

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

UNITED STATES FIRE INSURANCE COMPANY  
Plaintiff

: FEBRUARY TERM, 2000

: No. 3986

v.

:

AMERICAN NATIONAL FIRE INSURANCE COMPANY  
Defendant

: Control No. 050059

**ORDER**

AND NOW, this 30th day of May 2001, upon consideration of the Motion for Reconsideration of this Court's April 6, 2001 Order Denying Liberty Mutual Fire Insurance Company's Motion for Summary Judgment, Or, in the Alternative, for Certification of an Immediate Appeal Pursuant to 42 Pa. C.S.A. 702(b) of third party defendant Liberty Mutual Fire Insurance Company, and in accord with the Supplemental Opinion being filed contemporaneously with this Order, it is hereby **ORDERED** that the Motion is **Denied**.

**BY THE COURT,**

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**ALBERT W. SHEPPARD, JR., J.**

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**SUPPLEMENTAL OPINION**

**Albert W. Sheppard, Jr., J.** ..... **May 30, 2001**

In an Order dated April 6, 2001, this court denied the Motion for Summary Judgment of Liberty Mutual Fire Insurance Company (“Liberty”). The contemporaneous Opinion (“April Opinion”) explained that Liberty, as a primary insurer, may have owed a direct duty of notification to American National Fire Insurance Company (“American”), an excess insurer. Liberty subsequently filed a Motion for Reconsideration or, in the alternative, for Certification of an Immediate Appeal Pursuant to 42 Pa. C.S.A. 702(b). This Opinion is both a response to that Motion and a supplement to the April Opinion.

Liberty first contends that the Court erred in considering the “primary insurer subrogation” doctrine sua sponte. This issue was **not** considered sua sponte. As Liberty concedes, American “broadly alleged in its Sur-reply to Liberty Mutual’s Motion that, if Liberty Mutual believed that American National was obligated to provide excess coverage to Anderson as an additional insured under the IA Construction

policy, then Liberty Mutual had a duty to report the loss to American National.” Motion at ¶ 17.<sup>1</sup> The “primary insurer subrogation” theory is implicated by American’s arguments and has been recognized by courts in other jurisdictions.<sup>2</sup> To grant summary judgment while ignoring this potential theory of liability would have violated the standard to be applied when deciding motions for summary judgment. See, e.g., J.H. v. Pellak, 764 A.2d 64, 66 (Pa. Super. Ct. 2000) (“[s]ummary judgment may only be granted in cases where it is clear and free from doubt that the moving party is entitled to judgment as a matter of law”).

Liberty next argues that a servicing agreement between Liberty and IA Construction Co. provided that any notice to American was to be sent through Stewart Fuhrmann (“Fuhrmann”), Vice President and General Counsel for COLAS, Inc., IA Construction Co.’s parent company. Liberty asserts

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<sup>1</sup> In its Sur-reply, American alleged as follows:

If Liberty Mutual believed that American National was obligated to provide excess coverage to defendant James J. Anderson in the Vairo case, then Liberty Mutual had a duty to timely report the Vairo loss to American National so as to permit American National to meaningfully participate in the preparation of the defense of the case.

In addition, if Liberty Mutual believes that American National was obligated to provide excess coverage to Defendant James J. Anderson in the Vairo case, then Liberty Mutual had a duty to timely report the Vairo loss to its alleged insured, Anderson, so as to permit American National to meaningfully participate in the preparation of the defense of the case.

American’s Sur-reply at 4.

<sup>2</sup> Liberty also expresses concern that the Court’s decision was based on the Guiding Principles for Primary and Excess Insurance Companies (“Guiding Principles”). Motion at ¶¶ 31, 46. The April Opinion, however, was premised on precedent from other jurisdictions, due to the dearth of relevant Pennsylvania precedent. This supporting precedent from other jurisdictions was cited copiously in the April Opinion at Footnote 14 and included American Centennial Insurance Co. v. Warner Lambert Co., 681 A.2d 1241 (N.J. Super. Ct. Law Div. 1995), a case in which the rationale is particularly persuasive and articulate. The Guiding Principles were cited by this court once in a footnote for the sole purpose of elaborating on one element of the American Centennial court’s analysis.

that it complied with these terms on July 28, 1998 by advising Fuhrmann to notify American. Motion at ¶ 26. Liberty acknowledges that these allegations and documents were not presented with its initial summary judgment motion. *Id.* at ¶ 28 n.2.

It is suggested that Liberty's argument may be based on an overly broad reading of the April Opinion. In that April Opinion, this court found only that Liberty may have owed American a direct duty of notification.<sup>3</sup> The court did **not** address the manner of notification or the parties' right to determine the manner of notification by contract. If the parties had, in fact, contracted for a specific manner of notification and Liberty complied with it, then summary judgment might be justified. The present record as to this issue is incomplete because the new allegations raised by Liberty have not been fully addressed by both parties.

Based on the record presented, this court concludes that its denial of Liberty's Motion for Summary Judgment was proper. The Motion for Reconsideration will be denied.

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

**BY THE COURT,**

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**ALBERT W. SHEPPARD, JR., J.**

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<sup>3</sup> This direct duty of notification that a primary insurer may owe to an excess insurer should not be interpreted as a duty to notify an excess insurer directly.