



IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

IN RE: MOUNTAIN STATE UNIVERSITY LITIGATION Civil Action No. 12-C-9000

THIS DOCUMENT APPLIES TO:

Destany Pettry v. Mountain State University, Inc., *et al.* Civil Action No. 11-C-1746 KAN

Jamie Wagner v. Mountain State University, Inc., *et al.* Civil Action No. 12-C-2384 KAN

Jeannette Brown v. Mountain State University, Inc., *et al.* Civil Action No. 13-C-110 KAN

ORDER

On November 15, 2013, came Plaintiffs, Jamie Wagner, Destany Pettry, and Jeannette Brown, through counsel, and also came Defendant United Educators Insurance, through counsel, pursuant to Rule 56 of the West Virginia Rules of Civil Procedure, for a hearing on their respective motions for summary judgment.

Having fully considered the parties' respective motions, memoranda, responsive memoranda and the arguments of counsel, and having conferred with one another to insure uniformity of their decision, as contemplated by West Virginia Trial Court Rule 26.07(a), the Presiding Judges unanimously GRANT IN PART AND DENY IN PART Plaintiffs' motion for summary judgment on their declaratory judgment actions to the extent the Court FINDS there is a total of \$10,000,000.00 in insurance coverage available for the Mountain State University BSN Program cases under the terms of the 2010 – 2011 insurance policy issued by United Educators Insurance to Mountain State University.

The Presiding Judges unanimously GRANT IN PART AND DENY IN PART United Educators Insurance's motion for summary judgment to the extent the Court FINDS there is not \$30,000,000.00 in insurance coverage available for the BSN Program cases because only the

2010-2011 insurance policy issued by United Educators Insurance to Mountain State University applies to these cases.¹

In support of this ruling, the Court makes the following findings of fact and conclusions of law.

Findings of Fact

Background Facts

1. Before losing its school-wide accreditation and closing, Mountain State University (“MSU”) offered, among other programs, a Bachelor of Science in Nursing Program (“BSN Program”) and a Certified Nurse Anesthetist Program (“CRNA Program”).
2. Plaintiffs Destany Pettry (“Pettry”), Jeannette Brown (“Brown”) and Jamie Wagner (“Wagner”), (collectively referred to as “Coverage Plaintiffs”), sued MSU and certain MSU officers and trustees for claims arising out of the loss of accreditation for MSU’s BSN Program.
3. Although the Coverage Plaintiffs are the only Mass Litigation Plaintiffs to have filed declaratory judgment actions against UE seeking a declaration regarding UE’s insurance coverage obligations, this Court FINDS the insurance coverage argued for in the Coverage Plaintiffs’ motion extends to all BSN Program Plaintiffs.
4. The Coverage Plaintiffs, along with the other BSN Program Plaintiffs, were enrolled at MSU for the purpose of obtaining a BSN, and attended MSU at various times between

¹ This order does not address whether there is insurance coverage for the limited number of cases referred to the Mass Litigation Panel that arise from MSU’s Certified Nurse Anesthetist Program (“CRNA Program”), or that arise from *Dale Burger, et al. v. Mountain State University, Inc., et al.*, Civil Action No. 12-C-1293 KAN, the putative class action arising from MSU’s loss of its school-wide accreditation, as no declaratory judgment actions were filed in those cases. February 15, 2013, *Order Regarding Declaratory Judgment Action* (Transaction ID 49551753).

the 2008 and 2012 school years.

5. MSU offered BSN Programs throughout the state of West Virginia and in several other states.
6. MSU's BSN Program included a traditional BSN Program and three pathways or cohort programs: LPN to BSN; RN to BSN and BA/BS to BSN.
7. MSU's BSN Program was required to maintain accreditation with the West Virginia State Board of Examiners for Registered Professional Nurses (hereinafter "WVBRN").
8. MSU's BSN Program was nationally accredited and maintained accreditation with the National League for Nursing Accrediting Commission (hereinafter "NLNAC").
9. Students seek nationally accredited nursing programs, because accreditation greatly increases the realm of job and educational opportunities available to the graduate, and many employers, including federal agencies, require or prefer graduation from a nationally accredited program. In addition, most masters of science in nursing programs require a BSN from a nationally accredited program for admission.
10. In 2008, the NLNAC down-graded MSU's BSN Program to warning accreditation status.
11. By letter dated July 23, 2010, the NLNAC notified MSU of its decision to deny continuing accreditation to the MSU baccalaureate nursing program stating, "This decision is based on NLNAC policy that continuing accreditation is denied to programs with warning status that are found to be in continued non-compliance with any Accreditation Standard." Plaintiffs' Motion, Exh. 2.
12. The NLNAC found evidence of non-compliance in several areas:
 - Lack of participation of faculty in governance structure at the multiple locations.
 - Inadequate time or resources for the nurse administrator to perform her role as there was lack of oversight at multiple locations, resulting in incongruence

between teaching locations.

- All faculty not credentialed with a minimum of a master's degree with a major in nursing, and only 6% of full-time faculty doctorally-prepared.
- The number and utilization of faculty were not adequate to ensure program outcomes were achieved.
- Systemic assessment of part-time faculty performance was inconsistently applied and did not demonstrate competencies consistent with program goals and outcomes.
- Lack of evidence of ongoing systemic evaluation of student learning outcomes, program outcomes, and NLNAC standards.
- "The program fails to demonstrate evidence of achievement in meeting the performance on the licensure exam program outcome as the licensure exam pass rates are not at or above the national mean in all locations."

Id.

13. Although MSU appealed NLNAC's decision to deny accreditation to MSU's BSN Program, the appeal was denied on March 30, 2011.

14. By letter dated November 12, 2010, the WVBRN ordered MSU to cease and desist all admissions to all nursing programs/pathways for a minimum of 15 months, and directed MSU to obtain full accreditation by a national nursing accrediting agency. Plaintiffs' Motion, Exh. 3.

15. The WVBRN found MSU's school of nursing demonstrated:

- a. deficiencies in compliance with the WV19CSR1;
- b. noncompliance with the school's stated philosophy/mission, program design, objectives/outcomes and/or policies;
- c. a failure to provide sufficient variety and number of clinical learning opportunities for students to achieve stated objectives/outcomes;
- d. a failure to maintain at least 80% passing rate on the licensure examination by first-time candidates;
- e. a failure of the program dean or director to document annually the currency of faculty licenses;
- f. a failure to submit evidence that the nursing courses are supported by courses which meet requirements of the governing organization, including biological, physical and behavioral science courses;
- g. a failure to base the selection and admission of students on established criteria, and be consistent in the recruitment and admission of students, and to determine student enrollment by the clinical and teaching facilities available and by the

- numbers of nursing faculty;
- h. a failure to assure there were written agreements between the governing organization and the agency or agencies which provide clinical education experiences for students;
 - i. a failure to submit major changes in nursing curriculum or the nursing education pattern to include changes in required cognate (general education) courses and implementing such prior to receiving Board approval;
 - j. failure to obtain prior Board approval for an expansion of the program; and,
 - k. other activities or situations to the Board that its program does not meet legal requirements and standards:
 - i. MSU-SON continues to suffer from the results of the lack of strong nursing administrative leadership with decision making authority for the nursing department. Decisions made by the Dean have not been supported by direct administrative support;
 - ii. Failed to provide necessary oversight to all educational and clinical sites;
 - iii. Submitted an inaccurate final transcript resulting in the issuance of a temporary permit to practice as a registered professional nurse to an unqualified applicant;
 - iv. Failed to maintain national accreditation standards;
 - v. Failed to provide adequate communication to students by failing to address student concerns in a timely manner such as transfer credit, financial assistance, graduation reports, and program information; and,
 - vi. Failed to maintain student records.

Id.

16. MSU's school of nursing was under review by the WVBRN for failure to meet standards since 2004, which "eroded the Board's confidence in the ability of the Program's administration to consistently adhere to the Board's requirements." Id.

17. MSU was also unsuccessful in obtaining national accreditation from the Commission on Collegiate Nursing Education.

18. By letter dated January 16, 2012, the WVBRN found, among other things:

That MSU has a history of acting in direct disregard to this Board's authority. MSU's continuation in attempting to manipulate facts and information has been both disrespectful and in total disregard to the standards set by the state legislature in its legislative rules, this Board and national accrediting agencies of institutions of higher education. The actions of MSU to date are inexcusable and defenseless.

Therefore, in the best interest of the public, it is the decision of this Board that MSU should not be granted full accreditation.

That the students of MSU have been insurmountably harmed to a degree that is immeasurable by this agency.

Plaintiffs' Motion, Exh. 4.

19. By letter dated February 17, 2012, the WVBRN withdrew approval of the MSU School of nursing effective August 31, 2012.
20. Coverage Plaintiffs and the other BSN Program Plaintiffs (collectively "Plaintiffs") filed complaints and amended complaints against MSU, the Board of Trustees and Charles Polk. Plaintiffs asserted claims against the Defendants for: Breach of Contract; Breach of Good Faith and Fair Dealing; Fraud; Constructive Fraud; Intentional Misrepresentation; Negligent Misrepresentation; Unjust Enrichment; Unconscionability; Breach of Fiduciary Duties; and Violations of the West Virginia Consumer Credit Protection Act.
21. Plaintiffs claim MSU, the Trustees, and Polk committed a series of acts and omissions, which resulted in the NLNAC and WVBRN downgrading and ultimately revoking MSU's national and state accreditations for its BSN Program. The loss of accreditations caused irreparable harm to Plaintiffs.
22. Plaintiffs also claim Defendants failed to advise the students of MSU's accreditation status, misrepresented MSU's accreditation status, breached their fiduciary duty to Plaintiffs, violated the West Virginia Consumer and Credit Protection Act, and failed to properly supervise and monitor MSU's BSN program.
23. The first BSN Program complaint filed was a putative class action against MSU filed by

Deanna Cernuto on March 30, 2011 in the Circuit Court of Raleigh County, on behalf of herself and all others similar situated.

24. Destany Pettry and others filed complaints in August 2011 against MSU, MSU's Board of Trustees and President Charles Polk.
25. Amended complaints and additional complaints adding causes of action and bringing claims against Polk and the Trustees were filed in 2011, 2012, and 2013, alleging, *inter alia*, violations of the West Virginia Consumer Credit Protection Act.
26. MSU had an Educators Legal Liability ("ELL") Policy with UE that had been renewed on a yearly basis since March 27, 1996. Declarations, Page 1 Item F., 2010-2011 Policy.
27. The ELL policies took effect on March 27 of each and every year.
28. The ELL policies MSU purchased from UE were uniform for all years, with the exception of endorsements, which sought to restrict, reduce or exclude coverage.
29. The ELL policies were claims-made policies applying to covered claims first made against MSU during the policy period and reported to MSU in conformance with the Policies.
30. MSU obtained the ELL policies through Songer Insurance Agency ("Songer") located in Beckley, West Virginia.
31. Steve Cochran ("Cochran") was MSU's broker at Songer.
32. The insurance coverage in dispute is:
 - a. the ELL policy in effect from March 27, 2010 until 12:01 a.m. on March 28, 2011, Policy Number ELS201000236700 (the "2010-2011 policy");
 - b. the ELL policy in effect from March 27, 2011 until 12:01 a.m. on March 28,

2012, Policy Number ELS201100236700 (the “2011-2012 policy”); and

- c. the extended reporting period, commonly referred to as “tail coverage,” that allowed MSU to report claims under the 2011-2012 policy until March 27, 2013.
33. Because the Court **FINDS**, for the reasons set forth below, that the 2010-2011 policy is the only policy that provides insurance coverage for the BSN Program cases, it is unnecessary to discuss the terms, conditions and exclusions in dispute in the 2011-2012 policy or the extended reporting period for the 2011-2012 policy.

Terms of the 2010-2011 Policy

34. The endorsement exclusions at issue in the 2010-2011 policy are:

ELL516E

**ACCREDITATION/PEER REVIEW EXCLUSION
(Limited Exclusion)**

In consideration of the premium charged and subject to all other provisions of this Policy, **we** agree with the **Educational Organization** that this Policy does not apply to and **we** will not be liable for **Loss** related to or arising out of any accreditation, certification or peer review activities of or on behalf of:
Respiratory Therapy Program.

ELL697E

**ACCREDITATION/PEER REVIEW EXCLUSION
(Prior Acts Exclusion)**

In consideration of the premium charged and subject to all other provisions of this Policy, **we** agree with the **Educational Organization** that this Policy does not apply to and **we** will not be liable for **Wrongful Acts** prior to 01/20/2010 related to or arising out of any accreditation, certification or peer review activities of or on behalf of:
Certified Nurse Anesthetist Program.

35. The 2010-2011 policy also contains several definitions, terms and explanations of coverage relevant to the Court's analysis:

DECLARATIONS

Item C. Limits of Liability:

\$10,000,000 Each **Claim**
\$10,000,000 Annual Aggregate

INSURING AGREEMENT

1. We will pay on behalf of the **Insureds** that amount of **Loss** that exceeds the **Self-Insured Retention** up to the **Limit of Liability** as a result of a **Wrongful Act** anywhere for which a **Claim** is first made against an **Insured** during the **Policy Period** and reported to **us** as required by this Policy.

DEFINITIONS

2. This Policy is subject to the following definitions:

Claim means written notice to an **Insured** of the intent to hold the **Insured** liable for the results of a **Wrongful Act**. * * * A **Claim** is made at the time an **Insured** receives the first written notice of the **Claim**.

Incident means any circumstance that the **Insured** believes may give rise to a **Claim**.

Limit of Liability means the amounts stated in Item C of the Declarations and is the most **we** will pay for **Loss** respectively for each **Claim** and in the aggregate for all **Claims** first made during the **Policy Period**.

Loss means Damages and Defense Costs.

LIMIT OF LIABILITY

7. Regardless of the number of **Insureds**, parties who sustain injuries, or **Claims** made on account of one or more **Wrongful Acts**:
 - a. our liability for **Loss** arising out of one **Claim** is limited to the amount stated in Item C of the Declarations as applicable to "Each **Claim**" (except to the extent that the Annual Aggregate limit has been exhausted by payment of **Loss**); and

- b. **our** liability for all **Loss** arising out of all **Claims** first made in the **Policy Period** is limited to the amount stated in Item C of the Declarations as “Annual Aggregate.”

NOTICE OF CLAIMS AND WRONGFUL ACTS

17. If during the **Policy Period** an **Insured** first becomes aware of any **Incident**, and gives **us** written notice of that **Incident** prior to the end of the **Policy Period**, including the nature of the **Incident**, the name of the potentially damaged parties, and the manner in which the **Insured** first became aware of the **Incident**, then any **Claim** subsequently made arising out of that **Incident** will be deemed to have been made during the **Policy Period**.

CANCELLATION AND NONRENEWAL

22. If **we** elect not to renew coverage provided by this Policy at then current standard terms and conditions . . . at the end of the **Policy Period**, **we** will give the **Educational Organization** written notice at least 60 days before the end of the **Policy Period**.

Issuance of the 2010-2011 Policy and UE’s Denial of Coverage

36. UE sent an insurance renewal application to MSU in late January of each year, even though UE’s policy requires it to give MSU at least 60 days written notice before the end of the policy period if UE is going to change the terms of the policy. This practice made it impossible for UE to give MSU at least 60 days written notice of a change in the policy.
37. UE allowed MSU to submit applications for renewal of insurance coverage days prior to the beginning of a new policy year, which also made it impossible for UE to give MSU at least 60 days written notice of a change in the policy. UE was in complete control as to when the renewal application was released to MSU and when the application was to be completed and returned by MSU to UE.
38. MSU submitted its application for renewal of insurance for the 2010-2011 policy period

on March 26, 2010, the day before the 2009-2010 policy period expired.

39. MSU informed UE there were approximately 600 students in MSU's undergraduate nursing program during the application process.
40. Through a series of email correspondence all dated after March 26, 2010, UE and MSU discussed the possibility of exclusion endorsement ELL516E being revised to include the nursing program. However, when UE finally issued the 2010-2011 policy and mailed it to MSU on June 3, 2010, exclusion endorsement ELL516E applied only to the respiratory therapy program. The nursing program was not part of exclusion endorsement ELL516E when the policy was issued by UE to MSU.
41. Both UE and MSU thoroughly reviewed the 2010-2011 policy UE issued by UE and mailed to MSU on June 03, 2010.
42. Between June 03, 2010 and August 03, 2010, neither UE nor MSU complained of any error in the 2010-2011 policy.
43. By letter dated July 23, 2010, the NLNAC advised MSU: "The Board of Commissioners voted to deny continuing accreditation to the baccalaureate nursing program. This decision is based on NLNAC policy that continuing accreditation is denied to programs with warning status that are found to be in continued non-compliance with any Accreditation Standard." Plaintiffs' Motion, Exh. 2.
44. On August 03, 2010, MSU notified UE of the NLNAC's July 23, 2010 revocation of national accreditation for MSU's baccalaureate nursing program and provided UE with a copy of the NLNAC's July 23, 2010 letter.
45. When MSU notified UE of the Incident on August 03, 2010, the nursing program was not

part of exclusion endorsement ELL516E to the 2010-2011 policy.

46. Only after UE received notice of NLNAC's revocation of accreditation for MSU's baccalaureate nursing program did UE add the nursing program to exclusion endorsement ELL516E.

47. On August 5, 2010, Donna Esposito, Claims Management Coordinator for UE, issued an **"ACKNOWLEDGEMENT"** of claim to Jon Reed, Vice President of Legal Affairs at MSU and copied Steve Cochran of Songer Insurance Agency. Plaintiffs' Mot., Exh. 15.

48. The acknowledgement of claim set forth:

Date of Receipt: 08/03/2010

Date of Loss: 08/03/2010

File Number: 133336

Description of Loss: The National League for Nursing Accrediting Board of Commissioners voted to deny continuing accreditation to the University's baccalaureate nursing program.

Plaintiffs' Motion, Exh. 15.

49. The acknowledgement of claim further stated the matter was assigned to a claims analyst for coverage analysis and further contact.

50. UE treated MSU's August 03, 2010 notice of the NLNAC decision to revoke accreditation of MSU's BSN Program as an "Incident" giving rise to subsequently made claims.

51. On August 05, 2010, the same day UE issued its acknowledgement of claim, UE retroactively added the nursing program to exclusion endorsement ELL516E and sent MSU notice of the change by way of letter from Katie O'Neal, Underwriting Supervisor,

to Steve Cochran, Broker, stating, “Please also note that an amendatory endorsement may also be included. If so, its purpose is merely to correct typographical errors we have discovered within the recently enhanced policy form.” Plaintiffs’ Motion, Exh. 16.

52. UE failed to advise MSU in writing of the addition of the BSN Program to exclusion endorsement ELL516E to the 2010-2011 policy at least 60 days prior to the expiration date of the 2009-2010 policy.

53. By letter dated August 26, 2010, Tracy McPherson, Associate Claims Counsel at UE, informed Jon Reed, Vice President of Legal Affairs at MSU, that the 2010-2011 policy did not cover claims arising out of the NLNAC’s denial of continuing accreditation to MSU’s baccalaureate nursing program pursuant to exclusion endorsement ELL697E. Plaintiffs’ Motion, Exh. 20.

54. Even though exclusion endorsement ELL697E applied to MSU’s CRNA Program, and had nothing to do with MSU’s nursing program, UE repeatedly denied coverage to nursing program claims citing exclusion endorsement ELL697E.

55. UE did not deny coverage to MSU based on exclusion endorsement ELL516E, either as written in the 2010-2011 policy sent to MSU on June 3, 2010, or after UE retroactively changed exclusion endorsement ELL516E to add the nursing program on August 05, 2010.

Conclusions of Law

1. Summary judgment,

shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

Rule 56(c) of the West Virginia Rules of Civil Procedure.

2. It has long been held that,

“‘A motion for summary judgment should be granted only when it is clear that there is no genuine of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law.’ Syllabus Point 3, *Aetna Casualty & Surety Co. v. Federal Insurance Co. of New York*, 148 W.Va. 160, 133 S.E.2d 770 (1963).” Syllabus Point 1, *Andrick v. Town of Buckhannon*, 187 W.Va. 706, 421 S.E.2d 247 (1992).

Syllabus Point 1, *Williams v. Precision Coil, Inc.*, 194 W.Va. 51, 459 S.E.2d 329 (1995).

3. “The circuit court’s function at the summary judgment state is not to weigh the evidence and determine the truth of the matter, but is to determine whether there is a genuine issue for trial.” Syllabus Point 3, *Painter v. Peavy*, 192, W.Va. 189, 451 S.E.2d 755 (1994).
4. As required under Paragraph 22 of the 2010-2011 policy, UE failed to give MSU at least 60 days written notice before the end of the 2009-2010 policy period before adding the nursing program to endorsement exclusion ELL516E.
5. UE argues MSU waived the 60 day notice requirement by regularly submitting the renewal application within days of the renewal date. However, this argument is disingenuous. UE was in complete control as to when the renewal application would be released to MSU. UE was also in complete control as to when the application was to be completed and returned by MSU to UE. UE could reasonably have required the application process to be completed timely so the mandatory 60 day time period required for UE to give MSU written notice of policy changes under Paragraph 22 of the policy could be met.
6. An “Incident” is defined under the terms of the 2010-2011 policy as “any circumstances

that the **Insured** believes may give rise to a **Claim**.”

7. Paragraph 17 of the 2010-2011 policy provides:

If during the **Policy Period** an **Insured** first becomes aware of any **Incident**, and gives **us** written notice of that **Incident** prior to the end of the **Policy Period**, including the nature of the **Incident**, the name of potentially damaged parties, and the manner in which the **Insured** first became aware of the **Incident**, then any **Claim** subsequently made arising out of that **Incident** will be deemed to have been made during the **Policy Period**.

8. A notice or proof of loss provision of an insurance policy:

“is to be liberally construed in favor of the insured.” *Petrice v. Federal Kemper Ins. Co.*, 163 W.Va. 737, 740, 260 S.E.2d 276, 278 (1979). The provision is not to be read as a series of technical hurdles. Rather, a “substantial compliance” with the notice provision of a policy, “resulting in the insurer being able to adequately investigate the claim and estimate its liabilities is all that is required.” *Id.*

Colonial Insurance Company v. Barrett, 208 W. Va. 706, 542 S.E.2d 869 (2000). See also, *Greenburg Eleven Union Free School District v. National Union Fire Insurance Company of Pittsburgh, PA*, 304 A.D.2d 334, 335-336, 758 N.Y.S.2d 291, 293 (2003)(“Notice requirements are to be liberally construed in favor of the insured, with substantial rather than strict compliance being adequate.”).

9. UE had notice of potential BSN Program claims on August 03, 2010, when MSU notified UE of the loss of NLNAC accreditation of MSU’s baccalaureate nursing program and provided UE with a copy of the July 26, 2010 letter from the NLNAC. Notification of that “Incident” means that any subsequent claim “arising out of that Incident” is deemed to have been made during the 2010-2011 policy period. 2010-2011 policy, Paragraph 17.
10. Because MSU previously informed UE there were approximately 600 students in MSU’s

undergraduate nursing program during the application process, there was no need to provide the name of each potentially damaged party when MSU gave written notice to UE of the NLNAC's decision to deny accreditation to the BSN Program. MSU substantially complied with the notice requirements for reporting an Incident under Paragraph 17 of the 2010-2011 policy.

11. All of the BSN Program Plaintiffs made claims arising out of the loss of accreditation, an "Incident," which was reported by MSU to UE on August 3, 2010. As a result, under Paragraph 17 of the policy, all claims are deemed to have been made during the 2010-2011 policy period. Although Plaintiffs have made numerous claims under different legal theories or causes of action, all of the claims are closely related, intertwined with and arise from the loss of accreditation, as reported by MSU to UE on August 3, 2010.
12. "Where policy language involved is exclusionary, it will be strictly construed against the insurer in order that the purpose of providing indemnity not be defeated." Syllabus Point 8, *National Union Fire Ins. Co. of Pittsburgh, PA v. Miller*, 228 W. Va. 739, 724 S.E.2d 343 (2012).
13. "[A]mbiguities in an insurance policy are construed against the insurer, particularly when found in an exclusionary clause." *Farm Family Cas. Ins. Co. v. Habitat Revival LLC*, 91 A.D.3d 903, 904, 938 N.Y.S.2d 126, 128 (2012). ". . . exclusions from policy coverage must be specific and clear in order to be enforced. They are not to be extended by interpretation or implication, but are to be accorded a strict and narrow construction." *Id.* (Internal citations omitted.)
14. West Virginia Code § 33-6-21 provides:

No insurance policy insuring against loss or damage through legal

liability for the bodily injury or death by accident of any individual, or for damage to the property of any person, shall be retroactively annulled by an agreement between the insurer and the insured after the occurrence of any such injury, death, or damage for which the insured may be liable, and any such attempted annulment shall be void.

This Code provision implies, and the Court concludes, that public policy dictates against retroactive policy revision after notice of an “Incident” giving rise to a claim. See also, *Sarmiento v. 111 Eighth Avenue LLC*, 302 A.D.2d, 284, 756 N.Y.S.2d 10 (N.Y. App. Div. 1 Dept. 2003)(a retroactive endorsement was ineffective when issued after the underlying accident, after policy period expired, and after commencement of personal injury plaintiff’s lawsuit).

15. Insurance policy provisions in effect on the date of a claim and prior to the execution of any amendments govern the coverage afforded. *Sherlock v. Ocean Salvage Corp.*, 785 So.2d 932, 200-0886 (La. App. 4 Cir. 2001).
16. By letter dated July 23, 2010, the NLNAC advised MSU: “The Board of Commissioners voted to deny continuing accreditation to the baccalaureate nursing program. This decision is based on NLNAC policy that continuing accreditation is denied to programs with warning status that are found to be in continued non-compliance with any Accreditation Standard.”
17. On August 03, 2010, MSU notified UE of the NLNAC’s July 23, 2010 revocation of national accreditation for MSU’s baccalaureate nursing program and provided UE with a copy of the NLNAC’s July 23, 2010 letter. This constituted the reporting of an “Incident” under Paragraph 17 of the 2010-2011 policy.
18. When MSU notified UE of the “Incident” on August 03, 2010, the nursing program was

not part of exclusion endorsement ELL516E to the 2010-2011 policy.

19. Only after UE received notice of NLNAC's revocation of accreditation for MSU's baccalaureate nursing program did UE retroactively add the nursing program to exclusion endorsement ELL516E.
20. UE attempted to retroactively eliminate or limit coverage after UE had notice of an Incident. As such, the claims of the BSN Program Plaintiffs cannot be excluded by exclusion endorsement ELL516E.
21. UE denied coverage of the nursing program claims on August 26, 2010, citing exclusion ELL697E, the CRNA exclusion, which had nothing to do with MSU's nursing program and did not exclude nursing program claims.
22. UE never denied coverage under the 2010-2011 policy based on exclusion endorsement ELL516E, either as written in the 2010-2011 policy sent to MSU on June 3, 2010, or after UE retroactively added the nursing program to exclusion endorsement ELL516E on August 05, 2010.
23. There is an aggregate of \$10,000,000.00 available in coverage for the Plaintiffs' BSN Program claims under the terms of the 2010-2011 insurance policy issued by UE to MSU.
24. Because a putative class action is pending regarding the BSN Program claims, and because MSU's "institutional policy, practice or procedure [regarding the BSN Program] affects more than one individual seeking to hold the **Insured** liable for the results of a **Wrongful Act** [loss of accreditation]" the Court concludes that only a single self-insured retention in the amount of \$50,000.00 must be satisfied under the terms of the 2010-2011 policy. See Paragraph 4, Page 5, 2010 – 2011 Policy.

25. All of the claims and theories of recovery of all the BSN Program Plaintiffs relate to the loss of accreditation of the nursing program at MSU and, therefore, fall under the 2010-2011 Policy Period since the “Incident” was reported on August 3, 2010.

Conclusion

Pursuant to Rule 56 of the West Virginia Rules of Civil Procedure, the Presiding Judges unanimously GRANT IN PART AND DENY IN PART Plaintiffs’ motion for summary judgment on their declaratory judgment actions to the extent the Court FINDS there is \$10,000,000.00 in insurance coverage available for the Mountain State University BSN Program cases under the terms of the 2010 – 2011 insurance policy issued by United Educators Insurance to Mountain State University.

The Presiding Judges unanimously GRANT IN PART AND DENY IN PART United Educators Insurance’s motion for summary judgment to the extent the Court FINDS there is not \$30,000,000.00 in insurance coverage available for the BSN Program cases because only the 2010-2011 insurance policy issued by United Educators Insurance to Mountain State University applies to the BSN Program cases.

The parties’ exceptions and objections to the Court’s ruling are noted.

The Court FINDS AND DETERMINES there is no just reason for delay and DIRECTS ENTRY OF FINAL JUDGMENT pursuant to Rule 54(b) of the West Virginia Rules of Civil Procedure. This order is subject to immediate appellate review.

It Is So Ordered.

ENTER: December 17, 2013

/s/ Alan D. Moats
Lead Presiding Judge,
Mountain State University Litigation