. If a claim is made or **suit** is brought against any **Insured** that is reasonably likely to involve this policy you must notify us in writing as soon as practicable.
- 3. You and any other involved **Insured** must:
 - a. immediately send us copies of any demands, notices, summonses or legal papers received in connection with the claim or **suit**;

* * *

“Suit” is defined in the policy as:

Suit means a civil proceeding in which **Bodily Injury, Property Damage, Personal Injury** or **Advertising Injury** to which this insurance applies is alleged.

* * *

Id., § IV. L.

Guide moved for summary judgment on all notice defenses that the insurers could raise and the insurers, in response, argued only the issue of Guide's notice of the criminal action. The court therefore grants Guide's request for summary judgment on all other notice defenses against the insurers' duties to indemnify and defend that they could have raised.

An insured must give "reasonable" notice to its insurer. *Askren Hub States Pest Control Services v. Zurich Insurance Co.*, 721 N.E.2d 270, 278 n. 7 (Ind. App. 1999). A notice defense requires a showing of unreasonableness and prejudice, but if an insurer shows that a notice was unreasonable, then a rebuttable presumption of prejudice arises. *Miller v. Dilts*, 463 N.E.2d 257 (Ind. 1984).

The insurers contend that Guide did not give reasonable notice of the criminal claims against it. The parties agree that Guide notified the insurers of the ongoing criminal investigation in June 2000 (Guide learned of the investigation in February 2000) and next notified them of the government's proposed criminal penalty calculations on February 16, 2001. The February 16, 2001 communication also stated that Guide "will pursue" negotiations with the governments on the criminal matters. On June 18, 2001, the United States filed a criminal misdemeanor information against Guide, charging seven counts of negligent discharges in violation of environmental laws, and Guide entered into a plea agreement which was filed on that day as well. No formal criminal charges were filed before June 18, 2001. The insurers assert that significant activity involving the criminal matters occurred in the interim. Specifically, they point to three examples: Guide had a settlement conference with the United States Attorney's office in August 2000; proposed penalty calculations by the United States

Attorney's office were communicated to Guide in November 2000; and Guide asked an environmental consulting firm to analyze the calculations and develop counter-proposals. The insurers contend that the receipt of the government's proposed penalty calculations in November 2000 constituted a "claim" under AISLIC's and National Union's policies, (Insurers' Brief in Opposition (doc. no. 725), p. 36),⁵ thus triggering Guide's notice obligations. They argue that Guide's waiting until February 2001 to give notice was unreasonable and a breach of the policy.

The first issue the court examines is when Guide was required to give notice under the policies. As noted above, AISLIC's policy requires notice of a "claim" which is defined as a written demand that seeks a remedy and alleges liability or responsibility on the insured for loss. National Union's policy also requires notice if a "claim" is made that is reasonably likely to involve the policy. Unlike AISLIC's policy, National Union's does not provide a definition for "claim." The evidence relied upon by the parties shows that the November 2000 proposed penalty calculations were not communicated to Guide in writing. This fact is fatal to AISLIC's notice defense as its policy clearly requires that a claim be written. In addition, the nature and circumstances of these calculations and the relations between Guide and the United States were not described, rendering it impossible on this evidence to determine whether the United States' communication in November 2000 constituted a "demand" on Guide. The evidence shows that Guide was involved in some form of "settlement negotiations"⁶ with the United States at this

⁵ The insurers made no argument or suggestion that they contend Guide should have given notice of the criminal investigation before June 2000 or that the August 2000 negotiations constituted a "claim."

⁶ The parties refer to the interactions between Guide and the government at this time by this term but, by itself, it encompasses a wide spectrum of interaction, from pre-investigation

time. While it is fair to interpret “demand” to mean something less than the filing of formal charges, it is also fair to interpret it to mean something more than preliminary stages of settlement negotiations. AISLIC has not shown a genuine issue of fact that is material to the sufficiency of Guide’s notice.

National Union’s policy required Guide to give written notice when “a claim is made . . . that is reasonably likely to involve this policy.” Unlike AISLIC’s policy, National Union’s does not provide a definition of “claim” and National Union did not argue for a different definition than AISLIC’s. The court concludes that the plain, ordinary meaning of the term is close to AISLIC’s: a demand, written or unwritten, alleging liability or responsibility on the insured and seeking a remedy that is covered by the policy. But the slight differences in definition do not save National Union from the same deficiencies that defeated AISLIC’s argument. There is no showing that the November 2000 penalty calculations constituted a “claim” requiring notice under the policy. National Union has not shown that there is a genuine issue of fact material to the sufficiency of Guide’s notice.

Even if the November 2000 penalty calculations qualified as a claim under the policies, the insurers failed to show actual prejudice from Guide’s delay in giving notice until February 2001. There is a substantial overlap in the factors determining whether a notice was unreasonable and whether an insurer was prejudiced by late notice: for example, risks of evidence spoilage, fading memories of witnesses, witness unavailability, and lost opportunities for defenses and settlements. Guide has shown how these factors do not demonstrate

contact to calculation of a plea agreement’s sentence recommendation.

unreasonableness or prejudice in this case because it did give early notices of the fish kill incident, the criminal investigation, and the civil actions; Guide conducted its own defense with regard to all of these actions from the beginning; and neither insurer offered or requested to assume the defense. Guide thus rebutted the presumption that the insurers suffered prejudice from any late notice. Because neither insurer showed or suggested any actual prejudice it suffered, and finding Guide's argument convincing, the court concludes that the insurers did not show that they could prevail on notice defense.

The court finds that there is no genuine issue of material fact regarding the sufficiency of Guide's notices under the policies and concludes that judgment is due as a matter of law against AISLIC's and National Union's lack-of-notice defenses.

Cooperation

AISLIC's policy contains the following requirement:

Cooperation — The **Insured** shall cooperate with the Company and offer all reasonable assistance in the investigation and defense of **Claims** under the applicable Coverages purchased. The Company may require that the **Insured** submit to examination under oath, and attend hearings, depositions and trials. In the course of investigation or defense, the Company may require written statements or the **Insured**'s attendance at meetings with the Company. The **Insured** must assist the Company in effecting settlement, securing and providing evidence and obtaining the attendance of witnesses.

AISLIC Policy, § VII. C. The policy also includes a requirement which applies “[i]n the event the **Insured** is entitled by law to select independent counsel to defend the **Insured** at the Company's expense”: “As respects any such counsel, the **Insured** agrees that counsel will timely respond to the Company's request for information regarding the **Claim.**” *Id.*, § I. 2.

AISLIC's policy also contains the following term on the insured's duty to share information:

Access to Information — The **Named Insured** agrees to provide to the Company any information developed or discovered by the **Insured** concerning **Clean-Up Costs** for **Pollution Conditions** covered under this Policy, whether or not deemed by the **Insured** to be relevant to such **Clean-Up Costs** and to provide the Company free access to interview any **Insured** and review any documents of the **Insured**.

AISLIC Policy, § VII. K. "Clean-Up Costs" is defined by the policy as:

. . . expenses including reasonable and necessary legal expenses incurred with the Company's written consent, incurred in the investigation, removal, remediation or disposal of soil, surfacewater, groundwater or other contamination:

- (1) to the extent required by **Environmental Laws**, or specifically mandated by court order, the government or any political subdivision of the United States of America or any state thereof, or Canada or any province thereof duly acting under the authority of **Environmental Law(s)**; or
- (2) which have been actually incurred by the government or any political subdivision of the United States of America or any state thereof or Canada or any province thereof, or by third parties.

Id., § VI. E.

In addition, as noted above, the notice provision of AISLIC's policy contains the following terms:

The **Insured** shall give notice of **Claims** as soon as practicable, but in any event during the **Policy Period** or **Extended Reporting Period**, if applicable. *The Insured shall furnish information at the request of the Company.* When a **Claim** has been made, the **Insured** shall forward the following to the Company as soon as practicable:

- a. All reasonably obtainable information with respect to the time, place and circumstances thereof, and the names and addresses of the claimant(s) and available witnesses.
- b. All demands, summonses, notices or other process or papers filed with a court

of law, administrative agency or an investigative body;

- c. *Other information in the possession of the **Insured** or its hired experts which the Company reasonably deems necessary.*

Id., § II. A. 3 (italicized emphases added).

National Union's policy contains the following requirement:

Duties In The Event Of An **Occurrence**, Claim or **Suit**

* * *

3. You and any other involved **Insured** must:

- a. immediately send us copies of any demands, notices, summonses or legal papers received in connection with the claim or **suit**;
- b. authorize us to obtain records and other information;
- c. cooperate with us in the investigation, settlement or defense of the claim or **suit**;

* * *

National Union Policy, § VI. F.

To prevail on their defenses of lack of cooperation, the insurers must prove (1) that Guide intentionally and willfully failed to cooperate, (2) that the insurers made good faith and diligent efforts to obtain Guide's cooperation, and (3) that Guide's failure to cooperate caused actual prejudice to the insurers, meaning that the outcome of the case would have been different if the insured had cooperated. *Smithers v. Mettert*, 513 N.E.2d 660, 662 (Ind. App. 1987), *trans. denied*; *Cincinnati Insurance Co. v. Irvin*, 19 F.Supp. 906, 916 (S.D. Ind. 1998).

Under AISLIC's policy, the duty to cooperate arises only after a claim arises: the insured is required to "cooperate . . . and offer all reasonable assistance in the investigation and defense of **Claims**." The primary purpose of such cooperation duties is to protect insurers in litigation

with third-parties; they ensure that insureds will not “roll over” for plaintiffs by admitting liability or by sabotaging insurers’ defenses. *Gallant Insurance Co. v. Wilkerson*, 720 N.E.2d 1223, 1226 (Ind. App. 1999). A separate provision of AISLIC’s policy applies to cooperation duties “[i]n the event the **Insured** is entitled by law to select independent counsel to defend the **Insured** at the Company’s expense”: “As respects any such counsel, the **Insured** agrees that counsel will timely respond to the Company’s request for information regarding the **Claim**.” Another provision requires insureds to provide information developed or discovered relating to clean-up costs — including expenses incurred in investigation, removal, disposal, or remediation of surfacewater contamination — and to provide AISLIC free access to interview any insured and to review any document of the insured.

As noted, National Union’s policy requires, in the event of a claim or a suit, the insured to provide copies of any demands or legal papers; authorize National Union to obtain records and other information; “cooperate with us in the investigation, settlement or defense of the claim or **suit**”; and assist National Union, at its request, in the enforcement of rights against any third party liable to the insured.

Guide first gave notice of the fish kill to AISLIC on December 29, 1999 in a letter from its insurance agent and to National Union by letter on February 16, 2000. Guide described the notice as only a “precautionary” measure and emphasized that no formal claim had been made. AISLIC responded in a January 11, 2000 letter that acknowledged receipt of Guide’s letter, requested a list of information about the incident, and noted that AISLIC was reserving all of its rights. Guide responded to AISLIC’s letter on February 24, 2000 and included a point-by-point

response to AISLIC's January 11, 2000 request for information. AISLIC contends that Guide's responses included serious misrepresentations and omissions of important information and relies on these as evidence of Guide's breach of its duty to cooperate. But according to the plain language of AISLIC's policy, Guide was under no duty to cooperate because no claim, as defined in the policy, had yet arisen. There is no dispute that, at this time, there was no demand seeking a remedy and alleging liability on Guide for loss covered by the policy. In addition, there is no dispute that, at this time, Guide had not developed or discovered any information on clean-up costs. Neither IDEM's announcement in late December 1999 nor its January 5, 2000 cease and desist order served on Guide satisfy the requirements for a "claim" under AISLIC's policy as the court has already found. Without a claim, or information on clean-up costs, Guide was under no policy duty to cooperate or to inform.⁷

The court previously found that the earliest a claim arose was on May 3, 2000, when Guide sent notice and copies of the governments' civil complaints that were filed on April 27, 2000. Thereafter, Guide notified the insurers of the City of Anderson's motion to intervene on June 13, 2000 and the *Rasley* class action on June 22, 2000. As found above, neither insurer has a defense to the sufficiency of these notices by Guide. There is no dispute in the evidence presented on the present motion that neither insurer made any request for information or cooperation after AISLIC's initial January 11, 2000 letter until November 13, 2000 when

⁷ AISLIC did not contend that Guide failed to give notice of "Pollution Conditions" under § II. A. of its policy or failed to supply the information required with such notice. At any rate, under the policy, an insured is obligated to cooperate only in the investigation and defense of "claims", not pollution conditions, § VII. C., and there is no dispute that, at this time, Guide had not developed or discovered information regarding clean-up costs for pollution conditions, thus implicating the "access to information" obligation of § VII. K.

AISLIC notified Guide that it was withdrawing its September 8, 2000 denial of coverage and defense and requested information. Therefore, there could have been no failure of cooperation by Guide before November 13, 2000.

AISLIC's denial of coverage and defense on September 8, 2000 and reservation of rights on November 13, 2000 created a conflict of interest that justified Guide's employment of independent counsel to defend itself. In addition, this conflict justified Guide in withholding its privileged attorney-client and work-product materials and information from its insurers.⁸

Eastern Air Lines, Inc. v. United States Aviation Underwriters, Inc., 716 So.2d 340 (Fla. App. 1998); *Wisconsin v. Hydrite Chemical Co.*, 582 N.W.2d 411, 420-21 (Wis. App. 1998), *review denied*; *Rockwell International Corp. v. Superior Court of Los Angeles County*, 26 Cal.App.4th 1255, 32 Cal.Rptr.2d 153, 156-59 (Cal.App. 1994), *review denied*; *Remington Arms Co. v. Liberty Mutual Insurance Co.*, 142 F.R.D. 408 (D. Del. 1992); *Bituminous Casualty Corp. v. Tonka Corp.*, 140 F.R.D. 381 (D. Minn. 1992).⁹

⁸ Although National Union did not deny all coverage and defense until January 4, 2001, its claims processing and decision making was handled by AIG subsidiary AIGTS, the same entity that handled Guide's claim to AISLIC. Although AISLIC and National Union are separate subsidiaries of AIG, there is no indication in the evidence on this motion that a separation of the entities' claims was maintained by AIGTS or that the claims were segregated to separate handlers, supervisors, and decision makers. If there was no such separation, then AISLIC was justified in maintaining its privileges against National Union's claims handlers as well as AISLIC's. At any rate, the evidence on the present motion shows that, while AISLIC made requests for information after November 13, 2000, National Union did not make any information or cooperation requests before this suit was filed. Therefore, Guide could not have failed to cooperate with or inform National Union before this suit was filed and National Union cannot show the second element of its lack-of-cooperation defense.

⁹ AISLIC argued that, because it and Guide had a common interest in defending against the underlying suits, Guide's information should not have been privileged as to it. Just as the decisions cited in the text, the court rejects that theory. After AISLIC denied all coverage and

AISLIC asserts that, after its November 13, 2000 letter withdrawing its coverage denial and requesting information, it made oral and written requests for information on December 19, 2000; January 25 and 31, 2001; February 6, 22, 26, and 27, 2001; March 14 and 22, 2001; April 10, 11, and 13, 2001; and May 2 and 3, 2001. The information AISLIC requested included documents and correspondence regarding the litigations, reports by Guide's environmental consultants and other experts, documents relating to wastewater operations at Guide's plant, internal memoranda and notes of Guide's employees, and third-party reports including reports by regulatory agencies. AISLIC also requested information to be created by Guide, primarily defense-related information including estimates and evaluations of damages and liability; litigation status reports; settlement evaluations; defense budgets; estimates of future defense costs; litigation plans; and defense, consultant, and vendor bills. AISLIC contends that Guide failed to fully respond to its requests. Guide contends that it did supply requested information but that some information that was requested was privileged attorney-client and work-product material. In addition, on February 16, 2001, Guide informed its insurers that it was making many documents, including all documents provided to third parties, available for inspection in Indianapolis. The insurers did not accept Guide's offer and never inspected the materials apparently for the reason that Guide was obligated to deliver all of its material to AIGTS in New York City, despite Guide's representation that the materials were too voluminous.

defense, and then decided to defend with a reservation of rights, its interests and Guide's were adverse: it then had an interest in substantively defeating coverage by, for example, proving that Guide's management intentionally caused the releases or by setting up conditions or exclusions defenses. Guide was entitled to protect itself by hiring independent counsel and preserving its privileges.

These are genuine issues of material fact regarding whether Guide intentionally and willfully failed to cooperate with or to inform AISLIC between November 13, 2000 and the filing of this case. Facts and conclusions regarding, for example, the content and clarity of AISLIC's requests, the reasonableness of those requests, the adequacy and timing of Guide responses, whether Guide was justified in withholding information, whether any deficiencies by Guide were intentional and willful, and the reasonableness of AISLIC's refusal to inspect the documents made available by Guide, are disputed and would have to be decided at trial.

The court finds, however, that the insurers have failed to show any genuine issue of fact that is material to the third element of their cooperation defense — whether they suffered actual prejudice by Guide's alleged failures to cooperate or inform — and the court concludes that Guide has shown that it is entitled to judgment on this defense as a matter of law. The insurers must show that Guide's alleged failures to cooperate or inform actually prejudiced them, meaning that the outcome of the underlying litigations would have been different if Guide had cooperated by providing requested and required information. An insurer's showing of actual prejudice is particularly difficult when its insured is represented by independent counsel and a conflict exists between insured and insurer. Not only is the scope of available information narrowed by the insured's privileges and the usually narrower policy obligations to provide information (not full cooperation), but the fact that the insurer no longer controls the defense means that it has limited ability to affect the outcomes of underlying litigation regardless of the information at hand.

The insurers do not attempt to confront any of these difficulties. Instead, as their

prejudice showing, they rely solely on the effects of Guide's alleged failures to cooperate on *this* suit. The insurers first point to Guide's claims of bad faith in this case as "built upon the detritus of Guide's failure to cooperate": the alleged delays in paying Guide's defense bills were, in fact, due to Guide's own failure to supply requested necessary supporting documentation. But the insurers will be able to prove Guide's alleged failures to supply information at trial as part of their defense against Guide's bad faith failure-to-pay claims. What the insurers needed to show here, however, to support their defense against coverage and the duty to defend, was how Guide's cooperation would have caused a different result in the underlying suits, not how the lack thereof has shaped the present case.

Similarly, the insurers point to Guide's claim in this case for prejudgment interest and its claim that the insurers breached their coverage obligations by failing to agree to the underlying settlements. They argue that it was actually Guide's failures to supply requested information that caused payment delays and prevented the insurers from evaluating the reasonableness of the settlements. Again, the insurers will be able to defend against Guide's claims for prejudgment interest and coverage breach at trial, but they have not shown how Guide's cooperation would have led to different results in the underlying cases.

Finally the insurers assert their "most clear" evidence of prejudice in the contradiction between Guide's claim in this case that the insurers failed to defend it when it "was facing enormous and overwhelming investigative pressures during the first few months after the fish kill" and Guide's alleged conduct in actively concealing those very pressures from its insurers. There is nothing here to demonstrate how any of the outcomes in the underlying cases would

have been different had Guide not concealed the pressures it faced from its insurers.

Because the insurers have failed to make any showing of actual prejudice, the court finds and concludes that judgment is due as a matter of law against their lack-of-cooperation defenses.¹⁰

Use of cooperation evidence

As explained above, although the insurers may not use evidence of Guide's failure to provide requested information as a defense against their ultimate indemnification and defense duties, they may use it to defend against Guide's bad faith and breach claims that the insurers failed to timely pay Guide's defense bills. Guide argued that, after the conflict with its insurers arose, their only defense duty was to pay Guide's bills. However, a conflicted insurer's duty to its insured "does not include the duty to pay all bills as submitted. Rather, the insurer has the right to challenge the nature and reasonableness of the defense expenses incurred." *Employers Insurance of Wausau v. Recticel Foam Corp.*, 716 N.E.2d 1015, 1029 (Ind. App. 1999), *trans. denied*. The insurers are liable for only the reasonable and necessary expenses incurred by Guide in defending the underlying suits. *Id.*, at 1027. In addition, an insured has an obligation to comply with agreed-to defense billing guidelines.¹¹ Therefore, to the extent that the insurers' requests (beginning on November 13, 2000) for information documenting and supporting the

¹⁰ Because it is unnecessary, no ruling is made on Guide's argument that the insurers waived, or are estopped from asserting, their notice and cooperation defenses by failing to raise them before Guide entered into the settlements of the underlying suits.

¹¹ The court recognizes an apparent dispute in this case about whether, and to what extent, Guide previously agreed to the billing guidelines that AIGTS sent to it after its claims were made.

nature and reasonableness of Guide's legal bills were themselves reasonable and not contrary to Guide's privileges, the insurers may argue and prove that Guide had an obligation to cooperate and to provide the requested information. Similarly, although the insurers eventually decided to provide for Guide's defense under a reservation of rights, and were thus in conflict with Guide's defense and coverage interests, they were still entitled under the policy to request and to receive reasonable, non-privileged information in order to make final coverage determinations, which they had reserved. While the court has ruled that the insurers cannot assert a cooperation defense to defeat the duty to indemnify or defend, they may use evidence of Guide's non-cooperation to support the reasonableness and good faith of their handling of Guide's legal bills and coverage claims.

Conclusion

The Court finds that there is no genuine issue of fact that is material to AISLIC's and National Union's notice and cooperation defenses and the court concludes that Guide is due

judgment as a matter of law against those defenses. Guide's motion for partial summary judgment against AISLIC's and National Union's notice and cooperation defenses is granted.

SO ORDERED this _____ day of February, 2005.

RICHARD L. YOUNG, JUDGE
United States District Court
Southern District of Indiana

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