

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

STAPLES, INC.,	:	
	:	
Plaintiff,	:	CIVIL ACTION
	:	
v.	:	No. 01-CV-3882
	:	
WAUSAU UNDERWRITERS INSURANCE	:	
COMPANY,	:	
	:	
Defendant.	:	

ORDER

AND NOW, this 3rd day of January, 2003, following a hearing conducted on October 7, 2002, and upon consideration of Plaintiff Staples Inc.'s Complaint seeking declaratory judgment against Defendant Wausau Underwriters Insurance Company, it is hereby ORDERED and DECREED that Judgment is entered against Plaintiff and in favor of Defendant. It is further ORDERED and DECREED that following full consideration of the evidence and submissions relating to Defendant Wausau Underwriters Insurance Company's Counterclaim on the Workers' Compensation Lien, Judgment is entered in favor of the Defendant and against the Plaintiff in the amount of \$6,079.00.

On July 31, 2001, Staples Inc. (hereinafter "Staples") filed the instant suit against Wausau Underwriters Insurance Company (hereinafter "Wausau Insurance"). Staples alleges the following pertinent facts: Staples hired a company called Brenner Associates to perform shelving installation work at a particular Staples store; Brenner Associates was insured by Wausau Insurance pursuant to Wausau Insurance Policy Number 0527-00-10126 (hereinafter "the

Wausau Policy”); Staples is an “Additional Insured” pursuant to the Wausau Policy; an employee of Brenner Associates, Robert Kline, filed a claim with Staples, and later a lawsuit against Staples (hereinafter “the Kline action”), to recover damages for injuries Mr. Kline sustained while working for Brenner Associates at the Staples store; Mr. Kline’s injuries arose out of the work he was performing on behalf of Brenner Associates for Staples; and Wausau Insurance breached the terms of the Wausau Policy by refusing to defend and indemnify Staples in response to Mr. Kline’s claim and lawsuit. Staples requests reimbursement from Wausau Insurance for the \$75,000.000 arbitration award rendered against Staples in the Kline action, and damages in the amount of \$20,757.96 for attorney’s fees and expenses incurred by Staples in defending the Kline action. On November 30, 2001, Wausau Insurance filed its Answer in which it denies that it breached the terms of the Wausau Policy. Wausau Insurance also asserts a Counterclaim against Staples seeking judgment in the amount of \$6,079.00 for the Workers’ Compensation lien not honored by Staples.

Having reviewed the evidence submitted by the parties, I hereby enter, pursuant to Federal Rule of Civil Procedure 52(a), the following Findings of Fact, Conclusions of Law, and Order:

I. FINDINGS OF FACT

1. Plaintiff, Staples, Inc. is a corporation organized and existing under the laws of the Commonwealth of Massachusetts. Staples has a principal place of business at 500 Staples Drive, Framingham, Massachusetts and conducts business at 937 Paoli Pike, West Chester, Pennsylvania.

2. Defendant, Wausau Underwriters Insurance Company, is an insurance company duly licensed and organized under the laws of the State of Wisconsin.
3. Wausau issued Policy Number 0527-00-101266 to Brenner Associates, Inc. d/b/a National Marketing Services, Edison, New Jersey (hereinafter “Brenner Associates”) for the policy period July 19, 1996 to July 19, 1997.
4. Staples was named as an Additional Insured pursuant to an Additional Insured Endorsement, Policy No. 0527-00-101266, which was issued by Wausau Insurance on July 19, 1996.
5. Wausau Insurance was also the Workers’ Compensation carrier for Brenner Associates, Mr. Kline’s employer.
6. The Additional Insured Endorsement of the Wausau Policy provides, in relevant part:

**Additional Insured Endorsement
Owners, Lessees or Contractors (Form B)**

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

WHO IS AN INSURED (Section II) is amended to include as an insured the person or organization shown in the Schedule, but only with respect to liability arising out of 'your work' for that insured by or for you.

. . . .

Change Endorsement

Additional Insured Endorsement - Owners, Lessees or Contractors (Form B) GL2004 11-88 is Amended as Follows:

Name of Person or Organization:
Staples, Inc.

7. On or about October 15, 1996, Mr. Kline sustained injuries arising out of the work he was performing as an employee of Brenner Associates for the Staples store in West Chester, Pennsylvania.
8. Mr. Kline's attorney, Joseph M. De Simone, presented Staples with a claim for Mr. Kline's injuries by letter dated December 5, 1996.
9. On February 12, 1997, Wausau Insurance sent correspondence to Staples's insurer, CNA Insurance Company (hereinafter "CNA"), notifying CNA that Mr. Kline was an employee of Brenner Associates and receiving Workers' Compensation benefits under Wausau's Workers' Compensation Policy. Accordingly, Wausau Insurance advised CNA that it was reserving its rights to recover the benefits paid to Mr. Kline, and also advised CNA of Staples' legal obligation to protect Wausau's lien.¹
10. Staples acknowledged Wausau Insurance's notification of its Workers' Compensation lien and requested additional information by letters dated March 21, 1997 and May 13, 1997.
11. In a letter dated May 30, 1997, CNA requested that Wausau Insurance provide copies of its Workers' Compensation file relating to Mr. Kline's claim to include the initial loss report, payment log, all medical bills and reports.
12. Further correspondence regarding Wausau Insurance's Workers' Compensation lien was not exchanged by the parties.

¹ Wausau Insurance advised CNA: "Under the law we have the right to recovery of all payments made and no settlement should be made with the injured party without protection of our lien for any payments we are called upon to make. When you are ready to settle this claim, please contact us so that we may advise you of the amount of our lien."

13. On March 24, 1997, CNA made a tender of defense and indemnification to Wausau Insurance for Mr. Kline's claim.
14. At the time of CNA's tender, a suit arising out of Mr. Kline's injuries had not yet been filed.
15. The Wausau Policy contained a notice provision which provided in relevant part:

Duties In The Event of Occurrence, Offense, Claim Or Suit.

- a. You must see to it that we are notified as soon as practicable of an "occurrence" or an offense which may result in a claim. To the extent possible, notice should include:
 - (1) How, when and where the "occurrence" or offense took place;
 - (2) The names and addresses of any injured persons and witnesses; and
 - (3) The nature and location of any injury or damage arising out of the "occurrence" or offense.
 - b. If a claim is made or "suit" is brought against any insured, you must:
 - (1) Immediately record the specifics of the claim or "suit" and the date received; and
 - (2) Notify us as soon as practicable.
 - c. You must see to it that we receive written notice of the claim or "suit" as soon as practicable.
16. To determine Wausau Insurance's obligation under the terms of the Wausau Policy to defend and indemnify Staples for the claim brought by Mr. Kline, Wausau Insurance needed more information with regard to Staples' investigation of Mr. Kline's claim. Wausau Insurance wrote in a May 13, 1997 correspondence to Staples that "[y]our letter does not indicate the cause of claimant's injury." Consequently, Wausau Insurance

requested “all documentation relating to the investigation of this claim to include statements, scene photographs and diagrams, or contracts involving parties, and claimant’s letter of representation.”

17. In a letter dated May 30, 1997, Staples responded, in relevant part, “enclosed is a copy of Mr. De Simone’s letter of representation, and the certificated of insurance, naming Staples as an additional insured under Brenner’s policy. I do not have statements, photographs and diagrams, or contracts to send to you. I believe that we briefly discussed the alleged circumstances of this incident. Mr. Kline alleges that a Staples employee opened a door which caused a stack of tables to fall over hitting claimant in his back. I’ve conducted an extensive investigation with our employees and cannot find anyone who recalls this incident in any way, shape or form. I am beginning to have my doubts as to claimant’s version of what happened.”
18. The Wausau Policy contains a cooperation clause applicable to Staples whose express terms are as follows:

- d. You and any other involved insured must:
 - (1) Immediately send us copies of any demands, notices, summonses or legal papers received in connection with the claim or “suit”;
 - (2) Authorize us to obtain records and other information;
 - (3) Cooperate with us in the investigation or settlement of the claim or defense against the “suit”; and
 - (4) Assist us, upon our request, in the enforcement of any right against any person or organization which may be liable to the insured because of injury or damage to which this insurance may also apply.

20. On October 8, 1997, Wausau Insurance formally denied Staples' request for defense and indemnification on the basis that there appeared to be independent acts of negligence alleged against an employee of Staples.
21. Staples and CNA did not exchange written correspondence between October 8, 1997 and June 13, 2000.
22. On June 16, 1998, Mr. Kline filed a lawsuit against Staples captioned Robert Kline and Jean Kline v. Staples, Inc., in the Court of Common Pleas, Philadelphia County, Index No. 2449.
23. Staples deposed Mr. Kline on December 20, 1998, Leslie Bickel and Michael Ford on June 1, 1999, and Jacob Lamonsoff on February 25, 2000. Staples did not provide Wausau Insurance with prior notice of these depositions. Moreover, despite Wausau Insurance's request, Staples did not forward copies of the deposition transcripts.
24. Without notifying Wausau Insurance, Staples hired an attorney, defended the case and proceeded to arbitration. On June 5, 2000, the court entered judgment against Staples on the Klines' negligence claim, and entered an award in the amount of \$75,000.00.
25. At no time during the approximately 20 month period between the filing of the Kline action on June 16, 1998 and the entering of the arbitration award on June 5, 2000, did Staples and/or CNA notify Wausau Insurance of the Kline action.
26. Staples paid the arbitration award without either obtaining Wausau Insurance's consent or protecting Wausau Insurance's Workers' Compensation lien in the amount of \$6,079.00.
27. The Wausau Policy states that "[n]o insured will, except at the insured's own cost, voluntarily make a payment, assume any obligation, or incur any expense, other than first

aid, without our consent.”

28. Staples, through its counsel Marshall, Dennehey, Warner, Coleman & Goggin, tendered notice on June 28, 2000 of its request for Wausau Insurance to indemnify Staples for the \$75,000.00 award rendered in the Kline action and for the attorney's fees and expenses incurred by Staples in its defense of the Kline action subsequent to Wausau Insurance's October 8, 1997 denial of Staples' request for defense and indemnity.
29. In response to Staples' second request for indemnification, in a July 28, 2000 letter Wausau Insurance requested evidence regarding the circumstances of Mr. Kline's injuries which would counter Wausau Insurance's conclusion that the conditions of the policy had not been met. Moreover, Wausau Insurance expressed its concern that Staples had not honored its Workers' Compensation lien.
30. Staples, however, did not provide Wausau Insurance with additional information.
31. On March 26, 2001, Wausau Insurance denied Staples' request for indemnification of costs relating to the Kline action. Wausau Insurance concluded that Staples' claim did not fall within the terms of the Additional Insured Endorsement. Specifically, Wausau Insurance concluded that Mr. Kline's injuries did not "arise out" of his work for Brenner Associates and that, contrary to Staples' assertions, liability for Mr. Kline's injuries rested with Staples due to an independent act of negligence on the part of a Staples' employee. Further, Wausau concluded that Staples' failure to comply with the notice and cooperation clauses amounted to a breach of the contractual provisions of the Wausau Policy. Moreover, Staples paid the arbitration award in the amount of \$75,000.00 without notifying Wausau Insurance or obtaining its prior consent, as required by the

language of the contract.

32. On July 31, 2001, Staples filed the instant suit seeking a declaratory judgment against Wausau Insurance.

II. CONCLUSIONS OF LAW

1. Wausau Insurance did not have a duty to defend Staples at the time of Staples' March 24, 1997 correspondence, because Mr. Kline had not yet filed a Complaint against Staples.
2. Wausau Insurance is relieved of any liability it may have had under the Wausau Policy for the claims asserted by Mr. Kline as a result of Staples' failure to cooperate with Wausau Insurance and to provide information necessary to consider Mr. Kline's claim, which acts constitute a material breach of Staples' duty to cooperate. Forest City Grant Libery Assoc. v. Genro II, Inc., 438 Pa.Super. 553, 559, 652 A.2d 948, 951 (1995) ("Although a breach of a duty to cooperate will relieve the insurer from liability under the policy, a failure to cooperate must be substantial and will only serve as a defense where the insurer has suffered prejudice because of the breach."); Joseph Jones, et al. v. Allstate Insurance Co., 2001 U.S. Dist. LEXIS 24179 at *8 (E.D. Pa. 2001).
3. Wausau Insurance is entitled to recover its Workers' Compensation lien from Staples. Thompson v. Workers' Comp. Appeal Bd. (USF&G Co.), 566 Pa. 420; 781 A.2d 1146 (2001) (affirming the absolute nature of the employer's right to subrogation under section 319 of the Pennsylvania Workers' Compensation

Statute); Winfree v. Philadelphia Electric Co., 520 Pa. 392, 554 A.2d 485 (1989) (holding that under the Pennsylvania Workers' Compensation Act subrogation rights of the employer/carrier are absolute and it may recover its lien from the employee, tortfeasor or both).

III. ORDER

Because Wausau Insurance was not liable under the Wausau Policy and Staples failed to honor its Workers' Compensation lien, Wausau Insurance is not obligated to indemnify Staples for its defense costs and satisfaction of the Arbitration Award in the Kline action and Staples is required to reimburse Wausau Insurance for the amount of its Workers' Compensation Payments.

Accordingly, pursuant to Federal Rule of Civil Procedure 58, Judgment is entered against the Plaintiff and in favor of the Defendant on Plaintiff, Staples, Inc.'s Complaint seeking declaratory judgment against Defendant, Wausau Underwriters Insurance Company.

Moreover, pursuant to Federal Rule of Civil Procedure 58, Judgment is entered in favor of Defendant against Plaintiff in the amount of \$6,079.00 on Defendant, Wausau Underwriters Insurance Company's Counterclaim for the Workers Compensation Lien.

The Clerk of Court is directed to statistically close this matter.

BY THE COURT:
