UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Harmony East Condominium Association,

Plaintiff,

vs.

Falls Lake Fire and Casualty Company,

Defendant.

Court File No.: 24-cv-2048 SRN/ECW

PLAINTIFF'S SUPPLEMENTAL MEMORANDUM OF LAW IN SUPPORT OF MOTION TO COMPEL AND OPPOSITION TO MOTION TO DISMISS

INTRODUCTION

This matter came before the Court on Plaintiff's Motion to Compel Appraisal, and Defendant's Motion to Dismiss, on August 6, 2024. The Court has now permitted the parties to engage in supplemental briefing, and set forth the following issues to address:

1. The implications of Minn. R. 2700.0300, cited in Plaintiff's Reply Memorandum in Support of its Motion to Compel Appraisal;

2. The implications of the decision in *Silverado Park Ass'n, Plaintiff* v. *Country Mut. Ins. Co., Defendant.*, No. 23-CV-3687 (KMM/DLM), 2024 WL 3565792(D. Minn. July 29, 2024), on these proceedings, as the case was decided just a few days prior to the hearing;

3. The implications of *Eng'g & Const. Innovations, Inc. v. W. Nat. Mut. Ins. Co.*, No. A12-1785, 2013 WL 2460400 (Minn. Ct. App. June 10, 2013) for Plaintiff's estoppel argument;

4. The implications of the Minn. Stat. § 72A.201, Subd. 4(8) (Fair Claims Standards Practice Act) regarding notice to be provided when a statute of limitations is set to expire.

(Doc. 35.) Plaintiff submits this Supplemental Memorandum in accordance with the Court's Order.

A. Minnesota Rule 2700.0300 Categorically Bars Defendant's Alleged One-Year Suit Limitations Clause and Defeats the Motion to Dismiss.

At issue in this case is whether Defendant may enforce a suit limitations clause that allegedly prevents Plaintiff from commencing an action more than a year after experiencing a loss. Plaintiff has already argued, at length, that the clause can and must be read to conform to Minnesota law, and therefore that it must allow for suits to commence up to two years following a loss. *E.g.* Doc. 23. It will not repeat those arguments herein.

In its Reply Memorandum in Support of its Motion to Compel, Plaintiff cited a Minnesota administrative rule that bars an insurer from issuing a policy providing for a period of less than two years to commence an action. It states:

> No policy, rider, or endorsement form shall be accepted for filing by this department from any casualty insurance company that contains a provision limiting the time within which legal proceedings may be instituted against the insurer by the insured to a period less than two years.

Minn. R. 2700.0300. Because it was cited in reply, the Court permitted additional briefing.

The issue is a matter of first impression, as no Court has reached any decision about Rule 2700.0300's prohibition on insurers or the interaction between the Rule and a policy's conformation clause. However, under Minnesota law, when a rule is published on the State Register, it is presumed that it was duly adopted, issued, and promulgated. Minn. Stat. § 14.37, subd. 1(1). Once published, Minnesota Administrative Rules have "the force and effect of law." Minn. Stat. § 14.38, subd. 1; *see also Application of Peoples Nat. Gas Co.*, 389 N.W.2d 903, 906 (Minn. 1986); *Quam v. State*, 391 N.W.2d 803, 808 (Minn. 1986). They are therefore treated as though they are statutes. *Matter of Murack*, 957 N.W.2d 124, 128 (Minn. Ct. App. 2021).

Rule 2700.0300 was passed in 2007, and therefore applicable at the time of issuance of Defendant's Policy. It is found in a chapter simply entitled "Insurance Policies, Practices." Minn. R. Ch. 2700. It is the very first unrepealed rule in that Chapter. *Id*. It lists, as its statutory authority for passage, both Minn. Stat. § 60A.03 and Minn. Stat. § 65A.01. Section 60A.03, subd. 2, sets forth the power of the commissioner of commerce to promulgate rules by empowering it to act, in insurance matters, with all of the commissioner's authorities generally granted. That includes the power of rulemaking. Minn. Stat. § 45.023. Section 65A.01 mandates a two-year minimum period of time in which to commence an action under the "Standard Fire Policy." As a rule, generally applicable to all policies, it certainly applies to Defendant's Policy.

The Policy in this matter contains two separate conformation clauses, one within the "Suit Against Company" provision at issue. It provides:

> No suit, action or proceeding for the recovery of any claim under this policy shall be sustainable in any court of law … unless the same be commenced within twelve (12) months next after inception of the loss provided, however, that if under the laws of the jurisdiction in which the property is located such limitation is invalid, then any such claims shall be void unless such action, *suit or proceedings be commenced within the shortest limit of time permitted by the laws of such jurisdiction*.

(Doc. 1-12 at 50 (emphasis added).) Second, another generally applicable conformation clause states that "[t]erms of this policy in conflict with the written laws of the state in which the policy is issued are changed to conform to such laws." (*Id*. at 51.)

In their briefing on the issue, the parties noted the differing timeframes set forth for commencing an action in the "Standard Fire Policy" and "Hail Statute," the former

mandating two years, the latter permitting a one-year suit limitations clause. *See* Minn. Stat. § 65A.01, subd. 3; Minn. Stat. § 65A.26. Each argued that the statute pointed to by the other did not apply, with Defendant arguing that the Standard Fire Policy applies only to fire, and Plaintiff noting that this loss is not simply for hail, but for storm and wind damage (acknowledged in documents promulgated by Defendant's own agents).

These conflicting provisions are potentially confusing, and can lead to situations in which an insured, as here, is unaware that an insurer is taking the position that multiple different timeframes to commence suit may apply under one policy depending on the type of loss at issue. As a practical matter most property-casualty policies delivered in this State will be either all-risk, as with the Policy in this case, or at least afford protection against multiple different perils. Two such common perils will be fire and hail. Minnesota Statutes have therefore, seemingly, unwittingly created ambiguity that will hurt insureds in the State if enforced strictly. As that basis alone the one-year limitation should not be applied.

Rule 2700.0300 resolves that issue. It has the force of law, and mandates that each policy issued in this state provide at least two years to commence suit. The conformity clauses in the Policy automatically bring it into compliance with the rule. This utterly defeats Defendant's Motion to Dismiss. This Court may issue a concise holding that the Rule establishes a minimum level of protection for consumers in Minnesota, and the conformity clause of the Policy ensures that those consumers are so-protected. At the very least Plaintiff would like to undertake discovery to determine whether or not the Policy was properly vetted by the Department of Commerce and, if so, whether the Department believes that the conformity clause brought it into compliance with Rule 2700.0300.

B. *Silverado Park* Makes Clear that Since Defendant's Policy does not Condition Appraisal on Compliance with Other Portions of the Policy, the Motion to Compel must be Granted.

The next issue to be briefed to the Court is the impact of the decision in *Silverado Park Ass'n, Plaintiff v. Country Mut. Ins. Co., Defendant*, No. 23-CV-3687 (KMM/DLM), 2024 WL 3565792 (D. Minn. July 29, 2024) on this matter. Plaintiff already had an opportunity to address this case in its Reply Memorandum in Support of its Motion to Compel Appraisal. (Doc. 30 at 7-10.) It will not repeat those arguments herein, and instead reserve the right to reply to arguments raised in Defendant's Supplemental Brief.

C. Under *Eng'g & Const. Innovations* Defendant is Estopped from Enforcing the One-Year Suit Limitations Clause even if the Clause is Valid.

The final issue is whether or not Defendant was required, under the Minnesota Unfair Claims Practices Act ("UCPA") to notify Plaintiff that the suit limitations clause in its policy was set to expire. Relatedly, the Court has permitted the parties to address whether or not failure to do so causes Defendant to be estopped from relying on that clause under *Eng'g & Const. Innovations, Inc. v. W. Nat. Mut. Ins. Co.*, No. A12-1785, 2013 WL 2460400 (Minn. Ct. App. June 10, 2013).

While these are listed separate issues in the Parties' stipulation for supplemental briefing and the Court's ensuing Order, that was a request of Defendant. Plaintiff considers them interrelated. Furthermore, as with the implications of *Silverado Park*, Plaintiff has already briefed the Court on the impact of *Eng'g & Const. Innovations*, and did so in its Memorandum in Opposition to Defendant's Motion to Dismiss. As such, Defendant had every opportunity to address those issues in reply. Plaintiff does not view the Court's

invitation for supplemental briefing on the case as an opportunity to relitigate issues already briefed. As the Court correctly noted at the hearing, the issue is whether Defendant should be estopped based on its silence where it had a duty to speak. To the extent Defendant re-opens that issue, Plaintiff reserves the right to respond.

Instead, at the hearing counsel for Defendant argued that Minn. Stat. § 72A.201, subd. 4 does not apply because it seeks to enforce a suit limitations clause, not a statute of limitation. The statute provides as follows:

> "[t]he following acts by an insurer … constitute unfair settlement practices:
>
> ***
>
> (8) failing to advise in writing an insured or claimant who has filed a notification of claim known to be unresolved, and who has not retained an attorney, of the expiration of a statute of limitations at least 60 days prior to that expiration.

Id. This Court (Judge Richard Kyle) has previously spoken on the issue and determined that section 72A.201, subd. 4(8) "requires notification prior to the expiration of any limitations period in an insurance policy, regardless of whether it is the default six-year limit or something else entirely." *Hansen v. Markel Am. Ins. Co., No. CV 15-2833 (RHK/JSM),* 2016 WL 2901738, at *4 (D. Minn. May 18, 2016).

This ruling is only sensible, given that permitted limitations periods, be they one year, two years, or something else entirely, are driven by the written laws of this State. *E.g.* Minn. Stat. § 65A.01, subd. 3; Minn. Stat. § 65A.26; Minn. R. 2700.0300. Suit limitations clauses in insurance policies cannot be separated from the statutes authorizing them. They are, in effect, recitations of statutes of limitation, at least in Minnesota. Judge Kyle

therefore correctly determined that insurers are required to advise insureds of the upcoming expiration of suit limitations clauses, just as they must statutes of limitation.

In *Hansen*, the insured argued that section 72A.201 mandated that an insurer adhere to the general six-year statute of limitations on claims in Minnesota, an argument Judge Kyle rightly rejected. 2016 WL 2901738, at *4. However, the insured explicitly was not relying on the failure of notice and seeking estoppel on that basis. *Id*. Therefore, the remainder of the argument before the Court, that *Eng'g & Const. Innovations* holds that failure to comply with the UCPA, was not further discussed in *Hansen*.

Taken together, however, the cases require denial of the Motion to Dismiss. Under *Hansen*, Defendant had a duty to provide notice to Plaintiff that the suit limitations clause would run. Under *Eng'g & Const. Innovations*, its failure to do so causes it to be estopped from relying on the suit limitations clause in this litigation.

CONCLUSION

For all of the above reasons, Plaintiff respectfully requests that this Court issue an Order denying Defendant's Motion to Dismiss.

Respectfully Submitted,

SAURO & ALTON, PLLC

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