

**IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS  
DIVISION OF ST. CROIX**

<b>LEROY E. LIBURD and</b>	)	
<b>PHILBERT THORNHILL,</b>	)	
<b>Plaintiffs,</b>	)	<b>CIVIL NO. 579/2001</b>
	)	
<b>v.</b>	)	<b>ACTION FOR DAMAGES</b>
	)	
<b>COMMERCIAL SECURITY SERVICES,</b>	)	
<b>LTD., INC. AND COLIN E. DALEY,</b>	)	
<b>Defendants.</b>	)	<b><u>NOT FOR PUBLICATION</u></b>
	)	

**COUNSEL:**

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Cabret, Maria M., Presiding Judge

MEMORANDUM OPINION

(Filed June 3, 2006)

Plaintiffs were injured in a car accident and sued Defendants, who tendered the defense of the case to their auto liability insurer, Lloyds of London. During settlement negotiations, Plaintiffs were informed by the liability insurer that the policy limits of \$100,000 included defense costs. Plaintiffs disputed the insurer's position that the policy was cost inclusive and the

parties agreed to settle the case for the policy limits and to leave for the Court's determination the issue of whether the policy is cost-inclusive or cost-supplemental.

Additionally, Plaintiffs also raise the issue of the validity of Endorsement No. 1C within the insurance policy, which they claim was not approved by the Lieutenant Governor's Office, Division of Banking and Insurance, and is therefore unenforceable. For the following reasons, the Court determines that the insurance policy is inclusive of the costs incurred in defending against Plaintiffs' claims, and that Endorsement No. 1C is enforceable.

### I. Argument

Plaintiffs argue that coverage for defense costs is clearly set forth in the plain language of the Business Auto Policy, Form CA 00 01, Section IV(B)(4) which provides: "in addition to our limit of liability, we will pay for the insured: All costs taxed to the insured in a suit we defend." Plaintiffs contend that the insurer ignores this section of the policy, and relies instead on the Declarations Page within the policy which is stamped with the words "this policy is cost inclusive" and Endorsement No. 1C, which limits the amount that will be paid out, including costs, to policy limits. Plaintiffs assert that both of these provisions conflict with Section IV(B)(4) of the Business Auto Policy, and that pursuant to Virgin Islands law and *Commercial Union Assurance Co. v. Merrill*, 6 F. Supp. 2d 439, 442 (D.V.I. 1998), any contradiction in an insurance policy must be construed against the insurer. Finally, Plaintiffs maintain that Endorsement No. 1C, on which the insurer relies to argue that the policy is cost inclusive, is unenforceable and should not be considered because the Division of Banking and Insurance could not substantiate that it was approved by that office.

Defendants counter that the plain meaning of the pertinent policy language makes clear that defense costs are to be charged against the limits of insurance coverage. In support of their argument, Defendants cite *Brokers Title Company v. St. Paul Fire and Marine Ins. Co.*, 610 F.2d 1174, 1178 (3d Cir. 1979), which states that when the meaning of an insurance policy is clear and unambiguous, it is to be given effect by the court. While Defendants do not dispute that the language of Section IV(B)(4) of the policy would obligate the insurer to pay defense costs in addition to policy limits, they point out that said language was modified by Endorsement No. 1C, thereby limiting the insurer's obligation and making the policy cost-inclusive. Defendants cite *Coakley Bay Condominium Assn. v. Continental Ins. Co.*, 770 F. Supp. 1046, 1053 (D.V.I. 1991), for the proposition that an endorsement must prevail over the printed portions of a policy when there is a conflict. Additionally, Defendants note that the first indented sentence of Endorsement No. 1C states, "[i]t is hereby noted and agreed that with effect from inception the following amendment is made to the policy working under all sections of Personal Auto Policy Ca 00 01"

With regard to Endorsement No. 1C, Defendants maintain that Plaintiffs merely demonstrated that there was no entry relating to the endorsement in the Division of Banking and Insurance's 1999-2003 approval logs. Defendants contend that this does not eliminate the possibility that the endorsement was approved at some earlier time. Additionally, Defendants submitted the Declaration of Henry L. Feuerzeig, which shows that Endorsement 1C was approved by the Division of Banking and Insurance on March 5, 1993.

## II. Discussion

In a cost-inclusive policy, "the maximum liability of the insurer to its insured is capped by the limit of liability expressed in the policy, and both indemnity payments for claimants and

the costs of defending against such claims will be charged against the limit of liability.” *Aetna Cas. and Sur. Co. v. Home Ins. Co.* 882 F.Supp. 1328, 1335 (S.D.N.Y. 1995). In a cost-supplemental policy “the policy places in the insurer a duty to defend the insured but does not by its terms include those costs within the limit of liability.” *Id.* at 1336. In this case, if the policy is determined to be cost-supplemental, then Plaintiffs will be entitled to the full \$100,000 liability limits, and the insurer must, in addition, pay the costs of defending against these claims. On the other hand, if the policy is determined to be cost-inclusive, then all costs of defending the suit must be deducted from the \$100,000 policy limits.

To determine whether the policy is cost-inclusive, the Court must look at the entire policy and consider all of its provisions. The Virgin Islands Code states that “[e]very insurance contract shall be construed according to the entirety of its terms and conditions as set forth in the policy, and as amplified, extended or modified by any rider, endorsement, or application attached to and made a part of the policy.” 22 V.I.C. § 846 (2004). When reviewing policy provisions, “the court should attempt to view the policy in its entirety, and give effect, if possible, to all of the contract.” *Berne v Aetna Ins. Co.*, 21 V.I. 342, 347 (D.V.I. 1985), (citing *Treasure Craft Jewelers, Inc. v. Jefferson Ins. Co. of N.Y.*, 583 F.2d 650, 652 (3d Cir.1978)).

The Business Auto Policy in this litigation contains the following language in Endorsement No. 1C:

Under no circumstances shall Underwriters pay for any amounts in excess of the following, howsoever arising:-

US\$5,000 any one person—Medical Expenses

US\$100,000 Combined Single Limit – any one Accident.

The Court finds that the meaning the endorsement is both clear and unambiguous. The insurer will not pay any amount, howsoever arising, above the policy limits of \$100,000. When the meaning of a contract is clear and unambiguous, it is to be given effect by the court. *Brokers Title Company v. St. Paul Fire and Marine Ins. Co.*, 610 F.2d 1174, 1178 (3d Cir. 1979). Furthermore, the Plaintiffs have not offered a differing interpretation, reasonable or otherwise, that would establish ambiguity. *Coakley Bay Condominium Assn.* 770 F. Supp. at 1051. Instead, Plaintiffs' simply argue that the provisions are in conflict. The conflict that Plaintiffs claim exists disappears when the endorsement is considered in the context of the entire policy. *Coakley Bay Condominium Assn.* 770 F. Supp. at 1050.

While the parties disagree over the effect of Endorsement No. 1C, neither party clearly explains what effect an endorsement has on an insurance policy. The Court notes that an endorsement is, by definition, "a writing added or attached to a policy which either expands or restricts the insurance in the policy. It becomes a part of the contract when it is issued." *Fireman's Fund Ins. Co. v. CNA Ins. Co.*, 862 A.2d 251, 258 (Vt. 2004.); see also Lee R. Russ, *Couch on Insurance* vol. 2, § 18:17 (3d ed., West 2005). A typewritten endorsement, such as Endorsement No. 1C, "on an automobile liability insurance policy must be given effect over the printed provisions of the body of the policy to the extent that the body is in conflict with the endorsement." *Buntin v. Continental Ins. Co.* 583 F.2d 1201, 1206 (3d Cir.1978).

While Plaintiffs correctly argue that Section IV(B)(4) of the insurance policy states that Lloyd's must pay defense costs in addition to policy limits, this argument ignores the effect of Endorsement No. 1C which modifies the policy and makes it cost inclusive. Therefore, Plaintiff's argument that conflicting provisions within the policy must be construed against the

insurer fails in this case. Endorsement No. 1C must be given effect over Section IV(B)(4) of the Business Auto Policy.

### III. Enforceability of Endorsement

The court now turns to the issue of the enforceability of Endorsement No. 1C and its authorization for use in the Virgin Islands. The Virgin Islands Code forbids the issuance of any endorsement to an insurance policy unless it is first "filed with and approved by the Commissioner." 22 V.I.C. § 810 (a). The Plaintiffs produced a letter<sup>1</sup> from the Office of the Lieutenant Governor, Division of Banking and Insurance, indicating that the Division did not find an approval of Endorsement No. 1C. in the log during the period from 1999 to 2003. (Pl.'s Supp. Memo. in Opposition to Def.'s Mot. For Ruling, Ex. 1.) Defendants, on the other hand, have produced a letter<sup>2</sup> that evidences that the Endorsement No. 1C was approved for use in the Virgin Islands by the Division of Banking and Insurance. (Decl. Henry L. Feuerzeig, Ex. 2.) This letter bears the time-stamp of the Insurance Division which shows that Endorsement No. 1C was submitted to the Division of Banking and Insurance on March 3, 1993 and a second hand-stamp shows that Endorsement No. 1C was approved on March 5, 1993. Consequently, the

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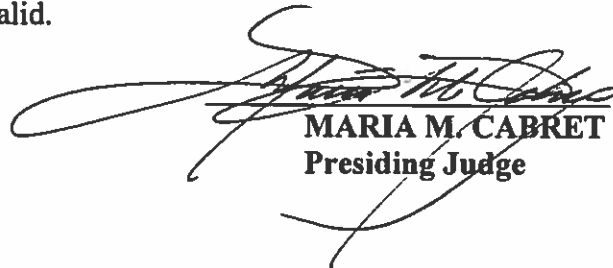
<sup>1</sup> This letter is admissible to show the absence of a record pursuant to title 5 section 932(17)(b) of the Virgin Islands Code as it was produced by the custodian, Glendina P. Matthew, Assistant Director/Legal Counsel, after a search that failed to find the requested record. In reviewing civil matters this Court looks first to the local evidentiary rules as reflected in the Virgin Islands Code, which utilizes the Uniform Rules of Evidence as opposed to the Federal Rules of Evidence. *Enfield Green Homeowners Ass'n v. Francis*, 46 V.I. 332 (D.V.I. 2004). The Court notes that this letter would also be admissible under Rule 803(10) of the Federal Rule of Evidence.

<sup>2</sup> This letter is admissible as a business entry pursuant to title 5 section 932(13) of the Virgin Islands Code as it was made in the regular course of business and its validity was attested to by Attorney Henry L. Feuerzeig. Attorney Feuerzeig has been the general representative or Attorney In Fact for certain Underwriters at Lloyd's, London. On March 2, 1993, Attorney Feuerzeig filed Endorsement No. 1C with the Division of Banking and Insurance on behalf of the insurer. Attorney Feuerzeig's Declaration has indicated that this letter was retrieved from the database of his firm, of all forms and endorsements filed on behalf of the insurer. The Court notes that this letter would also be admissible under Rule 803(6) of the Federal Rule of Evidence.

Court determines that Endorsement No. 1C was properly filed and authorized for use in the Virgin Islands and therefore is valid.

**IV. Conclusion**

A reading of the insurance policy in its entirety, including Endorsement No. 1C, compels the conclusion that the insurance policy is inclusive of the costs incurred in defending against Plaintiffs' claims. Additionally, the Court concludes that Endorsement No. 1C was authorized for use in the Virgin Islands and is valid.

  
**MARIA M. CABRET**  
Presiding Judge

ATTEST:

DENISE D. ABRAMSEN

Clerk of the Court

By:   
Chief Deputy Clerk

Dated: June 13, 2006