IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

KVAERNER US INC, KVAERNER HOLDINGS, INC.	: APRIL TERM, 2003
	: No. 0940
v.	
	: Commerce Program
ONEBEACON INSURANCE COMPANY, KEN RANDALL AMERICA, INC., and ACE INA HOLDINGS, INC.	:
	: Control No. 071532

O R D E R

AND NOW, this 29th day of September 2003, upon consideration of defendant Century Indemnity Company's Preliminary Objections, plaintiffs' response in opposition, the respective memoranda, all matters of record and in accord with the contemporaneous Opinion being filed of record, it is **Ordered** that defendant's Preliminary Objections are **Overruled** in part and **Sustained** in part as follows:

1. Counts I and II, as they pertain to pending asbestos related claims against Kvaerner, are dismissed for lack of subject matter jurisdiction. Tort claimants who have settled with Kvaerner, as well as future asbestos related claimants, are not indispensable parties. Therefore, Counts I and II are not dismissed as they pertain to settled claimants or future claimants.

2. Preliminary Objections to Count V are **sustained**, and Count V is dismissed.

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.

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O P I N I O N

Albert W. Sheppard, Jr., J. ……. September 29, 2003

Before this court are the Preliminary Objections of defendant Century Indemnity Company. For the reasons discussed, this court is issuing a contemporaneous Order **overruling in part and sustaining in part** these Objections.

FACTUAL AND PROCEDURAL BACKGROUND

Kvaerner U. S. Inc. and Kvaerner Holdings, Inc. ("Kvaerner") instituted this Declaratory Judgment action seeking a finding that insurance policies issued to plaintiffs from 1964 to 1986 obligate the defendants to defend Kvaerner against asbestos related bodily injury claims (Count I) and to indemnify Kvaerner for all sums it pays as damages with respect to the asbestos claims (Count II). Century is the successor in interest to certain insurance policies issued by Insurance Company of North America ("INA") to the plaintiffs.

The Amended Complaint asserts three additional causes of action against Century: Count III -breach of contract, Count IV - bad faith in failing to provide coverage, and Count V- negligent misrepresentation.

DISCUSSION

Century objects on two grounds: (1) lack of subject matter jurisdiction (Counts I and II) and (2) legal insufficiency (Count V).[1]

I. Subject Matter Jurisdiction -Counts I and II

Defendant Century argues that this court lacks subject matter jurisdiction as to Counts I and II because plaintiffs failed to join indispensable parties with an interest in this action as required by the Declaratory Judgment Act. (Dfts. Memo p. 2). In Pennsylvania, failure to join an indispensable party to a declaratory judgment action deprives a court of subject matter jurisdiction. Eastern America Transport & Warehousing, Inc. v. Evans Conger Broussard & McMcrea, Inc., 2002 WL 1803718 * 1 (Pa. Com. Pl. July 31, 2002) (Herron) (citing Vale Chemical Co. v. Hartford Acc. and Indem. Co., 512 Pa. 290, 516 A.2d 684 (Pa. 1986)). As the Vale court explained:

> Essential to the adversary system of justice and one of the basic requirements of due process is the requirement that all interested parties have an opportunity to be heard. Thus, all parties whose interest will necessarily be affected must be present on the record.

Id.

[1] Defendants, OneBeacon Insurance Company, Ken Randall America, Inc., and ACE INA Holdings, Inc., also filed Preliminary Objections, which are addressed in separate opinions.

The determination of indispensability requires consideration of the following: (1) whether the absent party has a right or interest related to the claim, (2) the nature of that right or interest, (3) is the right or interest essential to the merits of the issue and (4) can justice be afforded without violating the due process rights of absent parties. Id (citing Centolanza v. Lehigh Valley Dairies, Inc., 540 Pa. 398, 658 A.2d 336, 338-39 (Pa. 1995)).

Pennsylvania courts have consistently held that plaintiff-claimants who sue an insured are indispensable parties to any declaratory judgment action brought to determine the scope of an insurer's coverage of the insured. University Mechanical & Engineering Contractors Inc. v. Insurance Company of North America, 2002 WL 8571205 *6 (May 1, 2002) (Sheppard), Vale Chemical Co. v. Hartford Acc. and Indem. Co., 512 Pa. 290, 516 A.2d 684 (Pa. 1986). The lead Pennsylvania case is Vale Chemical Co. v. Hartford Accident and Indemnity Co., 512 Pa. 290, 516 A.2d 684 (Pa. 1986).

In Vale, our Supreme Court dismissed a declaratory judgment action brought by two insurers of Vale Chemical Company seeking a determination whether its insurance contracts with defendants required them to defend Vale and indemnify it against the underlying claim. Vale Chemical Co. supra. p. 685. The court held that the failure to join the underlying plaintiff was fatal and the declaratory judgment action was dismissed. This result was consistent with other Pennsylvania cases recognizing that plaintiffs-claimants in an underlying action are indispensable parties to a declaratory judgment action. See University Mechanical & Engineering Contractors Inc. v. Insurance Company of North America, 2002 WL 8571205 *6 (May 1, 2002) (Sheppard)(citations omitted).

Kvaerner argues that the "Vale" doctrine shall not apply because: (1) the underlying tort claimants have no "interest" (within the meaning of Vale or the Declaratory Judgment Act) in the question of the insurers' duty to defend, (2) the underlying claimants whose claims and lawsuits Kvaerner settled have no interest as to whether the defendants are required to reimburse plaintiff for those payments, and (3) the Vale doctrine does not apply to Asbestos Claims first asserted after the filing of the Complaint. (Plts. Memo. Pg. 18).

As here, the parties in Vale also argued that the duty to defend is distinct from the duty to indemnify. Id. at p. 685. The Supreme Court did not make such a distinction and concluded in dicta that whatever the merits of the distinction between the duty to defend and the duty to indemnify, "the record here shows that both obligations of the insurers were involved." Id. at 687. The court further concluded that because the Vale action "sought a declaration about **coverage,** it is apparent that Smith (the underlying claimant) had an interest in this declaratory action when it was filed." Id. at 688. (emphasis added). Thus, plaintiffs-claimants who sue an insured are indispensable parties to any declaratory judgment action brought to determine the scope of an insurers' coverage of the insured.

Here, plaintiffs seek a declaration concerning the duty to defend and the duty to indemnify. Kvaerner attempts to distinguish between these duties; however, both duties flow from a determination that the policy triggers coverage. General Acc. Ins. Co. of America v. Allen, 547 Pa. 693,706, 692 A.2d 1089,1095 (Pa. 1997). Since the plaintiffs-claimants have an interest in coverage, this court finds that the underlying claimants have an interest in this action.

Kvaerner also argues that Vale does not apply to underlying tort claims that have been settled. This court agrees. The allegations do not disclose a direct interest by the settled claimants in this litigation. Any effect which the declaratory judgment would have upon the parties that settled is highly speculative and would only be incidental to the issues in the instant action. The settled claimants are not essential to the merits of this issue and justice can be accomplished without violating due process rights. Accordingly, this court finds that claimants that have settled with Kvaerner in the underlying actions do not have an interest in this action.

Kvaerner also argues that the Vale doctrine does not apply to asbestos claims first asserted after the filing of the present Complaint. In J. H. France Refractories Co. v. Allstate Insurance Company, 521 Pa. 91, 555 A.2d 797 (Pa. 1989), the court held that subsequent claimants are not indispensable parties to an existing declaratory judgment action to determine coverage. Id. p.96-97. In reaching this holding, the court reasoned as follows:

> In this case, the court of common pleas had jurisdiction over both actions at the time they were filed for both actions named all parties who would be affected by the declaration at the time of filing. Secondly, were we to decide otherwise, we would be, in practical effect, depriving parties such as these access to declaratory judgment actions, for the expense and inconvenience of constantly adding parties as new claims surface would defeat the purpose of simplicity and efficiency of this form of action.

Id. at 96-97.

Accordingly, Counts I and II are dismissed for lack of subject jurisdiction, only as they pertain to open pending asbestos related claims against Kvaerner. Claimants who have settled their claims with Kvaerner, as well as future asbestos related claimants, are

not indispensable parties to the present action. Therefore Counts I and II are not dismissed as they pertain to settled claimants or future claimants.

II. The Economic Loss Doctrine Bars Kvaerner's Negligent Misrepresentation Claim

Century objects to Count V (alleging misrepresentation) arguing that: (1) plaintiffs' Amended Complaint fails to assert a claim for intentional or negligent misrepresentation, and (2) plaintiffs' cause of action for negligent misrepresentation is barred by the economic loss doctrine. In response, plaintiffs argue that Count V solely asserts a claim for negligent misrepresentation and that the claim is not barred by the economic loss doctrine since the negligent misrepresentation claim is separate and apart from the contractual coverage obligations imposed by the policies themselves.[2] (Plts. Memo p. 10).

The purpose of the economic loss doctrine, as adopted in Pennsylvania, is "maintaining the separate spheres of the law of contract and tort." JHE, Inc. v. , Southeastern Pennsylvania Transportation Authority, November Term No. 1790 (May 17, 2002) (Sheppard)[3] (quoting New York State Elec. & Gas Corp. v. Westinghouse Elec. Corp., 387 Pa. Super. 537, 550, 564 A.2d 919, 925 (Pa. Super. 1989)). In its current form, the doctrine precludes recovery for economic losses in negligence and strict liability where the plaintiff has suffered no physical injury or property damage. Id.

[2] Plaintiffs' argument that the economic loss doctrine does not bar its claim for negligent misrepresentation since plaintiffs' claim for negligent misrepresentation is separate and apart from the breach of contract claim confuses the economic loss doctrine with the gist of the action doctrine. The gist of the action doctrine requires an inquiry into the nature of the cause of action. The economic loss doctrine focuses on the injury sustained by the plaintiff.

[3] http://courts.phila.gov.

(citing Moscatiello v. Pittsburgh Contractors Equip. Co., 407 Pa. Super. 378, 385-86, 595 A.2d 1198, 1201 (Pa. Super. 1991)).

Here, there is no allegation of any physical injury or property damage incurred by plaintiffs. Plaintiffs' negligent misrepresentation seeks damages for administrative, clerical and legal expenses as well as other costs, expenses and losses. Such damages are purely economic. This court concludes that the economic loss doctrine bars plaintiffs' negligent misrepresentation claim. Count V should be dismissed.

CONCLUSION

For reasons discussed, defendant Century's Preliminary Objections are **overruled, in part and sustained, in part,** as follows:

1. Counts I and II are dismissed as they pertain to open pending asbestos related claims against Kvaerner for lack of subject matter jurisdiction. Claimants who have settled their claims with Kvaerner, as well as future asbestos related claimants, are not indispensable parties to the present action. Therefore Counts I and II are not dismissed as they pertain to settled claimants or future claimants.

2. Preliminary Objections to Count V are **sustained**. Count V is dismissed.

This court will enter a contemporaneous Order consistent with this Opinion.

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.