UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

JLD PROPERTIES OF ST. ALBANS, LLC, Plaintiff	)	
	)	
v.	)	Case No. 2:20-cv-134
	)	
PATRIOT INSURANCE COMPANY, Defendant	)	

OPPOSITION TO MOTION TO DISMISS

Preliminary Statement

JLD had no reason to suspect that it needed to sue Patriot Insurance Company ("Patriot") because Patriot had accepted coverage of the October 2017 windstorm. Cmplt. ¶¶ 11-12. Patriot fails to mention these allegations in its motion to dismiss because the allegations defeat its motion to dismiss. Patriot also fails to mention that part of Vermont law stating that courts do not enforce a contract suit limitation clause when doing so would be unreasonable. *Brillman v. New England Guar. Ins. Co.*, 2020 VT 16, ¶ 8 (contract suit limitation only enforced "if limitation is unambiguous and reasonable."); *Herbert v. Jarvis & Rice & White Ins. Co.*, 134 Vt. 472, 475 (1976) (same). Patriot's flip flop on coverage is exactly the sort of behavior that would make enforcing a contract suit limitation clause unreasonable.

Patriot's attempt to enforce its suit limitation clause also violates Vermont's insurance statute. Days before Patriot filed its motion to dismiss, Patriot's coverage attorneys sent a third coverage letter. In the letter, they asserted a number of new coverage defenses, including the contractual suit limitation. They only asserted these defenses after JLD spent significant time corresponding with Patriot and investigating the underlying claim. Patriot's outside counsel also asserted these defenses only after JLD filed its complaint in federal court. Patriot's continuing

gravel & shea | ATTORNEYS AT LAW
A PROFESSIONAL CORPORATION
76 St. Paul Street
P.O. Box 369
Burlington, Vermont 05402-0369

violations of the Vermont Consumer Fraud Act form the basis of JLD's supplemental complaint, which JLD is filing in conjunction with this opposition.

Patriot's attempt to avoid Vermont's insurance statute and the Vermont Consumer Fraud Act also fails. Patriot again neglects to inform the Court that the language of the Vermont Consumer Fraud Statute has changed significantly since the Vermont Supreme Court decided the *Wilder* case. *Wilder v. Aetna Life & Caus. Ins. Co.*, 140 Vt. 16 (1981). That changed language makes clear that claims exist against businesses including insurance companies for services they provide. At least two Vermont Superior Courts have so decided.

Facts

Patriot Insurance Company accepted coverage for the October 2017 wind storm that devastated parts of Vermont. Compl. ¶ 11-12. JLD had no reasons to sue Patriot. As the cost of repair mounted, Patriot reversed its position with respect to coverage. *Id.* On January 10, 2020, JLD sought coverage for losses caused by the wind storm. *Id.* ¶ 13. Patriot denied coverage with two letters. *Id.* ¶ 14-15. In June 2020, JLD's insurance broker sent a letter to Patriot detailing a number of factual errors that Patriot made in its investigation of the claim. *Id.* ¶ 16. Despite receiving this letter, Patriot Insurance did not request any additional information or conduct a new investigation. *Id.*

Failing to receive an answer from Patriot, JLD filed its complaint on September 9, 2020. After JLD filed its complaint, Patriot sent a third coverage letter. Supp. Compl. ¶¶ 17-18. Patriot's outside coverage counsel wrote this new coverage letter. *Id.* ¶ 19. The third coverage letter detailed several new defenses, including the assertion of a suit limitation clause. *Id.* ¶ 20. The third coverage letter also failed to discuss the factual errors with Patriot's previous factual investigation or even mention that it investigated them. *Id.* ¶ 23-24.

gravel & shea | ATTORNEYS AT LAW
A PROFESSIONAL CORPORATION
76 St. Paul Street
P.O. Box 369
Burlington, Vermont 05402-0369

Patriot's assertion of new defenses is part of a standard strategy to increase the costs of obtaining coverage so that rational economic actors will not purse coverage to which they are entitled because the costs of obtaining that coverage exceeds the amount of damages available under the policy. *Id.* ¶ 21. This standard strategy allows Patriot to make profits that it is not otherwise entitled to the detriment of its insureds. Supp. Compl. ¶ 22.

I. THE COURT SHOULD NOT DECIDE PATRIOT'S CONTRACT SUIT LIMITATION ARGUMENT ON A MOTION TO DISMISS.

A. The Court Should Not Resolve Statute Of Limitations Arguments On A Motion To Dismiss.

Courts should not resolve statute of limitation arguments when there are doubts about the facts. "[W]hile a statute-of-limitations defense may be raised in a motion to dismiss under Fed. R. Civ. P. 12(b)(6), such a motion should not be granted unless 'it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief'") *Ortiz v. Cornetta*, 867 F.2d 146 (2d Cir. 1988) *quoting Abdul-Alim Amin v. Universal Life Insurance Co.*, 706 F.2d 638, 640 (5th Cir. 1983). Plaintiffs should be given a reasonable opportunity to present evidence related to the statute of limitations issue. *Id.* at 148. In *Ortiz*, the Court reversed the granting of a motion to dismiss because the judge had failed to give Ortiz that opportunity. *Id.*

The same is true here. There are detailed facts that bear on the statute of limitations issues. In addition, JLD would like to take some discovery on Patriot that should also bear on the statute of limitations issues. Without facts and discovery, it is premature to rule on the statute of limitations issue.

Additionally, Patriot supports its motion to dismiss with an affidavit. JLD should be able to take the deposition of the affiant prior to a ruling on a motion to dismiss and file any necessary

gravel & shea ATTORNEYS AT LAW
A PROFESSIONAL CORPORATION
76 St. Paul Street
P.O. Box 369
Burlington, Vermont 05402-0369

affidavits in opposition. Fed. R. Civ. P. 26(d) ("All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion.")[1]

B. Courts Do Not Enforce Unreasonable Suit Limitation Clauses.

The Court should not apply a suit limitation clause in this case because its application is unreasonable. Vermont recognizes that a suit limitation clause must be reasonable to be enforced. *Brillman v. New England Guar. Ins. Co.*, 2020 VT 16, ¶ 8 (contract suit limitation only enforced "if limitation is unambiguous and reasonable."); *Herbert v. Jarvis & Rice & White Ins. Co.*, 134 Vt. 472, 475 (1976) (same).

In *Brillman*, the Vermont Supreme Court remanded to the Superior Court to determine if there were facts that should be considered in determining whether to enforce a suit limitation clause. "We recognize that suit limitations like the one in this case can lead to incongruous or unfair results. In a case where an insurer and a homeowner are engaged in ongoing negotiations, the suit limitations on its own would require a homeowner to file suit for breach of the insurance contract before the insurer has actually breached by finally declining to pay all sums due under the policy." *Brillman*, 2020 VT 16, ¶ 24. Here, the facts are worse than *Brillman* because the insurer had accepted coverage for the terrible wind storm that had occurred in Vermont in October 2017. It never told the insured that it was denying coverage. The insured could not have filed suit because it had no idea that it needed to file suit. This is the quintessential case of where enforcement of the suit limitations clause would be unreasonable.

[1] Contrary to Patriot's assertion the specific contract for insurance is not identifiable from the face of the complaint. The Court should not take judicial notice of a policy that Patriot has selected to bolster its arguments for dismissal.

gravel & shea ATTORNEYS AT LAW
A PROFESSIONAL CORPORATION
76 St. Paul Street
P.O. Box 369
Burlington, Vermont 05402-0369

C. Patriot Waived The Suit Limitation Clause And Is Estopped from Raising It.

Patriot waived the suit limitation clause in two ways. First, by accepting coverage, Patriot waived its right to contest coverage. Second, by failing to assert that clause in its previous coverage letters, Patriot waived the suit limitation clause. Patriot's acceptance of coverage also estops them from denying coverage.

Brillman expressly recognized the insurer's actions give rise to application of the waiver and estoppel doctrines. "If conduct or inaction on the part of the insurer is responsible for the insured's failure to comply with time limitations, injustice is avoided and adequate relief assured, without doing violence to the plain language of the insurance contract, by resort to traditional principles of waiver and estoppel." *Brillman*, 2020 VT 16, ¶ 25 *quoting Fed. Deposit Ins. Co. v. Hartford Accident & Indem*. Co., 97 F.3d 1148, 1151 (8th Cir. 1996). This is consistent with the generally recognized law on waiver or estoppel by an insurance company. Stephen Plitt *et al.*, 17 Couch on Insurance § 238:3 (2020) ("In fact, although policy clauses limiting time in which actions may be brought against an insurer are usually enforceable, such clauses are not favored by sound public policy and are easily waived. Accordingly, the defense of the period of limitations may be barred by waiver or an estoppel stemming from the conduct of an insurer or an insurer's agent.")

In the context of insurance, a waiver "involves the act or conduct of one of the parties to the contract, only." *Beatty v. Employers Liab. Ins. Co.*, 106 Vt. 25, 31 (1933). Waiver "is the intentional relinquishment of a known right." *Id.* Here, Patriot waived its right to contest coverage by initially accepting coverage for the wind storm.

In the context insurance industry, another type of waiver exists. "An insurer waives additional defenses that are not raised or reserved in an initial denial of coverage." *Progressive Ins. Co. v. Brown*, 2008 VT 103, ¶ 6. When an insurer "deliberately puts his refusal to pay on a specified ground, and says no more, he should not be allowed to 'mend his hold' by asserting other

gravel & shea | ATTORNEYS AT LAW
A PROFESSIONAL CORPORATION
76 St. Paul Street
P.O. Box 369
Burlington, Vermont 05402-0369

defenses after the insured has taken him at his word and is attempting to enforce his liability." *Id.* ¶ 7 *quoting Cummings v. Conn. Gen. Life Ins. Co.,* 102 Vt. 351, 361-62, 148 A. 484, 487 (1930). "Thus, if an insurer initially denies coverage on a specified basis and does not reserve the right to later raise other grounds, it waives any additional defenses." *Id.*

Because Patriot's assertion of the suit limitation clause did not occur until after the original complaint was filed, it is not addressed in the complaint. However, Patriot has filed a supplemental complaint that details the facts related to this late assertion. In particular, Patriot's late reversals denying the existence of coverage did not include the suit limitation clause as a reason for denying coverage. Supp. Compl. ¶ 20. Patriot did not assert the suit limitation clause until after JLD filed its complaint. *Id.*

Patriot is also estopped from asserting the suit limitation clause. To establish equitable estoppel, "a plaintiff must show that: (1) the defendant made a definite misrepresentation of fact, and had reason to believe that the plaintiff would rely on it; and (2) the plaintiff reasonably relied on that misrepresentation to his detriment." *Ellul v. Congregation of Christian Bros.*, 774 F.3d 791, 802 (2d Cir. 2012). Here, JLD has done so. It alleged that Patriot initially accepted coverage of the October 2017 wind storm. Compl. ¶ 11. Based on that initial acceptance, JLD requested additional funds for other damage related to the wind storm. Compl. ¶ 13.

Patriot's conduct prevented JLD from filing suit because JLD expected that Patriot would cover its losses associated with the October 2017 wind storm. It had no idea that it needed to file suit because it thought any suit would be completely unnecessary. JLD relied on Patriot's previous acceptance of coverage and the reasons put forth in its subsequent denial letters. Suppl. Compl. ¶11, 25.

In addition, JLD could not have filed a lawsuit because there would be no federal or state court jurisdiction over this hypothetical suit as there would be no case or controversy. Article III,

gravel & shea | ATTORNEYS AT LAW
A PROFESSIONAL CORPORATION
76 St. Paul Street
P.O. Box 369
Burlington, Vermont 05402-0369

Section 2 of the Constitution limits jurisdiction of federal courts to cases and controversies. *Mahon v. Ticor Title Ins. Co.*, 683 F.3d 59, 62 (2d Cir. 2011). Vermont has likewise adopted the case and controversy limitation. *Hinesburg Sand & Gravel Co. v. State*, 166 Vt. 337, 340 (1997).

Other jurisdictions have prevented an insurer from asserting a suit limitation clause when an insured relied on positions that the insurer took. *See, e.g., Ward v. All-State*, 964 F. Supp. 307 (C.D. Cal. 1997). In *Ward*, Allstate asserted a suit limitation clause that barred Ward's request for additional damages. Ward, who was a quadriplegic, relied on the insurer's inspection of the property to determine the extent of damage caused by an earthquake in California. After Ward discovered additional damage to his house, he sought additional coverage for the damage. After having agreed that the policy covered the earthquake, the insurer refused to provide additional money.

The Central California District Court denied Allstate's motion for summary judgment saying that there were disputes of fact concerning whether the insurer was estopped from denying coverage. The Court noted that "the Plaintiffs had submitted a timely claim to Allstate" and "relied on the representations of Mr. Sanchez, a purported expert and agent of Allstate." *Id.* at 312. Based on these representations, "Plaintiffs allowed the limitations period to elapse without conducting a further investigation." *Id.* The Court said that this was "precisely the type of situation contemplated by the estoppel doctrine. Allstate cannot be allowed to lull the Plaintiffs into sleeping on their rights, and then use the limitations period as a sword to cut down their claims." *Id.*; *see also Georgia Farm Bureau Mut. Ins. v. Mikell*, 126 Ga. App. 640, 191 S.E.2d 557 (Ga. Ct. App. 1972)("a waiver may result where the company leads the insured by its actions to rely on its promise to pay, express or implied.").

gravel & shea | ATTORNEYS AT LAW
A PROFESSIONAL CORPORATION
76 St. Paul Street
P.O. Box 369
Burlington, Vermont 05402-0369

II. THE VERMONT CONSUMER FRAUD ACT APPLIES TO PATRIOT'S ACTIONS.

A. The General Assembly Amended The Consumer Fraud Act To Give Business Claims Against Other Businesses.

After the Vermont Supreme Court decided the *Wilder* case, the Vermont General Assembly made a significant addition to the Vermont Consumer Fraud Act. In particular, it expanded the definition of "goods" or "services" so that it now reads "any objects, wares, goods, commodities, work, labor, intangibles, courses of instruction or training, securities, bonds, debentures, stocks, real estate, or other property or services of any kind."

At least two Vermont Superior Courts have acknowledged that this language made the Vermont Consumer Fraud Act applicable to insurance companies. *Blake v. Progressive Northern Ins. Co.*, 2016 Vt. LEXIS 3, attached as Exhibit 1; *Bertelson v. Union Mutual Fire Ins. Co.*, 2004 Vt. LEXIS 25, attached as Exhibit 2. The *Blake* Court held that the change in the statute's language undermined the holding of *Wilder*: "The 1985 amendments to the CFA fully undermine the basis for the Supreme Court's ruling in *Wilder*. Given the Legislature's significant expansion of the definition of matters covered by the CFA from 'delivery, installation, servicing, repair or improvement' of 'tangible personal chattel' to 'intangibles' and 'property and services of any kind' -- this Court believes that the CFA now covers transactions involving the sale of insurance." *Blake v. Progressive Northern Ins. Co.*, 2016 Vt. LEXIS 3 at *3-*4.

B. Title 8 Set The Standard Of Conduct For Whether An Act Is "Unfair" Under The Consumer Fraud Act.

The Vermont Consumer Fraud Act bars both "deceptive" and "unfair" acts. *Drake v. Allergan*, 63 F. Supp. 3d 382, 393 (D. Vt. 2014). "Whether an act is 'unfair' is guided by consideration of several factors, including (1) whether the act offends public policy, (2) whether it is immoral, unethical, oppressive or unscrupulous, and (3) whether it causes substantial injury to consumers." *Id.*

gravel & shea ATTORNEYS AT LAW
A PROFESSIONAL CORPORATION
76 St. Paul Street
P.O. Box 369
Burlington, Vermont 05402-0369

To determine whether an act "offends public policy," it certainly makes sense to look to enacted law to determine what public policy is. Thus, while Title 8 may not be have a private right of action itself, it can serve as the standard for conduct to determine the "public policy" element of the "unfair" prong of the Vermont Consumer Fraud Act. The General Assembly has expressly recognized this sort of approach by making interpretations of the FTC act relevant to determinations under the Vermont Consumer Fraud Act. 9 V.S.A. § 2453(b).

Title 8 also makes clear that the standards of conduct are independent of their contractual obligations under the policy. JLD's complaint relates to the investigation that Patriot conducted. That investigation can violate the statute even if the ultimate coverage decision goes against JLD. Specifically, JLD complains that Patriot's investigation failed by:

> (A) misrepresenting pertinent facts or insurance policy provisions relating to coverage at issue;
>
> (B) failing to acknowledge and act reasonably promptly upon communications with respect to claims arising under insurance policies;
>
> (C) failing to adopt and implement reasonable standards for the prompt investigation of claims arising under insurance policies;
>
> (D) refusing to pay claims without conducting a reasonable investigation based upon all available information.

8 V.S.A. § 4724(9)(A) & (B). JLD's Supplemental Complaint adds a claim that Patriot's investigation failed by:

> (M) failing to promptly provide a reasonable explanation on the basis in the insurance policy in relation to the facts or applicable law for denial of a claim or for the offer of a compromise settlement.

8 V.S.A. § 4724(9)(M). JLD can suffer damages independent of the coverage of the ultimate claim because it incurs significant costs related to attempting to correct the insurer's faulty

gravel & shea ATTORNEYS AT LAW
A PROFESSIONAL CORPORATION
76 St. Paul Street
P.O. Box 369
Burlington, Vermont 05402-0369

investigation and taking legal action based on the statements that Patriot made about the coverage.

C. JLD's Claims Are Not "On The Policy."

Relying on *Greene v. Stevens Gas,* 177 Vt. 90 (2004), Patriot mistakenly argues that JLD's claims are not covered by the Vermont Consumer Fraud Act because they are simply breach of contract claims or "on the policy."

At the threshold, a determination about whether an issue is "on the policy" is not properly the subject of a motion to dismiss. The *Brillman* Court recognized that a determination of whether an action is "on the policy" is a fact intensive inquiry: "Instead, we adopted the Iowa Supreme Court's position that "determining whether a tort action is 'on the policy' requires a case-by-case analysis of the nature of the tort claim, the timing of the relevant events, and the type of damages requested." 2020 VT 16, ¶ 14 *citing Greene*, 177 Vt. at 101. The Court noted several examples of actions that were not on the policy: "We cited with approval the Iowa court's examples of bad-faith claims that may not be "on the policy," such as claims based on fraud and negligence during policy purchase negotiations or claims based on insurer's conduct with respect to repair of previously damaged property." *Id.* Here, JLD is complaining about the insurer's conduct with respect to repair of previously damaged property – an action that the Vermont Supreme Court has held is not "on the policy."

In *Greene*, the Court also looked at the timing of the acts of the insurer. "The court noted that decisions from other courts applying a case-by-case analysis exempted bad faith claims from policy limitation clauses where the "bad faith occur[ed] either before or after the loss which triggers policy coverage." *Greene*, 177 Vt. at 101. Here, Patriot's conduct that is at issue was distant from the loss; it occurred in the process of trying to extricate itself after its previous acceptance of coverage. The allegations of the Supplemental Complaint occurred even further

gravel & shea | ATTORNEYS AT LAW
A PROFESSIONAL CORPORATION
76 St. Paul Street
P.O. Box 369
Burlington, Vermont 05402-0369

after the loss in this case. Moreover, the allegations are qualitatively different than whether coverage exists.

Vermont's statutory scheme attempts to force insurance companies to conduct investigations and settlement discussion in an economically efficient manner. Patriot's actions here were designed to increase the costs of obtaining coverage so that any rational person would not pursue coverage. That is the essence of a claim for "unfair" acts under the Vermont Consumer Fraud Act. This behavior runs contrary to the express public policy set forth in the Vermont Insurance statutes. Patriot's behavior is oppressive and unscrupulous. It has also caused substantial damages to JLD. *See Drake v. Allergan*, 63 F. Supp. 2d 382, 393 (D. Vt. 2014).

Conclusion

Patriot's assertion of the suit limitation clause is too late and violates Vermont's rules on the assertion of policy defenses by insurance companies. Patriot waived it and is estopped from raising it. In addition, the Vermont General Assembly has enacted and amended statutes to control this type of abusive behavior by insurance companies. The Court should deny Patriot's Motion to Dismiss.

Dated: Burlington, Vermont
November 12, 2020

/s/ Matthew B. Byrne

Matthew B. Byrne, Esq.
Gravel & Shea PC
76 St. Paul Street, 7th Floor, P.O. Box 369
Burlington, VT 05402-0369
(802) 658-0220
mbyrne@gravelshea.com
For Plaintiff