

APPELLATE DIVISION, SECOND DEPARTMENT
SUPREME COURT OF THE STATE OF NEW YORK

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KSW MECHANICAL SERVICES, INC.,
Plaintiff-Appellant-Respondent,
- against -

Queens County Clerk's
Index No. 7914/03
Appellate Division
Docket No. 2006-02322

AMERICAN PROTECTION INSURANCE COMPANY,
Defendant-Respondent-Appellant.

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AMICUS CURIAE BRIEF

PRELIMINARY STATEMENT

Amicus Curiae American Subcontractors Association, Inc.

("ASA"), hereby submits the following as its *Amicus Curiae* brief in support of appellant's appeal from the decision and order in this action rendered by the Supreme Court of the State of New York, Queens County, on February 8, 2006.

ASA is an IRS Section 501(c)(6) non-profit, national membership trade organization composed of approximately 5,500 business entities, all of whom are engaged as either subcontractors, specialty trade contractors or suppliers in the

construction industry. The organization was formed more than forty (40) years ago and is nationally recognized as dedicated to protecting the rights and interests of its members consistent with the best interest of the construction industry and its general business environment. ASA urges the Court to reverse, to the extent appealed from, the decision of the Supreme Court, Queens County because affirmance would reward the respondent's misconduct and expose the construction industry to acts by insurance carriers which the legislature of this State has condemned.

THE ISSUES ON THIS APPEAL

The issues raised on this appeal are (a) whether KSW, a named insured under an Owner-Controlled Insurance Policy ("OCIP" or "wrap-up"), whose work was damaged by other named insureds under the policy, is entitled to the status of a third-party claimant and (b) if KSW is indeed a third-party claimant, is it

entitled to recover consequential damages from the OCIP carrier, American Protection Insurance Company ("Kemper"), which egregiously and deliberately failed to properly administer KSW's general liability claims for damages. The latter issue is of great significance to the construction industry because OCIPs have proliferated and, as the industry has developed, subcontractors are forced to participate in such programs and rely upon the OCIP carrier for redress when their work is inevitably damaged by other insureds.

FACTS

An OCIP is a program by which an owner of a large construction project purchases for itself and all trades on the project all of the insurance coverage ordinarily provided by the individual contractors. In return for the owner provided insurance coverage, the contractors are required to eliminate all costs of insurance from their bids. Moreover, the trades are

precluded from asserting claims against one another when an insured's work is damaged. The sole recourse is to the tortfeasor's common OCIP coverage. These insurance programs have become quite common on large construction projects throughout New York State, and the country as well. If OCIP carriers can shirk their obligations with impunity, the weight of their misconduct will fall most heavily on trade subcontractors.

In the instant case, Kemper provided an OCIP which covered the construction work at two federal courthouse projects being built in Brooklyn, New York. Pursuant to each subcontract agreement, each subcontractor was to be provided with OCIP coverage, which included Workmen's Compensation, Commercial General Liability ("CGL") and Excess Liability Insurance. The CGL coverage included broad form property damage coverage with no deductible applicable to the subcontractor specifying:

"[Kemper] will pay those sums that the insured becomes legally obligated to pay as damages because of ... 'property damage' to which this insurance applies" (R, 635)

Each of the contractors on the project was a named insured under the OCIP which contained mutual waivers of subrogation.

Because of the nature of the projects, there was stringent security and only contractors working on the projects had access to the work sites (R. 127-8, 133).

During the course of KSW's work at the projects, the equipment and materials it installed were damaged by others, prior to acceptance by the Government (R. 146, 160). KSW filed claims with Kemper, which were initially ignored. (R. 662-3). Kemper finally acknowledged the claims, but took the position that KSW had to "positively" identify which contractor(s) had damaged KSW's work (R. 1186), even though all the contractors with access to the sites were enrolled under the OCIP (R. 453).

Instead of processing KSW's claims in an appropriate fashion, Kemper initially refused to recognize them and, when complaint was made to the NY State Insurance Department, even used illegal means to thwart KSW's complaint. Kemper falsely claimed in a letter to the Department, signed by a Kemper vice president, that Kemper had paid KSW for the damages to its work (R. 706). Based on the false assertions in Kemper's letter, the Department closed its investigation (R. 705).

When it could not achieve any resolution on four of its claims, KSW filed suit against Kemper for its unpaid third-party claims, as well as for consequential and punitive damages.

The New York Supreme Court for Queens County found that Kemper's defenses to KSW's unpaid damage claims were "legally and factually without merit." (R. 8) It awarded KSW \$25,451.53 for the unpaid claims. However, the Court below denied KSW's claim for consequential damages flowing from the delays and expenses caused by Kemper because the Court decided KSW was not a third-party claimant under the comprehensive general liability policy provided as part of the OCIP. (R. 11) In doing so, it deprived KSW of any redress for Kemper's denial of its claims and the carrier's misconduct under the Insurance Law of New York State.

POINT I

**KSW SHOULD BE RECOGNIZED AS A THIRD-PARTY
CLAIMANT UNDER THE OCIP POLICY AT ISSUE**

The OCIP program at issue provided comprehensive general liability coverage to contractors working on the project, which covered the contractors against claims by third parties (R. 625). The OCIP Program did not include separate first-party property insurance coverage. While the Court correctly found that KSW was entitled to have its property damage claims paid by Kemper, it incorrectly determined that KSW was not a third party claimant, even though Kemper could only be responsible to KSW, in its status as a third-party claimant under OCIP's general liability coverage for third party claims. Accordingly, the statement of the Court below that KSW was not entitled to be treated as a third-party claimant is clearly inconsistent with its own

decision. It was upon the Court's inconsistent ruling that KSW was denied status as a third-party claimant upon which to enforce its rights to further redress. Based on this apparent flaw in its decision, the Court's denial of KSW's claims for the carrier's misconduct in handling the claims becomes suspect. Not only is the decision below faulty in that it deprives KSW of treatment as a claimant under the policy, but it also gave to Kemper the option of evading its obligations with impunity.

POINT II

PRIVATE PARTIES SHOULD BE ENTITLED TO COMPENSATORY DAMAGES FROM AN INSURANCE COMPANY THAT VIOLATES INSURANCE LAW SECTION 2601

Insurance Law Section 2601 prohibits Kemper's unfair claim settlement practices in the instant case. The statutes prohibitions are as follows:

"§2601. Unfair claim settlement practices;
penalties

(a) No insurer doing business in this state shall engage in unfair claim settlement practices. Any of the following acts by an insurer, if committed without just cause and performed with such frequency as to indicate a general business practice, shall constitute unfair claim settlement practices:

(2) failing to acknowledge with reasonable promptness pertinent communications as to claims arising under its policies;

(4) not attempting in good faith to effectuate prompt, fair and equitable settlements of claims submitted in which liability has become reasonably clear, ...

(c) If it is found, after notice and an opportunity to be heard, that an insurer has violated this section, each instance of noncompliance with subsection (a) hereof may be treated as a separate violation of this section for purposes of ordering a monetary penalty pursuant to subsection (b) of section one hundred nine of this chapter. ..."

Section 2601(c) provides for monetary penalties to be imposed on insurers when they are found to have violated this section. Likewise, it provides that each instance of non-compliance by an insurer shall constitute a separate violation for purposes of ordering a monetary penalty.

In the instant action, Kemper clearly violated Sections 2601(a)(2) and 2601(a)(4). But for these violations, KSW would not have gone to the expense of bringing action against Kemper. Despite the clear delineation by the statute of this wrongful conduct, which Kemper could not deny, the Court below mistakenly decided that no independent wrong had been done by Kemper upon which to predicate any additional recovery. However, this misconduct should have given rise to at least two instances of wrongful conduct by Kemper.

Under the Roman legal maxim of *ubi ius, ibi remedium* (Where there is a right, there is a remedy), KSW should have been afforded a remedy. Section 2601 seeks to protect private parties from unfair settlement practices. Each instance of violation of Section 2601 is a wrong against a private party that should

afford to the wronged party the right to enforce a remedy against an insurer by way of a private action seeking compensatory damages for losses due to such violations.

This entitlement is supported by principles of equity and the case of *In Dunrite Auto Body & Motor Works Inc. v. Liberty Mut. Ins. Co.*, 153 Misc.2d 440, 590 N.Y.S.2d 152 on remand, 160 Misc.2d 168, 607 N.Y.S.2d 1005 (App. Term 1992). In *Dunrite* the court recognized that a party has a private right of action for compensatory damages under the insurance law and the underlying regulations setting the standards by which insurers are to process claims.

Under New York law, the unfair claims settlement statute should not preempt a common law claim for breach of covenant of good faith and fair dealing where, as here, the alleged wrongful acts consist of conduct cumulatively meeting statutory definition of unfair claim settlement practice. *Greenspan v. Allstate Ins. Co.*, 937 F.Supp. 288 (1996).

Damages are similarly levied on carriers where the claim is based upon the carrier's liability to its insured¹. Thus, *In re: Eurospark Industries Inc.*, 288 B.R. 177, 40 Bankr. Ct. Dec. 277 (2003), the court first distinguished a first-party action against an insurer (which occurs when an insured sues its insurer

¹ In such case the compensation is based on breach of the insurance contract. However, in the instant case, the right to redress is equally compelling.

over the insurer's treatment of the insured's claims or benefits) resulting from the insurer's treatment of claims by a third-party against the insured. It held an agency/fiduciary relationship is created between the insurer, who controls the disposition of third-party's claims and the insured for purpose of third-party action.

The Courts have recognized the right of a wronged party to recover from a carrier who fails to meet its obligation for fair dealing to resolve claims. As the Court observed in *Afia v. Continental Insurance Company*, 140 A.D.2d 167, 527 N.Y.S.2d 420, 1988, App. Div. 4663 (1st Dept. 1988), "the law is well established that compensatory damages in excess of the policy limits may be recovered where an insurer, in violation of its implied obligations to act in good faith, has failed to make a reasonable settlement of a claim within policy limits." Moreover, as the First Department recognized in *Acquisita v. New York Life Insurance Company*, 285 A.D.2d 73, 730 N.Y.S.2d 272, 2001, N.Y.App., Div. Lexis 7008 (1st Dept. 2001), "an award, at the conclusion of litigation, of money damages equal to what the insurer should have paid in the first place, may not actually achieve the goal of contract damages, which is to place the plaintiff in the position he would have been in had the contract been performed."

Therefore, Kemper should be held liable for all damages which KSW incurred due to Kemper's refusal to properly address its claims; otherwise, there will be no incentive for any OCIP insurer to diligently process and resolve claims. Such misconduct will impose severe burdens upon trade contractors. In the case at bar, KSW originally sought recovery under the OCIP for damages that other named insureds caused to KSW's work. It should be afforded the benefit of its rights under Section 2601 of the Insurance Law with a concomitant right to redress.

CONCLUSION

The decision rendered below should be reversed to the extent appealed from and remanded for further consideration consistent with respondent's failure to meet its obligations under Insurance Law Section 2601.

Respectfully submitted,

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