IN THE COURT OF COMMON PLEAS FOR PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
TRIAL DIVISION - CIVIL

TITEFLEX CORPORATION,	:	MARCH TERM, 2007
Plaintiff,	:	NO. 03963
v.	:	COMMERCE PROGRAM
NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA, *et al.*,	:	
Defendants.	:	

PRESENTED FOR REVIEW
PRO PROTH

OPINION

Defendant National Union Fire Insurance Company of Pittsburgh, PA ("NUFIC") has appealed from this court's Order entered June 21, 2012, in which the court found NUFIC had a duty to defend its insured, plaintiff Titeflex Corporation ("Titeflex"), in certain Underlying Actions pending in Montgomery County. For the reasons that follow, the court respectfully requests that its Order be affirmed on appeal.

Titeflex manufactured a flexible connector that was installed and used at a Montgomery County gas station owned by Thomas F. Wagner and Thomas F. Wagner, Inc. (collectively, "Wagner").[1] In the Spring of 1998, gasoline leaked from Wagner's property onto neighboring properties. As a result, many neighbors filed lawsuits against Wagner, Titeflex, and other

[1] Wagner was formerly made a party to this action, but the court granted Wagner's motion to be dismissed from this case. The voluntary absence of Wagner as a current party to this action does not deprive the court of jurisdiction to determine whether NUFIC has a duty to defend Titeflex as a matter of law. The statute simply requires that an interested party be made a party to the declaratory judgment action, not that it remain a party at all times. *See* 42 Pa.C.S. § 7540 ("When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration").

The plaintiff in the underlying action must be joined, so it can protect its own interests in the coverage litigation. *See* Vale Chemical Co. v. Hartford Acci. & Indem. Co., 512 Pa. 290, 294, 516 A.2d 684, 687 (1986)("plaintiff [in the underlying action] has an interest in seeing that an insurance company pays the judgment against its insured.") If, after being joined, the underlying plaintiff decides not to participate, the court may proceed without it.

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manufacturers and installers of products at Wagner's gas station (collectively, the "Underlying Actions").[2] Wagner filed cross-claims against Titeflex in the Underlying Actions.

Titeflex's primary insurer for the August 1, 1997-1998 policy year (and for prior and subsequent policy years) was Kemper under a Commercial General Liability Policy with a limit of $1 million per occurrence and an aggregate limit of $2 million.[3] NUFIC was Titeflex's excess insurer during the August 1, 1997-1998 policy period (and in other years as well) under an umbrella policy with a limit of $50 million per occurrence and an aggregate limit of $100 million (the " Excess Policy").[4]

Kemper initially provided a defense to Titeflex in the Underlying Actions pursuant to the terms of its primary policy. Kemper subsequently experienced financial difficulties, and Titeflex ultimately assumed and paid for its own defense in the Underlying Actions. In 2007, as part of a settlement of plaintiffs' claims against Titeflex in the Underlying Actions, Kemper and Titeflex together paid $1 million.[5] In addition, NUFIC paid over $9 million towards the settlement under its Umbrella Policies.[6] The Montgomery County court approved those portions of the settlement involving minors' claims and the claims of certain estates.

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[2] The Underlying Actions include Ball v. Marley Pump Co., Mont. Co. 1999-06438, which is currently on appeal before the Pennsylvania Supreme Court, and six other actions filed between 1998 and 2000. The Montgomery County court stayed trial in four of these actions pending the Ball appeal. It terminated the other two actions due to inactivity. The open actions involve the claims of approximately 60 plaintiffs.

[3] The primary policy was issued by a subsidiary of Kemper's, Lumberman's Mutual, and has a Policy Number of 5YL 947 077-04 (hereinafter cited as the "Kemper Policy").

[4] NUFIC Commercial Umbrella Policy No. 357 01 16 (hereinafter cited as the "NUFIC Policy").

[5] Kemper apparently paid only $375,000 because it was in a quasi-receivership in Illinois, and Titeflex paid the remaining $625,000 after a negotiated commutation of the Kemper policies.

[6] NUFIC claims to have paid $9,375,000 towards the settlement, with Titeflex contributing $625,000 towards the settlement of the Ball plaintiffs' claims and with Kemper contributing $375,000 towards the settlement of the Behr and Grant plaintiffs' claims.

Jared Glass was one of the minor plaintiffs with whom Titeflex settled. Master Glass received a total of $2,665,000 from Titeflex and from another settling defendant, Containment Technologies Corporation. Master Glass was apparently born in 2000, several years after the gasoline spill occurred, and claims to have suffered personal injuries allegedly resulting from the spill.[7]

Wagner's cross-claims were not part of the settlement, and they remain pending against Titeflex. In this action, Titeflex seeks a defense from NUFIC under the Excess Policy with respect to the Wagner cross-claims.[8] Titeflex and NUFIC filed Cross-Motions for Summary Judgment on the duty to defend issue.

> An insurer's duty to defend is broader than its duty to indemnify. It is a distinct obligation, separate and apart from the insurer's duty to provide coverage. An insurer is obligated to defend its insured if the factual allegations of the [pleading] on its face encompass an injury that is actually or potentially within the scope of the policy. As long as the [claim] might or might not fall within the policy's coverage, the insurance company is obliged to defend. Accordingly, it is the potential, rather than the certainty, of a claim falling within the insurance policy that triggers the insurer's duty to defend. The question of whether a claim against an insured is potentially covered is answered by comparing the four corners of the insurance contract to the four corners of the [relevant pleading].
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> [NUFIC] may not justifiably refuse to defend [Wagner's cross-]claim against [Titeflex] unless it is clear from an examination of the allegations in the [cross-claim] and the language of the policy that the claim does not potentially come within the coverage of the policy. In making this determination, the factual allegations of the underlying [cross-claim] are to be taken as true and liberally construed in favor of [Titeflex].[9]

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[7] Several of the settled plaintiffs' claims were subsequently tried against other defendants, and the jury found that their injuries were not caused by the gasoline spill. Specifically the jury found that "the contaminants of concern" did not reach the plaintiffs' property, or in the case of young Master Glass, did not enter his home.

[8] Titeflex also asserted a claim against NUFIC for indemnification, but the indemnity claim was stayed by the court pending resolution of the cross-claims in the Underlying Actions.

[9] Am. & Foreign Ins. Co. v. Jerry's Sport Ctr., Inc., 606 Pa. 584, 608-611, 2 A.3d 526, 540-542 (2010). *See also* Seaboard Surety Co. v. Gillette Co., 64 N.Y.2d 304, 310, 486 N.Y.S.2d 873, 876 (1984) ("Where an insurance policy includes the insurer's promise to defend the insured against specified claims as well as to indemnify for actual liability, the insurer's duty to furnish a defense is broader than its obligation to indemnify. The duty to defend arises whenever the allegations in a complaint against the insured fall within the scope of the risks undertaken by the insurer, regardless of how false or groundless those allegations might be. The duty is not

NUFIC previously brought an arbitration action against Titeflex in which NUFIC sought a declaration that it had no duty to defend Titeflex in the Underlying Actions.[10] The arbitrators denied NUFIC's claim and ruled that NUFIC "has a duty to defend Titeflex under [NUFIC's] 1997-98 umbrella policy with respect to any claims arising out of the [Wagner gas station's] gasoline release *that fall within the provisions of II-A-1 of the [NUFIC] policy.*"[11]

The issue presented by the parties' cross-motions in this case is whether the Wagner cross-claims fall within the provision of the NUFIC Excess Policy cited by the arbitrators. The Policy provides in relevant part as follows:

> We will pay on behalf of the Insured those sums in excess of the Retained Limit that the Insured becomes legally obligated to pay by reason of liability imposed by law or assumed by the Insured under an Insured Contract because of Bodily Injury, Property Damage, Personal Injury or Advertising Injury that takes place during the Policy Period and is caused by an Occurrence happening anywhere in the world.
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> * * *
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> We shall have the right and duty to defend any claim or suit seeking damage covered by the terms and conditions of this policy when:
> 1. The applicable Limits of Insurance of the underlying policies listed in the Schedule of Underlying Insurance[12] and the Limits of Insurance of any other

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contingent on the insurer's ultimate duty to indemnify should the insured be found liable, nor is it material that the complaint against the insured asserts additional claims which fall outside the policy's general coverage or within its exclusory provisions. Rather, the duty of the insurer to defend the insured rests solely on whether the complaint alleges any facts or grounds which bring the action within the protection purchased.")

There is some question whether New York or Pennsylvania law governs the parties' dispute. However, when the law of those two states are applied to the facts of this case, the result is the same, so there is no true conflict of laws that the court must resolve. *See* Ratti v. Wheeling Pittsburgh Steel Corp., 758 A.2d 695, 702 (Pa. Super. 2000) ("In Pennsylvania, choice of law analysis first entails a determination of whether the laws of the competing states actually differ. If not, no further analysis is necessary.")

[10] NUFIC's arbitration claim was based on a endorsement to the Excess Policy regarding pollution-related claims that deleted the "drop down" duty to defend provision in the Excess Policy, but did not delete the provision at issue here. *See* NUFIC v. Titeflex, AAA No. 1319500736 07 Decision and Award of May 29, 2009 (hereinafter cited as "AAA Decision and Award"); NUFIC Policy, p.1, § II(A)(2). The pollution endorsement to the Policy contains an arbitration provision and the Policy does not, which explains why this action was not also arbitrated.

[11] AAA Decision and Award, p. 23 (emphasis added).

[12] The Kemper 1997-98 primary policy is the only Commercial General Liability Policy listed in the Schedule of Underlying Insurance.

underlying insurance providing coverage to the Insured have been exhausted by payment of claims to which this policy applies[.][13]

In his cross-claims, Wagner alleges that Titeflex (and others) must compensate him for damage to his property, loss of gasoline, destruction of Wagner's business, and the environmental clean-up costs for which he is or will be found liable. Some of Wagner's claimed damages may have occurred in years other than the 1997-1998 policy year, and some may not involve claims for covered injuries. However, at least some of Wagner's cross-claims are for property damage occurring in 1998. Therefore, some of Wagner's cross-claims are potentially covered by the terms and conditions of NUFIC's Excess Policy.

Such potentially covered claims would be sufficient to trigger the duty to defend by a primary insurer. However, NUFIC is an excess insurer, and its policy language regarding the duty to defend contains additional requirements regarding exhaustion which are not found in primary policies. Therefore, the court must undertake an additional inquiry to determine whether NUFIC has a duty to defend Titeflex in the Underlying Actions.

The NUFIC Excess Policy requires that underlying insurance policies be "exhausted" before NUFIC's duty to defend will arise. NUFIC argues that the 1997-1998 Kemper primary policy is not the only policy underlying its Excess Policy with respect to the spill because the spill may have begun before 1998 and its claimed effects were felt long after 1998. As a result, NUFIC claims that all the Kemper yearly policies in effect from approximately 1995 through 2003 are implicated by the spill and are thereby policies underlying its Excess Policy, which policies must be exhausted before NUFIC's duty to defend arises.

Based on this argument, it would appear that Kemper owes additional millions of dollars as primary insurer under these policies. Kemper does not. The 1997-1998 Kemper Policy has an

[13] NUFIC Policy, p. 1, §§ 1-2(A)(1).

"Each Occurrence Limit" of $1 million. The "Each Occurrence Limit" is the most Kemper "will pay for the sum of [damages and medical expenses] because of all 'bodily injury' and 'property damage' arising out of any one 'occurrence.'"[14] The Kemper policy defines an "Occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions."[15]

The 1998 gasoline spill, out of which both the Wagner cross-claims and the plaintiffs' claims in the Underlying Actions arise, is an accident resulting in the various claimants' continuous or repeated exposure to substantially the same general harmful conditions, *i.e.*, a sudden, significant release of gasoline, which then emanated from Wagner's property and allegedly contaminated the soil and groundwater on neighboring properties.[16] Therefore, the spill constitutes a single occurrence under the Kemper policy.[17] It does not matter if the spill's

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[14] Kemper Policy, p. 8, § III(5).

[15] *Id.*, p. 12, § V(9) .

[16] Likewise, Titeflex's sale of the allegedly defective hose, which was installed at the Wagner gas station and which purportedly caused the spill, is a single occurrence.

[17] *See, e.g.,* Appalachian Ins. Co. v. Liberty Mut. Ins. Co., 676 F.2d 56, 61 (3d Cir. Pa. 1982) ("The fact that there were multiple injuries and that they were of different magnitudes and that injuries extended over a period of time does not alter our conclusion that there was a single occurrence. As long as the injuries stem from one proximate cause there is a single occurrence."); Donegal Mut. Ins. Co. v. Baumhammers, 595 Pa. 147, 938 A.2d 286 (2007) (court adopts the "cause" approach for determining what constitutes an "occurrence" pursuant to an insurance policy and thereby determines that the shooting of six people was but one occurrence). *See also* Mt. McKinley Ins. Co. v Corning Inc., 96 A.D.3d 451, 946 N.Y.S.2d 136 (1st Dep't June 7, 2012) (recognizing that New York "courts have interpreted identical or similar grouping provisions as combining into a single occurrence exposures emanating from the same location at a substantially similar time"); Ramirez v. Allstate Ins. Co., 26 A.D.3d 266, 811 N.Y.S.2d 19 (1st Dep't 2006) (Where policy stated: "All bodily injury and property damage resulting from continuous or repeated exposure to the same general conditions is considered the result of one occurrence," the court "held that by reason of this clause, and notwithstanding that each plaintiff may have ingested the lead at different times, both plaintiffs' exposure to the same lead hazard in the same apartment constituted only one occurrence subject to the $200,000 policy limit.")

Pennsylvania's "cause" approach and New York's "unfortunate event" approach to determining "occurrences" may, in some instances, produce different results. However, in this case, where one unfortunate event apparently caused multiple injuries, both states' courts would recognize only one occurrence.

effects spanned many years and many policies and generated multiple claims. It is still one occurrence subject to a $1 million limit for all claims arising out of it.[18]

NUFIC argues that Kemper was obligated to pay more than $1 million with respect to the spill because the Kemper Policy provides that its policy limits reset every year it is renewed.[19] However, this provision does not alter the definition of "Occurrence" in the Policy, nor that fact that Kemper has only obligated itself to pay a total of $1 million per any one "Occurrence." Instead, the provision simply makes clear that, if the policy limits are exhausted in Year One by one or more occurrences occurring in Year One, then new limits go into effect in Year Two to cover different occurrences occurring in Year Two.

It is irrelevant how many Kemper policies are implicated by the spill; only $1 million is due from Kemper in connection with the spill occurrence. Since the "Each Occurrence Limit" of the relevant Kemper policies was exhausted by Kemper's and Titeflex's combined payment of $1 million to settle the spill claims, all such policies underlying the Excess Policy have been exhausted.

In addition to requiring that the underlying policies be exhausted, the NUFIC Excess Policy also requires that they be exhausted "by payment of claims to which [the Excess P]olicy applies" before NUFIC's duty to defend will arise.[20] The use in the Excess Policy of the word "applies" is problematic. It could be interpreted to mean claims covered by, *i.e.*, eligible for payment under, the Excess Policy, which is an impossibility. If claims are paid under the

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[18] The parties presented no evidence that any of the primary policies arguably in effect during the spill period contained a different definition of "Occurrence."

[19] *See* Kemper Policy, p. 8 ("The limits of this coverage part apply separately to each consecutive annual period.")

[20] NUFIC Policy, p.1, § II(A)(1).

underlying policies and thereby exhaust such policies, then such claims necessarily cannot also be eligible for payment under the Excess Policy.

The court reads the phrase "claims to which this policy applies" to mean claims of the type covered by the Excess Policy, not claims actually covered by the Excess Policy. NUFIC's Excess Policy covers claims against Titeflex for "Bodily Injury, Property Damage, Personal Injury or Advertising Injury."[21] The settled claims that exhausted the underlying Kemper policy, including Master Glass' claims, were for bodily injury or property damage, so they were claims of the type to which the NUFIC policy applies.

NUFIC points out that its Excess Policy applies only to bodily injury or property damage that took place during the 1997-1998 policy year.[22] It then extrapolates from this limitation on its own coverage obligations to argue that its duty to defend does not arise unless all the underlying policies have been exhausted by payments for bodily injuries or property damage that took place in 1997-1998.[23] However, NUFIC also argues that the Kemper policies from 1995 through at least 2003 underlie its Excess Policy. Since the 1995-1996 and 1998-2003 policies do not cover claims for injury or damage taking place in 1997-1998,[24] it would be difficult, if not impossible, for them to be exhausted by such claims.

NUFIC's interpretation of its policy provisions, in effect, eliminates its obligation to defend its insured in cases, such as this one, involving an occurrence that causes injury or

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[21] *Id.*, § I. Each of such terms is expressly defined in the Excess Policy.

[22] *Id.*

[23] The duty to defend does not expressly contain a time limit on the exhaustion claims. Instead, NUFIC reads the time limitation from Section I of the Excess Policy into the exhaustion requirements of Section II.

[24] The Kemper policies apply "to 'bodily injury' and 'property damage' only if . . . . the 'bodily injury' or 'property damage' occurs during the policy period." Kemper Policy, p. 1, Section I (A)(1)(b)(2).

damage in more than one policy year. NUFIC's interpretation renders its duty to defend a nullity in such cases.

To the extent that NUFIC's reading of the phrase "claims to which this policy applies" is a fair one, it is certainly not the only fair reading of that phrase. Because the phrase is capable of different interpretations in the context of this case, it is ambiguous. Any ambiguity in an insurance policy is interpreted against the drafter, the insurer.[25] Therefore, the court will not adopt NUFIC's restrictive interpretation of the phrase "claims to which this policy applies." Instead, the court adopts the more expansive reading of the phrase to include all claims of the type covered by the Excess Policy, not limited to those involving injuries or damages taking place within the policy year.

The underlying policies were exhausted by payment of personal injury and property damage claims against Titeflex in the Underlying Actions, so they were exhausted by claims to which the NUFIC Excess Policy "applies." Because the underlying policies were properly exhausted, NUFIC has a duty to defend Titeflex with respect to the remaining claims in the Underlying Actions to which its Policy may apply, *i.e.*, the Wagner cross-claims.

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[25] *See, e.g.,* Prudential Prop. & Cas. Ins. Co. v. Sartno, 588 Pa. 205, 212, 903 A.2d 1170, 1174 (2006) ("Contractual language is ambiguous if it is reasonably susceptible of different constructions and capable of being understood in more than one sense. This is not a question to be resolved in a vacuum. Rather, contractual terms are ambiguous if they are subject to more than one reasonable interpretation when applied to a particular set of facts.") Standard Venetian Blind Co. v. American Empire Ins. Co., 503 Pa. 300, 305, 469 A.2d 563, 566 (1983) ("Where a provision of a policy is ambiguous, the policy provision is to be construed in favor of the insured and against the insurer, the drafter of the agreement."). *See also* White v. Continental Cas. Co., 9 N.Y.3d 264, 267, 848 N.Y.S.2d 603, 605 (2007) ("If the terms of a policy are ambiguous, however, any ambiguity must be construed in favor of the insured and against the insurer."); Westview Assocs. v. Guar. Nat'l Ins. Co., 95 N.Y.2d 334, 339, 717 N.Y.S.2d 75, 77 (2000) ("[The insurer's] interpretation would render the umbrella policy's specific exclusions mere surplusage, a result to be avoided. At the very least, [insurer's] interpretation presents an ambiguity in the umbrella policy which must be resolved against the insurer, as drafter of the agreement.").

For all the foregoing reasons, the court respectfully requests that its June 21st Order be affirmed on appeal.

Dated: October 24, 2012

BY THE COURT:

PATRICIA A. McINERNEY, J.