SUPREME COURT OF KENTUCKY
CASE NO. 2010-SC-000827-D
Court of Appeals Case No. 2008-CA-1248

AIG DOMESTIC CLAIMS, INC.
And NATIONAL UNION FIRE INS. CO. APPELLANTS

VS.

TAMMY TUSSEY, PIKE COUNTY
BOARD OF EDUCATION and
EDDIE MCCOY APPELLEES

* * * * *

BRIEF FOR APPELLEE PIKE COUNTY BOARD OF EDUCATION.

* * * * *

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 11th day of January, 2012, copies of the brief were served, by mail, upon the following named individuals: Hon. Eddy Coleman, 435 Hall of Justice, 172 Division Street, Pikeville, KY 41501; W. David Deskins, Pike Circuit Court Clerk, 336 Hall of Justice, 172 Division Street, P.O. Box 1002, Pikeville, KY 41502-1002; Lawrence R. Webster, Webster Law Offices, P.O. Drawer 712, Pikeville, KY 41502; Robert S. Walker, Frost Brown Todd, LLC, 250 West Main Street, Suite 2800, Lexington, KY 40507; Robert L. Chenoweth, Chenoweth Law Office, 121 Bridge Street, Frankfort, KY 40601, and that ten (10) copies of the foregoing have been this day mailed to the Hon. Susan Stokley Clary, Clerk of the Kentucky Supreme Court, 700 Capitol Avenue, Rm 235, Frankfort, KY 40601. It is further certified that the record on appeal was not removed from the Clerks office.

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STATEMENT CONCERNING ORAL ARGUMENT

The Appellee does believe that oral argument is necessary to assist the Court in deciding the issues presented in this appeal.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

COUNTERSTATEMENT OF THE CASE

Tammy Tussey (hereinafter "Tussey") filed suit against the Pike County Board of Education (hereinafter the "Board") on February 21, 2006, alleging gender discrimination in her employment with the Board. [R. v.1 at 1] The Board filed its Answer to the Complaint on April 24, 2006. [R. v.1 at 13] At the time the Complaint was filed the Board was insured under an Errors and Omissions policy provided by National Union Fire Insurance Company and its parent company, AIG Domestic Claims, Inc. (hereinafter "National Union"). This policy was a claims-made policy which ran from 12:01 a.m. on July 1, 2005 through 12:01 a.m. on July 1, 2006. [Appellant's Appendix F, Policy Declarations Page, p. 1] This policy was renewed by the Board. The Tussey claim was reported to AIG on April 23, 2007, during the renewal period of the policy, and just under one year after the Board filed its Answer to the Complaint. [Appellant's Appendix G] The School District Administration has changed entirely; new Superintendent, ne administrative staff including new executive secretary. The new administration assumed the prior had reported this claim.

National Union denied coverage for Tussey's claims against the Board based upon its assertion that the Board failed to report the claim in the same policy period in which it was made. Tussey filed an Amended Complaint in the Pike Circuit Court asserting a direct claim against National Union seeking coverage for her claims. [R. v.1 at 70, First Amended Complaint] The Board asserted cross claims against National Union seeking coverage for the claims made against it. [R. v.1 at 79, Answer to Amended Complaint and Cross Claim]

National Union and the Board both filed Motions for Summary Judgment with regard to the issue of coverage for Tussey's claims. [R. v.1 at 102-138, National Union's Motion for Summary Judgment] [R. v.2 at 143-162, Response to AIG's Motion for Summary Judgment and

Cross Motion for Summary Judgment] The Board argued that the policy, as renewed, provided coverage for Tussey's claims where the claims were first made during the initial policy period and reported during the subsequent renewal period. National Union argued that the Board's failure to report the claims in the same one year period in which they were made required that coverage be denied. The Pike Circuit Court agreed with the Board's argument and granted its motion for summary judgment while overruling the motion for summary judgment filed by National Union. [R. v.2 at 173, Order of Summary Judgment]

National Union appealed the decision of the Pike Circuit Court to the Court of Appeals. The Court of Appeals first decision was to remand the matter back to the Pike Circuit Court for entry of summary judgment in favor of National Union. The decision was a 2-1 plurality, with three separate opinions authored by the judges. Only one judge, Judge Wine, found that there was no coverage due to the claim not being reported in the same one year period in which it was made. Both Judge Thompson, in his concurrence, and Judge Caperton, in his dissent, found that the renewed policy provided continuous and seamless coverage between the initial policy period and the renewal period. [Appellant's Appendix C, Court of Appeals Opinion, August 28, 2009] Judge Thompson stated "[m]y disagreement with the majority opinion is my belief that when the Board renewed its policy at the precise time the earlier policy expired, its coverage was continuous." [Id. p. 11] Judge Thompson went on to state that "the policy was in force from July 1, 2005 through July 1, 2007", and that it was the "expectation of the parties that renewal of the policy carried with it continuation of coverage." [Id.] What caused Judge Thompson to concur with Judge Wine was his belief that the Board's failure to timely provide notice required entry of summary judgment in favor of National Union. [Id. p. 12]

As a majority of the Court had agreed that the policy as renewed provided for continuous and seamless coverage that would, if not for the issue of timeliness of notice, provide coverage for Tussey's claims, the Board filed a petition for rehearing arguing that the issue of notice had not been raised by National Union and that even if it had been raised, National Union had failed to show that it had suffered prejudice due to the delay in notice. A majority of the Court of Appeals agreed with the Board, granting the Board's petition for rehearing and issuing a new Opinion affirming the decision of the Pike Circuit Court. [Appellant's Appendix A, Opinion of the Court of Appeals, September 17, 2010]

In the second Opinion, a majority of the Court, Judge Thompson and Judge Caperton, held that the policy as renewed provided continuous and seamless coverage during the time the claim was made and reported. According to the majority, this was based upon the parties' expectation as evidenced by the language of the policy. [Id. at 8]. As to the issue of timeliness of the notice provided by the Board, which had been the crux of Judge Thompson's concurrence to the first Opinion, the majority found that the issue had not been properly preserved, having not been raised below. [Id. at 9].

STANDARD OF REVIEW

I. SUMMARY JUDGMENT STANDARD

Rule 56 of the Kentucky Rules of Civil Procedure provides that summary judgment may be entered in favor of the moving party where there is no genuine issue of any material fact and the moving party is entitled to judgment as a matter of law. Steelvest, Inc. v. Scansteel Service Center, Inc., 807 S.W.2d 476, 480 (Ky. 1991).

Granting summary judgment is proper where the facts and evidence developed at the time the motion is filed establish the non-existence of a factual issue. Paintsville Hospital Co. v.

Rose, 683 S.W.2d 255, 256 (Ky. 1985). A movant for summary judgment has the burden of proving that there is no genuine issue of material fact and that showing must be sufficient to exclude reasonable doubt. The evidentiary materials supporting the movant must be similar to those entitling the movant to a directed verdict at a jury trial. Copley v. Board of Education of Hopkins Co., 466 S.W.2d 952, 954 (Ky.Ct.App. 1971).

If the moving party has established the non-existence of a genuine issue of material fact, the opposing party must adduce countervailing evidentiary material. Copley, 466 S.W.2d at 956. In other words, in order to defeat a properly supported motion for summary judgment, the opposing party must present at least some affirmative evidence demonstrating that there is a genuine issue of material fact for trial. Steelvest, Inc., 807 S.W.2d 482; see also Gullett v. McCormick, 421 S.W.2d 352 (Ky. 1967); Continental Cas. Co. v. Belknap Hardware and Manufacturing Co., 281 S.W.2d 914 (Ky. 1955).

II. STANDARDS FOR INTERPRETING INSURANCE CONTRACTS

Insurance policies are to be liberally construed as a whole and exclusions within the policy are to be strictly construed so as to make insurance effective. Deerfield Ins. Co. v. Warren County Fiscal Court ex. rel. City Planning Com'n, 88 S.W.3d 867, 873 (Ky.App. 2002); Foster v. Allstate Ins. Co., 637 S.W.2d 655 (Ky.App. 1981). Where insurance contracts are ambiguous, the insured is entitled to all coverage that may be reasonably expected under the policy. Deerfield, at 873. It is also clear that "where provisions may conflict, the contract shall be resolved to afford maximum coverage." St. Paul Fire & Marine Ins. Co. v. Powell-Walton-Milward, Inc., 870 S.W.2d 223, 226 (Ky. 1994). Where there may be two reasonable interpretations of an exclusion, then it will be interpreted in favor of the insured. Id., at 226; Foster v. Allstate Ins. Co., 637 S.W.2d 655 (Ky.App.1981).

ARGUMENT

I. THE RESULT IN THE COURT OF APPEALS IS ENTIRELY CONSISTENT WITH THE INTENT OF THE PARTIES TO THE POLICY AS SHOWN BY THE LANGUAGE OF THE POLICY

The Court of Appeals ultimately found that the policy provided continuous and seamless coverage from July 1, 2005 through July 1, 2007. Despite the assertions of National Union, a finding of coverage under these circumstances does not rewrite the parties policies as 1), the plain language of the policy would lead a reasonable insured to believe that such coverage was in fact continuous from the start date of the first policy term, and 2) other provisions of the policy are so ambiguous as to require that they be interpreted against the insurer and in favor of coverage.

Ambiguous language in an insurance policy must be liberally construed against the drafter so as to resolve all doubts in favor of the insured and in favor of coverage. Bituminous Cas. Corp. v. Kenway Contracting, Inc., 240 S.W.3d 633, 638 (Ky. 2007). In conjunction with the rule as to ambiguities, is that an insured is entitled to all the coverage he may reasonably expect to be provided under the policy. Simon v. Continental Ins. Co., 724 S.W.2d 210, 212 (Ky. 1986).

A. THE PLAIN LANGUAGE OF THE POLICY

Language in the policy creates an impression that there is continuous coverage from the initial policy period through all renewals. On the very first page of the policy, in bold letters purporting to provide notice of the claims-made form of the policy, it states that liability under the policy is limited to "**THOSE CLAIMS THAT ARE FIRST MADE AGAINST THE INSURED AND REPORTED IN WRITING TO THE COMPANY WHILE THE POLICY IS IN FORCE.**" This notice does not limit liability to a particular policy period or to a

particular time period at all. The policy was in force at all relevant times, from July 1, 2005 through July 1, 2007. As has been established, there was no break in the policy during those years. From the insured's viewpoint, there would not have been a time when the policy was not in force. The insured would believe, reasonably so, where the policy was renewed for two consecutive periods, that a claim made during the first period could be reported during the second period as the policy was in force at all times without any gaps in coverage or termination. This language is in the first paragraph of the first page of the policy, in bold lettering and all capital letters.

In Cast Steel Products, Inc. v. Admiral Insurance Company, 348 F.3d 1298 (11th Cir. 2003), (attached hereto as Exhibit 1), the insurer, Admiral, had denied coverage on a claim made against its insured, Cast Steel. Admiral's reason for denial was that the claim was not made and reported under the same policy period. Cast Steel had in place a 1999 policy and a 2000 policy with Admiral. The claim was made within the 1999 policy period but was not reported until the 2000 policy period. The 11th Circuit Court of Appeals determined that the policy provided coverage for the subject claim and directed the District Court to grant summary judgment for Cast Steel.

In arriving at its decision, the Court noted that it was confronted with "two consecutive insurance policies that created apparently seamless coverage over two policy periods," and that "[o]n the face of the 99 and 00 Policies, there appears to be no gap in coverage." Id. at 1301. The Court also stated that "[a]t a glance, one would be hard pressed to imagine how a claim accruing in the middle of the two policy periods would not be covered by one of the policies." Id. at 1301-1302.

The Court in Cast Steel considered the argument that the lower premiums of a claims-made policy, as opposed to an occurrence policy, results in less coverage for the insured. The Court rejected this argument and found that to deny coverage to an insured who renewed a policy under those circumstances to be "both illogical and inequitable". Id. at 1303-1304.

The facts of Helberg v. National Union Fire Insurance Company, 657 N.E.2d 832 (Oh.App. 1995), cited by the court in Cast Steel, are directly on point with the present matter. In Helberg, the insurance carrier denied coverage because the claim was not reported in the same policy period in which it was made. However, as in the present situation, the insured was covered under two subsequent policy periods with the same insurer, with no breaks in coverage. The claim was made during one policy period and reported during the subsequent policy period. The Court reversed the grant of summary judgment to the insurance carrier at the trial court.

The court in Helberg, distinguished the holding in U.S. v. A.C. Strip, 868 F.2d 181 (6th Cir. 1989), as that case involved an insured who had changed his insurance carrier between the time the claim was made and the time he reported the claim. The claim was reported to the first carrier when its coverage had expired and there had been no renewal, and the claim was made prior to the existence of coverage with the second carrier. In Helberg, as here, there was no break in coverage, the insured being covered under two subsequent policy periods with the same carrier. There was coverage at all times with the same carrier, when the claim was first made and when it was reported.

As in Cast Steel and Helberg, it would be similarly illogical and inequitable here to deny coverage where the same policy of insurance was in place at all relevant times with the same insurance carrier. There was no break in coverage, and there was no termination of coverage. Coverage was renewed by the insured, and it was continuous and seamless.

Even if there were other language in the policy explicitly limiting coverage to those claims made and reported during the same one year period, regardless of renewal, this language, on the very face of the policy, would, at least, create an ambiguity that requires that the policy language be liberally construed, against the drafter, so as to meet the reasonable expectations of the insured and make coverage effective.

B. AMBIGUITIES IN THE POLICY LANGUAGE REQUIRE THAT IT BE LIBERALLY CONSTRUED AGAINST THE DRAFTER AND IN FAVOR OF COVERAGE.

i. Exclusions

On Page 3 of the policy, under "Exclusions". It states, "This policy does not apply to any Claim: ...15. Arising out of any Wrongful Act prior to the inception date of the first policy issued by the Company and continuously renewed and maintained, if on or before such date any Insured knew or could have reasonably foreseen that such Wrongful Act could lead to a Claim;" A nearly identical provision in the policy at issue in Helberg, was noted by the Court as an indication that the parties expected continuous coverage upon renewal. Id. at 682. This provision does not attempt to exclude those "Wrongful Acts" known prior to each policy period, but only those that occurred prior to the first policy period. This policy language was also noted as a distinguishing characteristic between the policy at issue in Helberg and the policy at issue in Checkrite. Checkrite, 95 F.Supp.2d 180, 194 (SDNY 2000).

Likewise, another provision in AIG's policy, number 14 under the "Exclusions" section, purports to exclude those "pending or prior litigation or hearing prior to the effective date of the "first" policy issued and continuously renewed by the Company." This is further evidence that the parties intended renewal of the policy to provide continuous coverage. The policy does not exclude litigation pending prior to the effective date of each policy period, but only those pending prior to the first policy.

ii. Extended Reporting Period

The Court in Cast Steel, also found that the policy at issue was ambiguous as there was language in the policy that extended the reporting period for those insureds that terminated the policy or non-renewed. The policy was completely silent as to whether a similar extension was affected by renewal of the policy. As noted by the Court, "the inclusion of 'non-renewal' of the policy as one of those circumstances demanding the purchase of an extended reporting endorsement excludes a 'renewal' as a circumstance which demands such a purchase." Cast Steel, 348 F.3d at 1303.

Citing to Helberg (attached hereto as Exhibit 2), the Cast Steel court reasoned that "if choosing to cancel or non-renew provided the insured with an extended reporting period, electing to continue to do business with the same insurer by renewing the claims-made policy certainly 'should not precipitate a trap wherein claims spanning the renewal are denied.'" Id. at 1304. The Court also noted that it was "both illogical and inequitable to deny coverage to the insured who chooses to renew its claims-made policy for successive years with the same insurer". Id. at 1304.

The extended reporting provision that was at issue in Helberg stated,

> "[i]n case of cancellation or non-renewal by either the Named Insured or the Company, the Named Insured shall have the right, upon payment within 30 days of the termination of an additional premium, to have issued an endorsement providing an unlimited extendend reporting period covering claims first reported during the extended reporting period acts or omissions occurring prior to the end of the policy period and otherwise covered by the policy."

That provision set forth only two circumstances under which the purchase of an extended reporting period was necessary, when the policy is either cancelled or not renewed. As stated by the Court, "the inclusion of 'non-renewal' of the policy as one of those circumstances demanding

the purchase of an extended reporting endorsement excludes a 'renewal' as a circumstance which demands such a purchase." Id. at 835. Therefore, as the Court determined, the renewal of a policy automatically extended the period for reporting a claim into the renewed policy period.

A similar provision is found in the policy at issue here. On page 4 of the Policy, Special Provisions, 4. Discovery Period, it states,

> "[i]f the Company or the School Entity shall cancel or refuse to renew this policy, the School Entity shall have the right, upon payment of an additional premium...to a period of twelve (12) months following the effective date of such cancellation or non-renewal in which to give written notice to the Company of any Claim made against the Insured during said twelve (12) month period for any Wrongful Act before the end of the Policy Period."

As in Cast Steel and Helberg, there are only two circumstances where it is necessary, or even possible, to purchase an extended reporting period; when the policy is cancelled or not renewed. Therefore, as noted by the Courts in Helberg and Cast Steel, renewal of the policy implies an automatic extended reporting period for claims made under previous policy periods, a period that extends into the renewal period. In fact, this extended reporting period is an additional twelve months, which would extend past the date the claim was reported. This provision is, in the least, ambiguous and creates an expectation on the part of the insured that the reporting period for a claim will be extended into the renewed policy period.

This extended reporting period language represents a significant and distinguishing circumstance between the present facts, and those of Cast Steel and Helberg, and those present in the cases cited by AIG, including Pantropic Power Prods. V. Fireman's Fund Ins. Co., 141 F.Supp.2d 1366 (S.D.Fla. 2001), Ehrgood v. Coregis Ins. Co. v. Bauman, 1992 WL 1738 (N.D.Ill. 1992), and Checkrite Limited v. Illinois National Insurance Co., 95 F.Supp.2d 180 (S.D.N.Y. 2000). The court in Cast Steel, specifically distinguished Pantropic, Ehrgood, and

Checkrite, because those cases dealt with language in the policy that automatically provided an extended reporting period for those insureds that renewed their policies. Cast Steel, 348 F.3d at 1302. That was not the case in Cast Steel or Helberg, nor is it the case here. Also, the court in Checkrite distinguished its facts from those found in Helberg, because the policy in Helberg included language which raised expectations that coverage was continuous where the policy was renewed. This language is also found in the AIG policy at issue here, as discussed below. Checkrite, 95 F.Supp.2d at 194.

The language used throughout the policy creates the expectation that there will be continuous coverage from the first policy period through all renewal periods. In fact, it goes beyond mere ambiguity as it is clear evidence of the parties' intent that there would be continuous coverage from the first policy through all renewals. Given this language, one would at least expect coverage for a claim that was both made and reported during a period of continuous coverage with the same insurance carrier.

While National Union asserts that the Court of Appeals has, by way of its decision, re-written the language of the policy, it is instead the very language of the policy as written by National Union, and forced upon the Board, that creates a reasonable expectation in the insured of continuous and seamless coverage. Therefore, it is the language of National Union's policy which requires the result reached by the Court of Appeals.

II. TIMELINESS OF NOTICE

National Union also argues that aside from the issue as to whether there are two distinct policy periods, or one seamless continuous policy period, that the claim was still not reported as soon as practicable as required under the policy. National Union argues that the Board failed to report the claim as soon as practicable and therefore, due to this failure, coverage is excluded

under the policy. However, as was found by the Court of Appeals below, National Union failed to raise this issue and cannot now rely upon it for reversal, and Kentucky law requires that the National Union provide evidence of prejudice as a result of the failure to provide timely notice before the Court will find that coverage does not apply, which National Union has clearly not done here.

A. NATIONAL UNION FAILED TO RAISE ISSUE BELOW AND IS BARRED FROM ARGUING ISSUE NOW

As noted by the majority in the Court of Appeals, errors to be reviewed on appeal must be "precisely preserved and identified in the lower court." Skaggs v. Assad, 712 S.W.2d 947, 950 (Ky. 1986). For the Court in Skaggs, the mere presence of the issue was not sufficient. Id. at 949. The Court in Skaggs cited to Sechler v. State, 340 N.W.2d 759 (Iowa 1983), a Supreme Court of Iowa case in which the Plaintiff had been barred from recovery at the trial court due to contributory negligence. Among the Plaintiff's arguments on appeal were that the trial court should have applied comparative negligence as opposed to contributory negligence. The Court in Sechler held that although the Plaintiff had argued before the trial court that the defense of contributory negligence should not be applied, the Plaintiff had failed to preserve for review the issue of applying comparative negligence.

Likewise, here, while National Union may have made mention of the term "as soon as practicable" in its motion in the trial court, the instances in which it did so were mere references to the language of the policy and it was never set forth as a fully developed argument. National Union's argument in the trial court was that the claim was not made and reported in the same policy period. This was the argument that the trial court responded to in its decision. National Union never argued that the late notice, aside from failing to have reported the claim in the same period in which it was made, was a reason for granting judgment in its favor. This is exactly the

type of situation for which the Court in Skaggs set forth the standard of "precisely preserved and identified". Mere mentions of an issue are not sufficient to preserve an issue.

B. NATIONAL UNION HAS FAILED TO SHOW ANY PREJUDICE FROM THE DELAY IN NOTICE

In Jones v. Bituminous Cas. Corp., 821 S.W.2d 798 (Ky. 1991), the Court determined that an insurer must show that "it is reasonably probable that the insurance carrier suffered substantial prejudice from the delay in notice." In Jones, the insurer sought a declaratory judgment declaring that it had no duty to defend or indemnify its insured due to having been provided with notice six and one-half months after the occurrence. The trial court found that the policy was void due to the insured's breach of the requirement to provide prompt notice. The issue of prejudice was argued at the trial court, but the trial court had found that proof of prejudice was not required. In reversing, the Court was overturning Kentucky precedent on this issue, but was conforming with the modern trend, "that an insurer cannot withdraw coverage on the ground that a notice condition has not been met unless the insurer can show that it was prejudiced by the act of the insured." Id. at 801.

No Kentucky court has held that Jones would not apply to a situation that involved a claims-made insurance policy. National Union cites to Trek Bicycle Corp. v. Mitsui Sumitomo Insurance Co., LTD, 2006 WL 1642298 (W.D.Ky. 2006), for its assertion that the holding of Jones should not apply to claims-made policies. The Court in Jones sets forth four factors upon which it based its reasoning for requiring proof of prejudice. While the Court in Trek Bicycle mentions the holding of Jones, there is no discussion of these factors behind the Court's decision in Jones. Therefore, the holding of Trek Bicycle is not persuasive here and it is more instructive

to examine the factors set out by the Court in Jones as they apply here. These factors apply equally to claims-made policies, and, more importantly, apply directly to the present matter.

As the Court in Jones noted, there were four factors that caused its divergence from prior precedent, namely contracts of adhesion; doctrine of reasonable expectations; statutory coverage and premiums. The concern of the Court with regard to each of these four factors is present here. At issue here, as at issue in Jones, is a standard form insurance policy that was presented on a "take it or leave it" basis. National Union has previously asserted that the Board should be considered a sophisticated consumer and that concerns that might normally relate to Contracts of adhesion are not present here. However, even sophisticated consumers can have little to no bargaining power with regard to entering into contracts for insurance, and it is the bargaining power available to the insured, i.e. whether terms were bargained for and changed at the insured's requests, that determine whether concerns regarding contracts of adhesion come into play.[1] Here there were no bargained for terms of the policy.

As explained by the Court, the doctrine of reasonable expectations is "that the insured is entitled to all the coverage he may reasonably expect to be provided under the policy. Only an unequivocally conspicuous, plain and clear manifestation of the company's intent to exclude coverage will defeat that expectation." Id. at 802. As explained above, the language of the policy gives rise to an expectation that coverage will be continuous and seamless. On the very first page of the policy there is bolded, all caps language which purports to provide coverage for liability arising from claims made and reported while the policy is in force. As noted above, there is nothing connected with that language which would provide notice to the insured that such coverage is limited to a specific one-year policy period as opposed to the policy and renewal terms. In addition, two separate exclusions in the policy limit coverage for wrongful

acts and litigation that existed or were known prior to the first policy period. This provision does not attempt to exclude those "Wrongful Acts" known prior to each policy period, but only those that occurred prior to the first policy period. A nearly identical provision in the policy at issue in Helberg was noted by the Court as an indication that the parties expected continuous coverage upon renewal. Id. at 682. Lastly, there is also an extended reporting provision in the policy which provides the option of an extended reporting period to those whose policies were terminated or not renewed. As noted above, this gives rise to an expectation amongst those insureds that did renew their policies, that their reporting period would be extended into the renewed policy as surely they could not be worse off for having renewed with the same company than an insured who did not renew and purchased another policy elsewhere.

Like National Union here, the insurer in Jones claimed that the notice clause was imperative so that it could accurately price its insurance according to the risk involved. The Court, however, noted that there would be no increase in risk to the insurer where the insurer had not suffered any substantial prejudice from the delay. Id. at 802. Noting that an absence of prejudice to the insurer would allow a windfall to the insurer, the Court stated that "[b]y adopting a rule requiring proof of prejudice from a delay in notification, all the insurance company is being required to do is to take the risk it was paid to take rather than escape liability for coverage otherwise provided." Id.

IV. CONCLUSION

At the time the claim was made by Tussey, and the time Tussey's claim was reported by the Board to AIG, the Board was covered under a policy of insurance with AIG. This policy had not been terminated, cancelled or non-renewed at any time between the time the claim was made and the time it was reported. As found by the Court of Appeals, the coverage was, at all times

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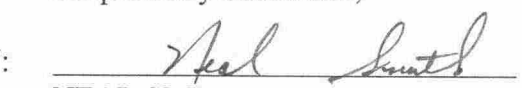
[1] Old Republic Ins. Co. v. Underwriters Safety & Claims, Inc.,

relevant herein, continuous and seamless. Language within the policy creates an expectation that the policy coverage would be continuous from the initial policy period through subsequent renewals. At the very least, this language creates an ambiguity in the policy which should be interpreted in favor of coverage for the insured. As noted by the Court in St. Paul, 870 S.W.2d 223, doubts and uncertainty should be resolved in favor of the insured, and "[a]s long as coverage is available under a reasonable interpretation of an ambiguous clause, the insurer should not escape liability". St. Paul, 870 S.W.2d at 227.

The Pike Circuit Court was correct in granting summary judgment for the Board finding that there was coverage under the AIG policy. Its decision should be upheld and the opinion of the Court of Appeals should be affirmed.

Respectfully Submitted,

BY: 

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