

Pennsylvania Superior Court Clarifies Standard for Reservations of Rights

On Friday, April 24, 2020, a divided Pennsylvania Superior Court panel decided [Selective Way Ins. Co. v. MAK Services, Inc. 2020 PA Super 103](#). This case has important implications for insurance carriers who issue, and defend insureds subject to, reservations of rights.

MAK Services, a snow-removal contractor, obtained insurance from Selective Way through a broker. In what the court called a “comedy of errors,” the Selective Way policy excluded coverage for liability claims arising out of snow-removal activities that MAK Services or any subcontractors performed. A patron of a shopping center slipped and fell on snow and ice, and sued MAK Services and others. Three weeks later, Selective Way sent MAK Services a generic reservation of rights that did not mention the snow and ice exclusion. Selective Way later sought a declaratory judgment that the snow and ice removal exclusion precluded a duty to defend MAK Services in the patron’s lawsuit.

After MAK Services prevailed in the trial court, a panel of the Superior Court reversed 2-1 in a published opinion. The Superior Court held that Selective Way was estopped from denying coverage, because the reservation of rights failed to mention the snow and ice removal exclusion. The court held that the reservation of rights did not “fairly inform” MAK Services of Selective Way’s insurance coverage position. Even though the reservation of rights informed MAK Services that future contingencies might affect coverage, it “provided no notice whatsoever of the existing coverage issue appearing on the face of the policy, *i.e.*, the snow and ice removal exclusion.” The court further stated that, while an insurer does not need to mention every particular defense in a reservation of rights, “*some* level of specificity is necessary.” The majority also explained that an insurer may issue multiple reservations of rights as litigation progresses. Finally, the majority stated that the lack of specificity in the reservation of rights showed that Selective Way’s investigation of the claim was “deficient.”

Estoppel usually requires a showing of prejudice. The two-judge majority held that it could presume that MAK Services was prejudiced by the deficient reservation of rights. The [dissenting judge](#) argued that MAK Services could not show prejudice since the deficient reservation of rights did not cause MAK Services to change its position regarding defense of the patron’s lawsuit. The majority responded that an insurer still must investigate a claim and identify any insurance-coverage issues to its insured with some specificity.

The *MAK Services* decision shows that an insurer must perform a proper investigation of a claim and, if a particular policy provision precludes coverage, must mention this provision in a reservation of rights. A court may refuse to permit an insurer to later disclaim coverage on other grounds, especially if the reservation of rights indicates inadequate investigation of the claim.

The *MAK Services* decision also shows the value in involving insurance coverage counsel at the outset of a claim if questions exist about coverage. FHMS's Coverage Department is experienced in identifying, investigating, and evaluating insurance coverage issues. Should you have any questions about coverage, please do not hesitate to contact us.

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