NOT RECOMMENDED FOR FULL-TEXT PUBLICATION
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No. 15-5377

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Feb 29, 2016
DEBORAH S. HUNT, Clerk

ASHLAND HOSPITAL CORPORATION, dba King's Daughters Medical Center,	)	
Plaintiff-Appellant,	)	
v.	)	**ON APPEAL** FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY
RLI INSURANCE COMPANY,	)	
Defendant-Appellee.	)	**MEMORANDUM OPINION**

BEFORE: NORRIS, CLAY, and COOK, Circuit Judges.

PER CURIAM. In July 2011, the United States Department of Justice initiated an investigation of Ashland Hospital Corporation. Ashland eventually settled with the government, paying $40.9 million to resolve allegations that it billed the government for unnecessary heart procedures. At the time of the investigation, Ashland was covered by a $15 million primary directors and officers liability insurance policy from another carrier and a $10 million excess liability policy from defendant RLI Insurance Company for losses in excess of the primary policy limit.

Both policies were "claims-made" policies under which coverage is for losses stemming from claims that arise during the policy period of October 1, 2010, to October 1, 2011, regardless of when the events underlying the claim might have occurred. This contrasts with an "occurrence-based" policy, where coverage is for losses resulting from events that occur during

the coverage period, even though it might be long after the policy period before the events are discovered and the claim is filed.

Ashland notified the primary policy carrier about the investigation on the latest day permitted under the policy, December 30, 2011, and eventually recovered the $15 million coverage limit under that policy. Ashland notified RLI about the investigation on June 29, 2012. RLI denied coverage because Ashland failed to satisfy the excess policy's notice requirements.

Ashland filed suit based on breach of contract, common law failure to act in good faith, and statutory failure to act in good faith in violation of Kentucky Revised Statutes § 304.12-230. Ashland also requested relief under the Declaratory Judgment Act, 28 U.S.C. § 2201. The district court granted summary judgment in favor of RLI on all claims and refused to grant declaratory relief.

Ashland concedes that notice was late but maintains that it was entitled to coverage under the RLI policy because RLI did not show that it was prejudiced by the late notice. In 1991, the Kentucky Supreme Court adopted for occurrence-based policies under certain circumstances what generally is referred to as the "notice-prejudice rule," under which an insurer must show prejudice before rejecting a claim due to late notice. *See Jones v. Bituminous Cas. Corp.*, 821 S.W.2d 798, 803 (Ky. 1991). It has never ruled as to whether the rule also should apply to claims-made policies.

We have had an opportunity to review the record below, the briefs submitted by the parties, and to hear oral argument. We agree with the district court's prediction that the Supreme Court of Kentucky would not extend the notice-prejudice rule to a claims-made policy like the excess policy here, which contains unambiguous notice requirements as conditions precedent to collecting under the policy. *See Ashland Hosp. Corp. v. RLI Ins. Co.*, No. 13-143-DLB-EBA,

2015 WL 1223675, at *12 (E.D. Ky. Mar. 17, 2015) ("Kentucky would not apply *Jones* to an excess claims-made policy that requires the insured to provide the insurer with notice of a claim within a definite time both after the claim is reported to the primary insurer and after the policy expires.").

Ashland argues in the alternative that the question should be certified to the Kentucky Supreme Court. "However, such certification is disfavored when it is sought only after the district court has entered an adverse judgment. This court has explained that the appropriate time for a party to seek certification of a state-law issue is before, not after, the district court has resolved the issue." *State Auto Prop. & Cas. Ins. Co. v. Hargis*, 785 F.3d 189, 194 (6th Cir. 2015). Because we detect no error in the district court's thorough analysis, neither certification to the Kentucky Supreme Court, nor a reasoned opinion by this court, would serve any useful purpose.

The judgment of the district court is **affirmed**.