Marlin v. Wetzel County Board of Education, 569 S.E.2d 462 (West Virginia Ct. App., 2002)

The Board entered into a construction agreement with a contractor to build a school. The contract included a hold harmless provision, required that the Board be given additional insured status under the contractor's CGL policy, and that a certificate of insurance to that effect be provided. The latter provision stated:

7. Certificate of Insurance a. The Certificate of Insurance shall be provided by the Contractor to the Owner...

b. The Certificate of Insurance shall contain a provision that coverage afforded will not be cancelled until at least sixty (60) days prior written notice has been given to the Owner...

c. The Owner shall be the Certificate Holder.

d. The Certificate shall be prepared on "Acord" Form 25 (2/84) or an equivalent form.

e. The Certificate shall indicate that the Owner...[is an] ADDITIONALLY INSURED.

When a claim was tendered to the insurer, Commercial Union, the carrier denied the claim on the basis that additional insured status was never requested by the agent and that the certificate was not enforceable to that effect. The insurance company asserted that it never received either the certificate of insurance or any other document suggesting the insurance policies needed to be amended. Despite the errors committed by its agent, Commercial Union argued that the certificate of insurance was issued, by its own terms, for "information only," and could not alone modify the policies to extend coverage. Commercial Union points to disclaimer language prominently on the certificate of insurance which states:

This certificate is issued as a matter of information only and confers no rights upon the certificate holder. This certificate does not amend, extend or alter the coverage afforded by the policies below.

The certificate of insurance also contains the following disclaimer:

This is to certify that [the] policies of insurance listed below have been issued to the insured named above for the policy period indicated. Notwithstanding any requirement, term or condition of any contract or other document with respect to which this certificate may be issued or may pertain, the insurance afforded by the policies described herein is subject to all the terms, exclusions and conditions of such policies.

Commercial Union contended that there was no coverage available to the Board under the certificate because it issued no amendments or alterations to the actual insurance policy to extend coverage to the Board, and because the certificate, by its own terms, could not amend or alter the policy.

The Board argues that because it relied upon the misrepresentation in the certificate of insurance that it was an "additional insured" under both

policies, under the doctrine of estoppel, Commercial Union cannot now deny coverage.

This is the court's discussion of the certificate of insurance issues:

Coverage under the Certificate of Insurance

The Board argues that it is an "additional insured" under both insurance policies at issue - the general liability policy and the umbrella policy. The Board argues that because an agent for Commercial Union issued a certificate of insurance listing the Board as an additional insured under both policies, the Board reasonably relied upon that representation to its detriment and thereby allowed Bill Rich Construction to perform the construction work without adequate insurance coverage. Because the Board relied to its detriment on Commercial Union's misrepresentation of coverage, the Board argues that Commercial Union is now prevented under the doctrine of estoppel from denying the representation made on the certificate.

Commercial Union does not dispute that its agent issued a certificate of insurance listing the Board as an additional insured. Instead, Commercial Union argues that it had no knowledge of the certificate's existence, and therefore could not modify the actual policy to include coverage for the Board. For example, Commercial Union points out that neither the Board nor Bill Rich Construction paid additional premiums for the alleged additional coverage. Commercial Union asserts that disclaimer language on the face of the certificate of insurance should have made clear to any reader - including the Board - that no right to coverage was created by the certificate. In other words, Commercial Union contends that because no firm representation of the existence of coverage was ever made, and the Board could not have reasonably relied on the certificate as evidence of coverage, the doctrine of estoppel does not apply.

We begin our analysis by considering the purpose of certificates of insurance. As previously mentioned, parties to a contract may contractually shift a risk of loss through an indemnity provision in the contract. The "indemnitee" in the contract can also require the "indemnitor" to provide some insurance protection for the indemnitee. However, while indemnitees can make very specific and comprehensive contractual requirements concerning the protection to be afforded, . . . they have very few alternatives for verifying that indemnitors have complied with them. . . .

The certificate of insurance is the primary vehicle for verification that insurance requirements have been met.

Donald S. Malecki, et al., The Additional Insured Book 341 (4th Ed., 2000).

A certificate of insurance is a form that is completed by an insurance broker at the request of an insurance policyholder, and is a document evidencing the fact that an insurance policy has been written and includes a statement of the coverage of the policy in general terms. Black's Law Dictionary (5th Ed. 1979). A certificate of insurance "serves merely as evidence of the insurance and is not a part of the insurance contract." Richard H. Glucksman, et al., "Additional Insured Endorsements: Their Vital Importance in Construction Defect Litigation," 21 Construction Lawyer 30, 33 (Winter 2001). "Certificates provide evidence that certain general types of policies are in place on the date the certificate is issued and that these policies have the limits and policy periods shown." Malecki, supra at 341.

A problem with certificates of insurance, which appears to be common in indemnification contracts such as that in the instant case, is that insurance agents often issue certificates of insurance detailing a particular form of coverage, but then fail to notify the insurance company of the need to alter or amend the coverage to match the certificate. The result is that the insurance company - like in the instant case - refuses to provide coverage. As one commentator notes,

Although a broker for the subcontractor [policyholder] may have prepared the certificate of insurance, in many cases he or she did not follow through and actually obtain the necessary endorsement. . . . As a result, although a developer may hold a certificate that states it is named as an additional insured on the subcontractor's policy of insurance, the subcontractor's carrier will deny the tender of defense and contend that the agent did not have express authority to bind the carrier.

Glucksman, at 33.

In some instances, insurance companies attempt to avoid liability by asserting policy exclusions which are inconsistent with the coverage noted in the certificate of insurance. One commentator indicates that some courts do not give these exclusions effect:

Certificates of insurance are often inconsistent with the related policy, and a prudent indemnitee should assume exclusions in the policy exist that do not appear on the certificate. In some jurisdictions, certificates do not govern coverage while in others, an exclusion of which a certificate holder is unaware will not be given effect.

Douglas R. Richmond, et al., "Expanding Liability Coverage: Insured Contracts and Additional Insureds," 44 Drake L.Rev. 781, 796 (1996). See also, Brown Mach. Works & Supply Co. v. Ins. Co. of North America, 659 So. 2d 51, 56 (Ala. 1995) (holding that an insurance company that does not deliver a policy to a certificate holder is estopped from asserting exclusions contained in the policy but not revealed in the certificate); Moore v. Energy Mut. Ins. Co., 814 P.2d 1141, 1144 (Utah App. 1991) (holding that exclusions are invalid unless they are communicated to the certificate holder in writing); J.M. Corbett Co. v. Ins. Co. of North America, 43 Ill. App. 3d 624, 357 N.E.2d 125, 2 Ill. Dec. 148 (1976) (holding that because exclusion was not provided to certificate holder, terms of the certificate controlled).

A similar situation occurs in the context of medical, disability or other types of group insurance, where insureds are often given a certificate as evidence of coverage but are never given a copy of the master policy. The majority rule is that the coverage provisions stated in a certificate of coverage furnished to an insured by the insurance company takes precedence over conflicting terms in the master policy. See "Group Insurance: Binding Effects of Limitations on or Exclusions of Coverage Contained in Master Group Policy But Not in Literature Given Individual Insureds," 6 A.L.R.4th 835 (1981). Cf., syllabus point 3, Romano v. New England Mut. Life Ins. Co., 178 W.Va. 523, 362 S.E.2d 334 (1987) ("Where an insurer provides sales or promotional materials to an insured under a group insurance policy, which the insurer knows or should know will be relied upon by the insured, any conflict between such materials and the master policy will be resolved in favor of the insured.")

A treatise on "additional insureds" suggests that the fact pattern in the instant case is "the most common area" of conflict involving certificates of insurance. As the treatise states:

Probably the most common area in which certificates of insurance and insurance policies conflict is with respect to additional insured status. Certificate holders are often listed as additional insureds on certificates without the policy actually being endorsed to reflect that intent. An extreme case of this that often occurs is for a copy of an additional insured endorsement to be attached to the certificate but not the policy. This practice may not provide additional insured status and, thus, is sometimes called the "fictitious insured syndrome."

Sometimes this problem stems from a lack of communication. The insurance agent, for example, may have the authority to add another party to a policy as an additional insured and may issue a certificate indicating that this has been done while forgetting to ask the insurer to issue the endorsement. When the insured later seeks protection, the insurer denies protection, shifting the blame elsewhere.

This, of course, is really a matter of principal-agency liability and should not detrimentally affect the certificate holder. However, concise wording in the certificate's preamble indicating that the certificate is "for information only" fosters an insurance company's opportunity to deny any protection. . . .

The insurance company maintains that it does not matter what the certificate says, it is what the policy states that counts. . . .

Malecki, supra at 345-46. The insurance company in this case makes the same argument: it does not matter that the certificate of insurance says that the Board is an additional insured, it is what the policy states - or, more particularly, does not state - that counts.

The Board argues that it reasonably relied to its detriment upon representations of coverage made by Commercial Union in its certificate of insurance, and therefore Commercial Union should be estopped from denying coverage.

The doctrine of estoppel "applies when a party is induced to act or to refrain from acting to [his/]her detriment because of [his/]her reasonable reliance on another party's misrepresentation or concealment of a material fact." Syllabus Point 2, in part, Ara v. Erie Ins. Co., 182 W.Va. 266, 387 S.E.2d 320 (1989). Estoppel is properly invoked to prevent a litigant from asserting a claim or a defense against a party who has detrimentally changed its position in reliance upon the litigant's misrepresentation or failure to disclose a material fact. Ara, 182 W.Va. at 270, 387 S.E.2d at 324. The doctrine is "designed to prevent a party's disavowal of previous conduct if such repudiation would not be responsive to the demands of justice and good conscience." White v. Austin, 172 N.J.Super. 451, 454, 412 A.2d 829, 830 (1980).

In Potesta v. U.S.F.&G., 202 W.Va. 308, 504 S.E.2d 135 (1998), we suggested that the doctrine of estoppel may not be used to create insurance coverage, or increase coverage beyond that provided by the policy. We stated, at Syllabus Point 5, that:

Generally, the principles of waiver and estoppel are inoperable to extend insurance coverage beyond the terms of an insurance contract.

The rationale for this rule is that an insurance company should not be made to pay for a loss for which it has not charged a premium. See "Doctrine of Estoppel or Waiver as Available to Bring Within Coverage of Insurance Policy Risks Not Covered by its Terms or Expressly Excluded Therefrom," 1 A.L.R.3d 1139, 1144 (1965).

There are, however, numerous recognized exceptions to this rule. We held in Potesta at Syllabus Point 7 that the some of the exceptions "include, but are not necessarily limited to" the following:

Exceptions to the general rule that the doctrine of estoppel may not be used to extend insurance coverage beyond the terms of an insurance contract, include, but are not necessarily limited to, instances where an insured has been prejudiced because: (1) an insurer's, or its agent's, misrepresentation made at the policy's inception resulted in the insured being prohibited from procuring the coverage s/he desired; (2) an insurer has represented the insured without a reservation of rights; and (3) the insurer has acted in bad faith.

These exceptions have been used "to create insurance coverage where to refuse to do so would sanction fraud or other injustice." Crown Life Ins. Co. v. McBride, 517 So. 2d 660, 662 (Fla. 1987).

In the instant case we focus our analysis on the first exception, whether the insurer or its agent made a misrepresentation by issuing a certificate of insurance at the inception of coverage which resulted in the Board not having the coverage it desired. Our research indicates that it is well settled that an insurer may be equitably estopped from denying coverage where the party for whose benefit the insurance was procured reasonably relied upon the provisions of an insurance certificate to that party's detriment.

Lenox v. Excelsior Ins. Co., 255 A.D.2d 644, 645, 679 N.Y.S.2d 749, 750 (1998) (citations omitted). See also, Zurich Ins. Co. v. White, 221 A.D.2d 700, 633 N.Y.S.2d 415 (1995) (insurer was estopped from asserting deductibles to liability coverage when certificate of insurance represented there were no deductibles); Criterion Leasing Group v. Gulf Coast Plastering & Drywall, 582 So. 2d 799 (Fla.App. 1991) (under doctrine of promissory estoppel, insurer was prevented from denying workers' compensation coverage to subcontractor's employee when subcontractor was named as a "coinsured" on certificate of insurance); Bucon, Inc. v. Pennsylvania Mfg. Assoc. Ins. Co., 151 A.D.2d 207, 547 N.Y.S.2d 925 (1989) (insurer estopped from denying the existence of plaintiff's coverage after issuing certificate of insurance identifying the plaintiff as an "additional insured"). "A Certificate of Insurance is an insurance company's written statement to its customer that he has insurance coverage, and the insurance company is estopped from denying coverage that the Certificate of Insurance states is in effect." Blackburn, Nickels & Smith, Inc. v. National Farmers Union Property and Cas. Co., 482 N.W.2d 600, 603 (N.D. 1992).

We therefore hold that a certificate of insurance is evidence of insurance coverage, and is not a separate and distinct contract for insurance. However, because a certificate of insurance is an insurance company's written representation that a policyholder has certain insurance coverage in effect

at the time the certificate is issued, the insurance company may be estopped from later denying the existence of that coverage when the policyholder or the recipient of a certificate has reasonably relied to their detriment upon a misrepresentation in the certificate.

Examining the record, we believe that the elements of estoppel against Commercial Union's denial of coverage have been established by the Board. At the inception [*31] of "coverage" for the Board, on September 14, 1987, an agent for Commercial Union prepared a certificate of insurance naming the Board as an additional insured. The insurance company's "bare, conclusory averment that the certificate naming plaintiff [the Board] as an additional insured was the result of 'clerical error' was insufficient to overcome the estoppel effect of its misrepresentation, since even an innocent misleading of another party may bar one from claiming the benefits of his deception." Bucon, Inc., v. Pennsylvania Mfg. Assoc. Ins. Co., 151 A.D.2d 207, 211, 547 N.Y.S.2d 925, 927 (1989). See also, Potesta v. U.S.F.&G., 202 W.Va. at 321, 504 S.E.2d at 148, citing Harr v. Allstate Ins. Co., 54 N.J. 287, 255 A.2d 208 (1969) (finding equitable estoppel is available to broaden coverage when there is a misrepresentation before or at the inception of the insurance contract, even where the misrepresentation is innocent).

The circuit court therefore erred in holding that the certificate of insurance did not create an obligation for Commercial Union to provide the Board with a legal defense and coverage under both the general liability and umbrella policies at issue.