UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In re:	)	
	)	
NANOVATION TECHNOLOGIES, INC. and NANOVATION TECHNOLOGIES OF MICHIGAN, INC.,	)	Chapter 7
	)	Case No. 01 B 26090
	)	(Jointly Administered)
Debtors.	)	
_____	)	
	)	
BARRY CHATZ, Chapter 7 Trustee of the Estates of Nanovation Technologies, Inc. and Nanovation Technologies of Michigan, Inc.,	)	Adv. No. 02 A 1680
	)	
Plaintiff,	)	
	)	
v.	)	Judge Pamela S. Hollis
	)	
NATIONAL UNION FIRE INSURANCE CO., et al.,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION

This matter comes before the court on the motion of Stephen Barney, Gary Bjorklund, Daniel Dorman and David Grubb (the "Intervenor-Plaintiffs") for reconsideration of the court's Memorandum Opinion and Order issued July 27, 2006. James Davidson filed a response and joined in the motion. The Trustee has filed only a motion to extend time to file an appeal and a notice of appeal, and has not joined in the motion for reconsideration.

Motions for reconsideration, more properly known as motions to alter or amend a judgment, are brought pursuant to Fed. R. Civ. P. 59, made applicable via Fed. R. Bankr. P. 9023. Rule 59 motions serve a narrow purpose and must clearly establish either a manifest error

of law or fact or present newly discovered evidence. Federal Deposit Ins. Corp. v. Meyer, 781 F. 2nd 1260, 1268 (7th Cir. 1986). "These motions cannot be used to raise arguments which could, and should, have been made before the judgment issued." Id. (citation omitted).

As the motion is limited to a question of law, and because the Memorandum Opinion contained a detailed recitation of the facts with which the parties are already familiar, the court will proceed directly to the legal issue at hand.

The Intervenor-Plaintiffs contend that this court made an error of law when it found that the notice requirement of Fla. Stat. Sec. 627.426(2)(a), requiring insurers to give "written notice of reservation of rights to assert a coverage defense" within 30 days, does not apply in the instant case because the sufficiency of a notice of circumstances letter is not a "coverage defense" under Florida law.

Intervenor-Plaintiffs cite several cases in support of their argument. Not a single one of those cases, however, holds that the insufficiency of a purported notice of circumstances is a coverage defense such that the insurer must comply with the requirements of § 627.426(2)(a).

The reason that none of those cases so holds is because to do so would create an intolerable situation for insurers who issue claims-made policies with relation-back or awareness clauses that allow notice of circumstances, as in this case. An insured could send a letter stating any set of facts, so long as the insured noted in that letter that the insurer should construe the letter to be notice of circumstances that could give rise to a claim. Then, if the insurer failed to respond to the letter within 30 days, the insured could argue that the insurer is barred from denying coverage based on insufficient notice for any claim filed with the insurer at any time in the future which could possibly relate to the facts described in the letter.

Suppose the insured sent a letter that simply stated, "Pursuant to our policy, I am putting you on notice of potential claims. I am going to rearrange my sock drawer and believe that such action will give rise to claims being filed against me. I will advise you of the specifics of the claims as I become aware of them." Must the insurer respond to that letter?

If the Intervenor-Plaintiffs are correct in their interpretation of § 627.426(2)(a), then the insurer is taking a great risk by failing to respond. At any time in the future, the insured might claim that while searching for socks in the newly arranged drawer, his housekeeper injured herself and is suing the insured. Or the insured was delayed by a search for socks, missed a client deadline, and is now being sued for malpractice. Since the insured put the insurer on notice that he had rearranged the drawer, the insurer had notice of circumstances that could give rise to a claim. And if the insurer had not responded to the sock drawer letter within 30 days, advising the insured that the notice was insufficient, Intervenor-Plaintiffs would say that the insurer is now barred from making that argument.

While the sock drawer letter may be an extreme example, the Intervenor-Plaintiffs leave no room for a bright line to be drawn about when a purported notice of circumstances is so insufficient that an insurer need not respond. Instead, they argue that under § 627.426(2)(a), any such letter must be responded to or the insurer loses the right to raise the argument that notice was insufficient and the claim does not relate back.

The Intervenor-Plaintiffs assert that their position is supported by Solar Time Ltd. v. XL Specialty Ins. Co., 2004 WL 1683149 (S.D. Fl. June 15, 2004), aff'd, 142 Fed. Appx. 430 (11th Cir. 2004).

Having read Solar Time more than once prior to issuing the Memorandum Opinion, and having thoroughly reviewed Solar Time in light of this motion, the court disagrees with the interpretation proffered by the Intervenor-Plaintiffs.

Movant correctly states that the insurance policy at issue in Solar Time had two different provisions governing notice. Condition 2 is a reporting provision, which limited coverage to claims "reported by [the insured] to us in writing while this agreement is in effect." Condition 7 required the insured to "immediately notify us in writing of the negligent act, error or omission," and the Solar Time court concluded that:

> [a]n insured's breach of paragraph seven's notice provision would permit the insurer to forfeit coverage that otherwise exists. Therefore, condition seven is a "coverage defense" for which Defendant was obligated to provide timely notice.

2004 WL 1683149 at *5.

The analytical error, however, is Intervenor-Plaintiffs' characterization of Condition 7 as a "sufficiency of notice provision." It is disingenuous to characterize it so, because in fact it is more than that. The very first sentence of Condition 7 imposes a requirement upon the insured: "You must immediately notify us in writing of the negligent act, error or omission. Do this even though no claim has been made." The Solar Time court notes that "Condition 7 is the sort of provision for 'immediate notice' or 'notice as soon as practicable' found in almost all liability policies." Id. at *4.

In reviewing the insurer's position, the Solar Time court stated that "[a]n insured's breach of paragraph seven's notice provision would permit the insurer to forfeit coverage that otherwise exists." Id. at *5. That breach is not a lack of sufficiency in the notice, as Intervenor-Plaintiffs argue herein. A lack of sufficient detail is never raised by the insurer, and is never

considered by the Solar Time court. The breach at issue is instead the failure to "immediately" make any report whatsoever of a possible claim, as required by Condition 7.

Nanovation's policy did not have a condition that required immediate reporting of a possible claim. If Nanovation failed to send a notice of circumstances letter, but the claim was made and reported within the policy period, the insurers could not raise the failure to send a notice of circumstances letter as a defense to coverage.

The only reason that the sufficiency of the notice of circumstances letter is at issue here is because the Trustee's claim was made outside the policy period. If the Trustee's claim had been made and reported within the policy period, the sufficiency of Ofenloch's purported notice of circumstances letter would have been irrelevant.

Not so in Solar Time. Condition 7 required the insured to make an immediate report if it "or another protected person is aware that something was done that shouldn't have taken place, or something wasn't done that should have . . .". Id. at *1. By contrast, the notice of circumstances provision in Nanovation's policy was merely an alternate method for Nanovation to obtain coverage if the actual claim were made and reported outside the policy period.

Moreover, in Solar Time the insurer had retained and paid defense counsel for the insured, made an offer at mediation, and never declined coverage until filing a declaratory judgment action over 2 years later. There has been no such misleading activity on the part of the insurers in this case. Ofenloch's letter was totally insufficient to provide notice of circumstances under the relevant relation-back or awareness clause, and so simply coverage never existed. The insurers never acted as though it did exist, but instead have consistently disclaimed coverage.

A more analogous case, although not mentioned by the Intervenor-Plaintiffs, is Aguilar v. Royal Surplus Lines Ins. Co., 2006 WL 2038643 (Bankr. S.D. Fla. June 5, 2006). The Aguilar insured did not have a "relation back" clause that allowed for notice of circumstances as Nanovation did; instead, the insured was only covered for claims actually made and reported during the policy period. The insured, who assigned its rights under the policy to Aguilar, sent a letter to the insurer during the policy period that described a potential claim.

The court found that since the policy lacked a "relation back" clause, notice of a potential claim was insufficient. Aguilar then argued that the insurer's failure to "timely advise [the insured] that the May 22 notification [of potential claim] was insufficient to invoke coverage" must result in a waiver of the insurer's right to deny coverage because the insurer violated the requirements of Fla. Stat. Sec. 627.426. Id. at *13.

The court rejected Aguilar's argument, citing Country Manors and AIU Ins. Co. v. Block Marina Investment, Inc., 544 So. 2nd 998 (Fla. 1998), for the proposition that "[a]n insurer does not assert a 'coverage defense' where there is no coverage in the first place." Country Manors Ass'n v. Master Antenna Systems, Inc., 534 So. 2nd 1187, 1195 (Fla. Dist. Ct. App. 1988).

> In this case, Royal denied coverage because the policy lapsed without Premiere providing the requisite notice of a claim under the policy, i.e., no coverage existed for Aguilar's claim, and therefore, under Block Marina, § 627.426 is inapplicable.

Aguilar, 2006 WL 2038643 at *14. The insured attempted to give notice, but it was insufficient. Therefore, no coverage existed for the claim.

Similarly, National Union, Federal and Twin City denied coverage because the policies lapsed without Nanovation providing notice of either a claim or sufficient notice of

circumstances that could give rise to a claim. Therefore, no coverage existed for Nanovation's claim and § 627.426 is inapplicable.

Nanovation tried to give notice under its relation-back or awareness clause, and the Aguilar insured tried to give notice under its notice of claim clause. Neither of the notifications met the requirements of the policies: Nanovation's did not describe circumstances that could give rise to a claim, and Premiere's described only a potential claim, not an actual one. Just as the Aguilar court found that failure to satisfy the terms of the notice clause and therefore failure to give notice meant that coverage did not exist and § 627.426 was inapplicable, so too does this court.

The Intervenor-Plaintiffs contend that Florida Physicians Ins. Co. v. Stern, 563 So. 2nd 156 (Fla. Dist. Ct. App. 1990) supports their theory that the adequacy of a notice letter is a coverage defense. In that case, an actual lawsuit had been filed and the insured failed to immediately forward the papers from the suit, as the policy required. Unlike Aguilar, where a timely notice was insufficient, Florida Physicians makes no mention of the adequacy of a timely notice. It dealt instead with a late notice.

Nationwide Mut. Fire Ins. Co. v. Beville, 825 So. 2nd 999 (Fla. Dist. Ct. App. 2002) and Continental Cas. Co. v. United Pacific Ins. Co., 637 So. 2nd 270 (Fl. Dist. Ct. App. 1994) are also cited by the Intervenor-Plaintiffs in support of the proposition that a violation of the notice provision is a coverage defense. However, these cases are factually very different from the instant litigation, and comments regarding their notice provisions must not be taken out of context.

In Beville, the policy's notice provision required the insured to provide the carrier with written notice "as soon as practicable" when a lawsuit was filed. 825 So. 2nd at 1003. The Beville court stated that any violation of that notice provision was a coverage defense subject to § 627.426(2). But this was a notice of litigation provision, not a notice of circumstances provision.

And the Beville court followed that statement with an analysis of the prejudice suffered by the insurer from the late notice. "Obviously the failure of the carrier to offer a proper defense upon receipt of the notice waives any defect in delaying notice." Id. at 1004. Such an analysis would be unnecessary under a claims-made policy, as in our case, because in a claims-made policy a defect in notice cannot be waived. The court thoroughly discussed the issue of waiver in its Memorandum Opinion of July 27, 2006.

Timely notice is what causes the coverage under a claims-made policy to exist. "[E]xcusing the insured from the notification provision or altering the provision is tantamount to a gratis extension of coverage to the insured." Resolution Trust Corp. v. Artley, 24 F. 3rd 1363, 1367 n.8 (11th Cir. 1994).

Continental Casualty is even less apposite than Beville, as it considers the theory of equitable subrogation and whether one insurer may recover a pro-rata share of attorneys' fees incurred in providing a defense to the insurers' mutual insured. Continental Cas. Co., 637 So. 2nd at 271. The court mentioned in passing that the insurer who had not paid for the defense

> was not put on notice of a claim covered under its policy until the suit had been pending over four years and its insured had been defended by Continental for at least a year. Presumably, when put on notice, United could have raised substantial coverage defenses, including late notice, lack of cooperation, or prejudice . . . .

Id. at 273. This dicta, briefly observed in a case with entirely different legal issues than Nanovation's, is not "clear support" for the Intervenor-Plaintiffs' assertion that the insufficiency of a purported notice of circumstances letter is a coverage defense. It merely mentions that late notice could have been a coverage defense.

Having considered the arguments raised by the Intervenor-Plaintiffs, the court finds that no manifest error of law was committed. The insurers were not compelled by § 627.426(2) to inform Nanovation within 30 days that its purported notice of circumstances letter was insufficient, on the grounds that such assertion is a coverage defense.

Furthermore, the court need not consider the issues raised by the insurers in their responses and addressed by the Intervenor-Plaintiffs in their reply: Application of the statute to excess insurers; Federal's response to the Ofenloch Letter; whether the statute only applies once a carrier has undertaken a defense; and any confusion about whether this policy has a relation-back provision. The motion for reconsideration is limited to the legal issue of whether the sufficiency of a notice of circumstances letter is a coverage defense. The court has reconsidered that issue, and come to the same conclusion as it did in the Memorandum Opinion - it is not a coverage defense and the requirements of § 627.426(2) were not triggered.

For all of the reasons stated above, the Intervenor-Plaintiffs' motion for reconsideration and James Davidson's response to that motion are denied.

Date: _____

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PAMELA S. HOLLIS
United States Bankruptcy Judge