IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

ACER AMERICA CORPORATION, Plaintiff, v. AON TRADE CREDIT INSURANCE SERVICES INC. n/k/a AON FINANCIAL & INSURANCE SOLUTIONS, INC. & AON RISK INSURANCE SERVICES WEST INC., Defendants.	)	No. 16 L 5286 Honorable Patrick J. Sherlock

ORDER

This matter having come to be heard upon the motion of defendants' Motion to Dismiss plaintiff's first amended complaint pursuant to 735 ILCS 5/2-615, 2-619 and 2-619.1.

Plaintiff alleges defendant negligently failed to procure a trade credit insurance policy for Acer that covered the risk of loss to its business arising from preference claims in the event of a bankruptcy. Well, one of Acer's larger clients did file for bankruptcy, the bankruptcy Trustee filed a preference action under the Bankruptcy Code and that is when Acer learned that Aon purportedly did not obtain for Acer an appropriate policy.

Facts

Plaintiff is a well-known computer company that distributed millions of dollars in personal computers and electronics to big box retailers. Plaintiff would issue invoices with the expectation of payment in the future. Plaintiff required insurance policies to cover the risks inherent in shipping products on credit. In January 2005, plaintiff appointed defendant as its broker of record. Plaintiff alleges defendant was aware of the policy it previously had with

another broker and expected similar policies. Plaintiff alleges defendant recommended policies issued by insurance company Euler Hermes. As alleged, the policies procured did not contain "Preference Coverage" which would protect against losses in cases of bankruptcy. During the term of the policies, on November 10, 2008, Circuit City (the relevant creditor) filed for protection under the United States Bankruptcy Code. Plaintiff had $32 million in invoices paid by Circuit City within the 90-day bankruptcy preference period. The Circuit City bankruptcy trustee made a preference claim against plaintiff but did not assert the claim until November 5, 2010. The bankruptcy trustee's preference claim was settled four years later on June 24, 2014. According to the complaint, the potential claim was not a secret and discussions continued with Euler Hermes making an offer as a "commercial gesture" of a plan for payout if and when there was a loss. After the settlement with the bankruptcy trustee and the payout of the commercial gesture, there remained a loss and plaintiff made demands on defendants to make up the loss. The complaint contains a single count for malpractice.

Court's Reasoning

Defendants now seek to dismiss Plaintiff's First Amended Complaint pursuant to 735 ILCS 5/2-615 and 735 ILCS 5/2-619(a)(5). Section 2-619.1 allows for a party to bring a combined motion to dismiss pursuant to both 735 ILCS 5/2-615 and 735 ILCS 5/2-619.

Defendant urges the Court to dismiss the case in its entirety as being time barred. Motions to dismiss based on statute of limitation generally serve as affirmative matter that defeats the claim and are usually pursuant to 735 ILCS 5/2-619. The Court will review under that standard. Section 2-619(a) of the Illinois Code of Civil Procedure sets forth nine bases upon which this Court can grant a motion to dismiss. 735 ILCS 5/2-619(a). Subsection (5) allows a motion to dismiss an action when "the action was not commenced within the time limited by

law." 735 ILCS 5/2-619(a)(5). Subsection (9) allows the motion when "the claimed asserted against the defendant is barred by other affirmative matter avoiding the legal effect of or defeating the claim." 735 ILCS 5/2-619(a)(9).

There is no dispute the Illinois two year statute of limitations applies.

> Actions against insurance producers, limited insurance representatives, and registered firms. All causes of action brought by any person or entity under any statute or any legal or equitable theory against an insurance producer, registered firm, or limited insurance representative concerning the sale, placement, procurement, renewal, cancellation of, or failure to procure any policy of insurance shall be brought within 2 years of the date the cause of action accrues.

735 ILCS 5/13-214.4; *General Cas. Co. v. Carroll Tiling Serv.*, 342 Ill. App. 3d 883 (2d Dist. 2003).

The two year statute of limitations in section 13-214.4 "encompasses [all] claims by an insured against his insurance agent."). That section provides that "[a]ll causes of action brought by any person or entity under any statute or any legal or equitable theory against an insurance producer, registered firm, or limited insurance representative concerning the sale, placement, procurement, renewal, cancellation of, or failure to procure any policy of insurance shall be brought within 2 years of the date the cause of action accrues." 735 ILCS 5/13-214.4 (West 2014). This encompasses claims by an insured against its insurance agent or broker. *Scottsdale Ins. Co. v. Lakeside Cmty. Comm.*, 2016 IL App (1st) 141845, P20 (Ill. App. Ct. 1st Dist. 2016)

The pertinent question in this case is: when did plaintiff's cause of action accrue. Plaintiff urges this Court to find the cause of action did not accrue until there was a final determination that there were damages and therefore, the relevant denial date is when the settlement was signed and damages were sustained. Plaintiff's argument makes a lot of sense. What would have happened if Acer had filed suit before any type of indemnity was due from Euler Hermes? What damages would it have suffered? Courts are well aware that there are

many instances of malpractice in a variety of arenas (whether medical, legal or insurance broker) that simply are not actionable because there has been no damage as a result of the malpractice. Parties should not be compelled to file anticipatory claims which may later prove to be unnecessary. *Guzman v. C.R. Epperson Construction, Inc.*, 196 Ill. 2d 391, 400, 752 N.E.2d 1069, 1075 (2001). The statute of limitations should not simply be construed to begin running at the earliest possible moment. "The purpose behind a statute of limitations is to prevent stale claims, not to preclude claims before they are ripe for adjudication." *Guzman*, 196 Ill. 2d at 400, 752 N.E.2d at 1075-76.[1]

In this case, there was potentially no loss at all if the trustee settled for less than what Hermes "commercial gesture" was worth or if the preference claim was denied. This Court believes it was premature to expect Acer to have filed a file claim against Aon in anticipation of loss. But the appellate courts have drawn a bright line which this Court is bound to follow. The Court in *State Farm v. Rickhoff*, clearly re-affirmed caselaw finding the statute of limitations runs when the duty is breached, not when the damages are sustained. *State Farm v. Richkoff Sheet Metal*, 394 Ill. App.3d 548 (1st Dist 2009); *Broadnax v. Morrow*, 326 Ill. App. 3d 1074, 762 N.E.2d 1152 (4th Dist. 2002); *Indiana Ins. Co. v. Machone & Machon, Inc.*, 324 Ill. App. 3d 300, 303 (1st Dist. 2001). "That damages are not immediately ascertainable does not postpone the accrual of a claim." *Ind. Ins. Co. v. Machon & Machon, Inc.*, 324 Ill. App. 3d 300, 304 (1st Dist. 2001) *citing Del Bianco v. American Motorists Insurance Co.*, 73 Ill. App. 3d 743, 748 (1st Dist. 1979). "Further, in cases of torts arising out of a contractual relationship, the statute of limitations runs when the duty is breached, not when the damages are sustained." *Ind. Ins. Co.*, 324 Ill. App. 3d at 304; *Del Bianco*, 73 Ill. App. 3d at 748.

[1] This exact reasoning was specifically rejected in *Broadnax*, which the First District applied as recently as *Scottsdale v. Lakeside*. For that reason, this Court cannot reach an opposite conclusion.

Indiana Insurance, 324 Ill. App. 3d at 304, and *Broadnax*, 326 Ill. App. 3d at 1081, and similar cases point to the same moment for the accrual of a claim against an insurance producer—when coverage is denied. *Scottsdale Ins. Co. v. Lakeside Cmty. Comm.*, 2016 IL App (1st) 141845, P38 (Ill. App. Ct. 1st Dist. 2016).

There is no issue of tolling in this case. Plaintiff admits that when Circuit City filed for bankruptcy on November 10, 2008, it "promptly" informed Euler Hermes and raised the issue of a preference claim. ¶45. At this early date, plaintiff was aware that its policy did not contain "preference claim" protection. The complaint further admits that in November 2010, when the Circuit City Trustee filed the preference claim, that Euler Hermes again told plaintiff it did not have a claim under the policy. ¶47. On April 29, 2011, Euler Hermes could not have been clearer of its denial. "As per our previous exchanges, our position is that the possible claim on Circuit City (once the amount will be known) does not appear to be covered, given several elements including the absence of the "preferential claim" cover on the old Acer North America policy [.]" (Complaint- Exhibit 7). While plaintiff urges the Court to emphasize the words, "possible claim" as no injury until the claim ripens, the Court finds the words "does not appear to be covered, given several elements including the absence of the "preferential claim" cover [...]" The language is not ambiguous. No matter when and if there was a loss, nor the amount of a loss, there was never coverage for preferential claims because the policy did not contain that provision. Plaintiff was put on notice yet again that the policy was deficient and any claim of negligence accrued.

In the correspondence of both May 2011 and June 2013, Euler Hermes, recognizing the gap in coverage in the policy, offered a "commercial gesture" due to the oversight. Clearly there

was no deception preventing plaintiff from discovering the denial. Correspondence dated June 4, 2013 from plaintiff expressly states:

> "1. We did not have cover for preference claims under the US policy.
> 2. Euler Hermes have agreed to make a partial payment as a commercial gesture- they have no legal obligation to make this payment.
> 3. Ace will suffer a loss- the difference between the amount we are ordered to repay and the sum paid by EH as a "commercial gesture."
> This being the case, I have to advise you that we will hold Aon responsible for failing to ensure that AAC were properly covered against this preference claim."

(Complaint-Exhibit 10).

Further, plaintiff obviously recognized the issue of time when it sought a tolling agreement on November 22, 2013.

WHEREFORE, by reason of the foregoing, it is hereby ordered:

A. Defendant's Motion to Dismiss pursuant to 735 ILCS 5/2-619 is granted and the case is dismissed with prejudice.

ENTER: Judge Patrick J. Sherlock
FEB 27 2017
Circuit Court – 1942

Honorable Patrick J. Sherlock
Judge Presiding

February 23, 2017