

STATE OF MINNESOTA
IN COURT OF APPEALS

Appellate Court Case No. A10-913

EEP Workers' Compensation Fund,

Plaintiff/Respondent,

vs.

Fun & Sun, Inc., and Carol A. Wagner,

Defendant/Appellant.

APPELLANT'S REPLY BRIEF

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ARGUMENT

Respondent's supplemental statement of facts raises several points which are not accompanied by any analysis that would explain how they support respondent's theory of the case. For instance,

1. Respondent asserts¹ (without citation to the record, but probably correctly), that "it was only after determining that Appellant sold only its assets to the new entity that the Fund pursued Appellant's deficit.) This further supports the fact that appellant had no way whatsoever to guess that it might someday face a claim that it owed more money to its former insurer.
2. Respondent emphasizes² that all fund members agreed to be "jointly and severally liable for all claims and expenses of all the members of EEP..." That statement lends no support to respondent's position that, ultimately, only EEP is responsible for its own employees' claims.
3. The program was described in the sales brochure as "your program, and your funds." There is no dispute here that it was essentially a mutual or cooperative arrangement, in essence owned by the fund members
4. Respondent explains³, once again without citation to the record, how EEP calculates its premiums. But, the note does not explain how that analysis differs from appellant's or how it supports respondent's claim.

In its argument, respondent relies upon Article X of EEP's by-laws⁴. It is crucial to note, however, that there are *two* sets of by-laws in the record: a set dated August 30, 1997 (AA7-

¹ Respondent's brief, p. 2.

² Respondent's brief, p. 3.

³ Respondent's brief, p. 4, footnote 2.

⁴ Respondent's brief, pp 8-9.

AA15), and a newer set dated November 29, 2001. The newer set would seem to apply to this case, since F&S withdrew in 2003, a year when there was admittedly no fund deficit. AA-47.

For unknown reasons, there is a page missing from the record in the older set. The missing page contains part of Article X. AA12-13. But, importantly, the former by-law contained a reference to assessing “each member having incurred losses...” That wording was removed from the 2001 by-laws. The new by-law is the opposite and provides for “assessment of members” (plural), first retro-rating *all members*, and assessing members (plural).

There is a section in respondent’s brief entitled “Not all deficits are the same.”⁵ Aside from the reference to Article X, that entire section contains only a single reference to the record or to the law, and that one reference (to Add-46) cites to a rule that does not say anything even remotely close to the proposition it is claimed to stand for. The rest of the section is pure unsupported assertion, all outside of the record. In fact, yet again, the rule cited at Add-46 actually supports appellant’s position, in that it provides for “assessment of the *membership*” (emphasis added) of the group, not assessment against an individual member. Minn.R. 2780.5000.

Respondent makes the incorrect statement, “There is no provision anywhere in the applicable law by which a self-insured employer participating in a self-insurance group is relieved of the ultimate liability to pay the workers’ compensation claims made by its employees.”⁶ *Not so.* As detailed in appellant’s brief, in fact, everything about the statutes and rules, everything about the by-laws, everything about the representations made to appellant, and everything about the way respondent operated, all support appellant’s position. As examples, Minn.Stat. § 176.181 Subd. 2 describes that the purpose of a group self-insurance arrangement is

⁵ Respondent’s brief, p. 8.

⁶ Respondent’s brief, p. 6.

so that groups of employers can “enter into agreements to pool⁷ their liabilities.” ADD-8. Also, Minn. Stat. § 79A.01 Sub. 10 provides that there must be a “common claims fund” to pay a group fund’s claims. ADD-1.

One of EEP’s starkest admissions that it is in fact a true group or pool is the representation it made when it was soliciting F&S for membership. It talks about dividend payouts “*based on the experience of the group.*” (emphasis added) AA-58.

Respondent goes on to assert that the group “simply provides a greater pool of resources,” and if one member has a catastrophic claim, it has some obligation to stay in the group⁸. There is no support in the record for either of those assertions, and none is cited. In fact, the entire record supports the opposite conclusion.

Respondent claims that Article XIII of the by-laws “addresses individual member aggregate deficits payable on withdrawal.”⁹ It does not. There is no such statement in Article XIII. Rather, Article XIII deals with a member’s share of the fund surplus. “Fund surplus” is a defined term. AA-17. It deals with the fund as a whole. The fund was not in a negative position.

But, respondent argues, if a “member’s share of the fund surplus” means that if the member’s separate claims paid are supposed to be charged against that individual member (it does not say that anywhere), and if “deficit determined after withdrawal” really means “deficit incurred after withdrawal (it does not say that anywhere), then the Fund can keep paying claims indefinitely and can keep billing the former member for them indefinitely. That argument simply does not match any of the attributes of a group pooled fund.

⁷ The pertinent definition of “pool” is “a combination of resources, funds, etc. for some common purpose or benefit.” Webster’s New 20th Century Dictionary, 2nd Edition.

⁸ Respondent’s brief, p. 6.

⁹ Respondent’s brief, p. 9.

If that is really what the by-laws are supposed to mean, then they are ambiguous and even downright misleading. Ambiguous contracts are to be resolved against the drafter, who, of course, in this case is respondent. *Cherne Industrial, Inc. v. Grounds & Assoc., Inc.*, 278 N.W.2d 81, 89 (Minn.1979).

Respondent concludes that each member is supposed to pay its own claims and that a member who “experiences a large claim” is on its own to pay that large claim. These statements are nothing more than conclusions, with no support whatsoever in the record.

Respondent also claims, once again without citing to the record, that “as long as the member stays in the fund and continues to pay premiums, any deficit will eventually be erased.”¹⁰ Even if the by-laws are supposed to be interpreted as respondent claims, that absolutely would not happen. Assuming, *arguendo*, that Article X means that a catastrophic claim counts individually against a member in the year the claim is incurred, then Article X should have kicked in to require an assessment then and there, up to 150 percent of premium, not a letter raising the issue for the first time in 2005 and demanding repayment of the entire claim. There is no evidence that the Fund has ever operated in this manner, lending further support to appellant’s position that the losses are pooled and shared among the entire group, as they were represented to be in the solicitation materials. AA-58.

Appellant’s defenses of laches, equitable estoppel, and breach of contract are dismissed by respondent in two short paragraphs.¹¹ They are, however, very serious defenses in this case and should not have been disposed of by summary judgment.

There is no accusation of “wrongdoing,” as respondent suggests. There is, however, a basic unfairness to respondent’s position that it can keep its interpretation of the rules to itself

¹⁰ Respondent’s brief, p. 12.

¹¹ Respondent’s brief, p. 12.

until it is too late for a former member to protect itself, and then claim absolute entitlement to reimbursement for whatever claims it chooses to pay for whatever length of time it continues to pay them, with no prior notice or disclosure whatsoever.

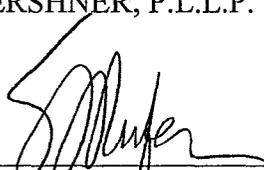
CONCLUSION

Appellant is entitled to a determination that the law is otherwise or, at the very least, to an opportunity for a jury to determine which party followed the Fund's by-laws.

Respectfully submitted:

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Dated: 8/3/10

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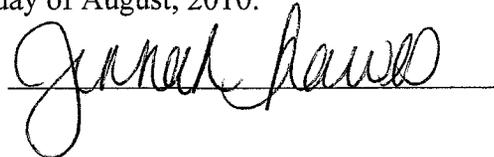
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COUNTY OF OTTER TAIL)

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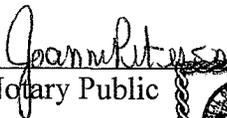
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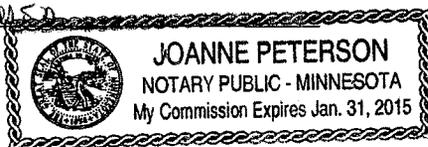
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by enclosing the same in an envelope addressed to such party at the above address with postage fully prepaid and by depositing said envelope in the United States Post Office in the City of Fergus Falls, Minnesota, on the 3rd day of August, 2010.



Subscribed and sworn to before me
this 3rd of August, 2010.


Notary Public



SFR:jep
2009-5002