

STATE OF MICHIGAN
IN THE 17th CIRCUIT COURT FOR KENT COUNTY

CAPITOL SPECIALTY INSURANCE
CORPORATION,

Plaintiff,

vs.

SUPERIOR FEED INGREDIENTS, LLC,

Defendant.

Case No. 16-01276-CKB

HON. CHRISTOPHER P. YATES

OPINION AND ORDER GRANTING PLAINTIFF'S MOTION
FOR SUMMARY DISPOSITION UNDER MCR 2.116(C)(9)

This insurance-coverage dispute requires the Court to decide whether the pollution exclusion in an insurance policy applies to unintentional contamination of animal feed. Specifically, Plaintiff Capitol Specialty Insurance Corporation (“Capitol Insurance”) has moved for summary disposition pursuant to MCR 2.116(C)(9) based upon the contention that its insured, Defendant Superior Feed Ingredients, LLC (“Superior Feed”), has no right to coverage for any claims or losses resulting from the introduction of lasalocid laced with lascaldoil into animal feed, which caused harm to turkeys and swine. Requesting a declaratory judgment that it has no duty to defend or indemnify Superior Feed, Capitol Insurance insists that the contamination of the animal feed falls squarely within the pollution exclusion, which precludes coverage for damage “which would not have occurred in whole or in part but for the . . . discharge, dispersal, seepage, migration, release or escape of ‘pollutants’ at any time.” Because the Court concludes that the pollution exclusion defeats coverage in this instance, the Court shall award summary disposition to Capitol Insurance under MCR 2.116(C)(9) and permit Capitol Insurance to submit a proposed declaratory judgment reflecting this conclusion.

I. Factual Background

Plaintiff Capitol Insurance’s motion for summary disposition under MCR 2.116(C)(9) asks for resolution of the parties’ dispute in its favor because Defendant Superior Feed “has failed to state a valid defense to the claim asserted” by Capitol Insurance. A motion for summary disposition under MCR 2.116(C)(9) “is analogous to one brought pursuant to MCR 2.116(C)(8) in that both motions are tested by the pleadings alone, with the court accepting all well-pleaded allegations as true.” See Hackel v Macomb County Commission, 298 Mich App 311, 316 (2012). Thus, the Court shall limn the facts by considering Capitol Insurance’s complaint and relying upon the answer filed by Superior Feed in the instant case and the complaint against Superior Feed in the underlying tort action.¹

The amended complaint in the underlying lawsuit alleges that Defendant Superior Feed “is a feed ingredient company, which acts as a broker for Restaurant Recycling.” See Complaint for Declaratory Relief, Exhibit 2 (First Amended Complaint, ¶ 40). As part of its business, Restaurant Recycling sells “soyoil, also known in the industry as ‘grease,’ to producers of animal feeds.” Id. (First Amended Complaint, ¶ 37). In this case, “the soyoil which Restaurant Recycling and Superior obtained . . . was contaminated Lascadoil[,]” see id. (First Amended Complaint, ¶ 46), which is the “by-product of the manufacture of Lasalocid” and “is sold . . . for use as a bio-fuel.” Id. (First Amended Complaint, ¶ 51). Such a bio-fuel “is not approved for use as an animal feed additive or for animal or human consumption[,]” id. (First Amended Complaint, ¶ 52), so the introduction of

¹ “Whether an insurance carrier has a duty to defend its insured in an underlying tort action depends upon the allegations in the complaint” in the underlying case. Fitch v State Farm Fire and Casualty Co, 211 Mich App 468, 471 (1995). Thus, the Court must consider the allegations against Defendant Superior Feed in the underlying lawsuit. Plaintiff Capitol Insurance quite appropriately has attached a copy of the most recent pleading in that underlying case to its complaint in the instant case, so the Court may treat that pleading as part of the complaint in this declaratory-judgment suit. See MCR 2.113(F)(2).

lascadoil into the animal feed resulted in the predictable death of many turkeys, id. (First Amended Complaint, ¶¶ 59-62), which was attributable to consumption of feed contaminated with lasalocid. Id. (First Amended Complaint, ¶ 67). In the fullness of time, testing left “only the liquid ingredients as the only remaining possible source of the contamination.” Id. (First Amended Complaint, ¶ 77). Similarly, hog feed was tested, id. (First Amended Complaint, ¶ 78), and the “test results confirmed high levels of Lasalocid contamination in the soyoil samples.” Id. (First Amended Complaint, ¶ 80). The test results led to “a hold placed on shipment of swine,” id. (First Amended Complaint, ¶ 89), which caused suppliers “to give substantial discounts to their customers due to this delay[,]” id. (First Amended Complaint, ¶ 90), even though hog mortality did not occur.

After a group of turkey and hog farmers filed suit against Defendant Superior Feed and others involved in animal-feed production asserting that Superior Feed and the others made and sold animal feed contaminated with lasalocid laced with lascadoil, Superior Feed sought insurance coverage from Plaintiff Capitol Insurance for its defense costs and losses resulting from that action. Superior Feed’s coverage request prompted Capitol Insurance to file the instant case seeking declaratory relief with respect to its duty to defend and indemnify its insured, Superior Feed, in connection with the action alleging production and distribution of contaminated animal feed. Capitol Insurance’s complaint for declaratory relief comprises two counts: a request in Count One for declaratory relief based upon the pollution-exclusion clause in Superior Feed’s policy; and a demand in Count Two for relief under other exclusions and limitations in the policy. The pending motion for summary disposition rests solely upon the pollution exclusion cited in Count One. Although Capitol Insurance concedes, for purposes of its motion, that “property damage” occurred under the policy at issue, it insists that the pollution exclusion negates coverage for that loss.

II. Legal Analysis

Plaintiff Capitol Insurance has requested summary disposition under MCR 2.116(C)(9) on its demand for declaratory relief concerning the applicability of the pollution exclusion in the policy issued to Defendant Superior Feed. As an initial matter, the Court concludes that this case presents an appropriate situation for declaratory relief. According to MCR 2.605(A)(1), “[i]n a case of actual controversy within its jurisdiction, a Michigan court of record may declare the rights and other legal relations of an interested party seeking a declaratory judgment, whether or not other relief is or could be sought or granted.” “[T]he declaratory remedy is an especially appropriate vehicle for resolving insurance coverage disputes[,]” Allstate Ins Co v Hayes, 442 Mich 56, 65 (1993), so the Court shall turn to Capitol Insurance’s request for summary disposition on its demand for declaratory relief. But because Capitol Insurance has sought summary disposition pursuant to MCR 2.116(C)(9), the Court can award relief only if Superior Feed’s “defenses are so untenable as a matter of law that no factual development could possibly deny the plaintiff’s right to recovery[.]” See Hackel, 298 Mich App at 316. With that standard in mind, the Court must consider the pollution exclusion invoked by Capitol Insurance in an effort to negate its duty to defend and indemnify Superior Feed for claims and losses arising from the feed that was unintentionally contaminated with lasalocid laced with lascaloid.²

² As a threshold matter, the parties disagree about whether the Court should apply Michigan or Minnesota law to resolve this case. The insurance policy does not contain a choice-of-law clause. ““In the absence of an effective choice of law by the parties,”” the Court must apply ““the local law of the state which . . . has the most significant relationship to the transaction and the parties”” Chrysler Corp v Skyline Industrial Services, Inc, 448 Mich 113, 120-121 n14 (1995). Although the parties may have entered into the insurance agreement in Minnesota, nothing else about this case has any connection to Minnesota. Instead, all of the events resulting in this coverage dispute occurred in the State of Michigan, where Defendant Superior Feed conducted the business that led to its claim for insurance coverage. Thus, the Court shall apply Michigan law to resolve the coverage dispute. See Townsends of Arkansas, Inc v Millers Mutual Ins, 823 F Supp 233, 237-238 (D Del 1993), aff’d, 26 F3d 123 (3rd Cir 1994).

Michigan law recognizes a duty to defend and a duty to indemnify in the insurance context. Although “the duty to defend is broader than the duty to indemnify[,]” American Bumper and Mfg Co v Hartford Fire Ins Co, 452 Mich 440, 450 (1996), “[t]he duty to defend is related to the duty to indemnify in that it arises only with respect to insurance afforded by the policy.” Id. Consequently, “[i]f the policy does not apply, there is no duty to defend,” id., and necessarily no duty to indemnify either. “An insurance policy is similar to any other contractual agreement, and, thus, the court’s role is to ‘determine what the agreement was and effectuate the intent of the parties.’” Hunt v Drielick, 496 Mich 366, 372 (2014). Interpretation of an insurance policy “requires a two-step inquiry: first, a determination of coverage according to the general insurance agreement and, second, a decision regarding whether an exclusion applies to negate coverage.” Auto-Owners Ins Co v Harrington, 455 Mich 377, 382 (1997). “While ‘[i]t is the insured’s burden to establish that his claim falls within the terms of the policy,’ ‘[t]he insurer should bear the burden of proving an absence of coverage.’” See Hunt, 496 Mich at 373. Although exclusionary clauses in insurance policies “‘are strictly construed in favor of the insured[,]’” id., “‘[i]t is impossible to hold an insurance company liable for a risk it did not assume,’” id., so “‘[c]lear and specific exclusions must be enforced.’” Id. These principles govern the Court’s interpretation of the pollution exclusion at issue here.

The two sides agree on the language of the pollution exclusion that controls this dispute,³ but they do not agree on how that language should be applied to this case. The pollution exclusion cited by Plaintiff Capitol Insurance in its motion for summary disposition states as follows:

This insurance does not apply to:

³ The Commercial General Liability Coverage Form from Plaintiff Capitol Insurance contains a pollution exclusion, see Complaint, Exhibit 1 (CGL Coverage Form, § I(2)(f), Page 3 of 16), which was altered by a Total Pollution Exclusion Endorsement from which the language at issue is drawn.

f. Pollution

(1) “Bodily injury” or “property damage” which would not have occurred in whole or part but for the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of “pollutants” at any time.

See Complaint, Exhibit 1 (Total Pollution Exclusion Endorsement). Capitol Insurance appears to concede, at least for purposes of its summary-disposition motion, that “property damage” occurred. Thus, the Court must first focus upon whether the lasalocid laced with lascadoil that contaminated the animal feed is a “pollutant.” If the lasalocid laced with lascadoil is a “pollutant,” the Court must decide whether the “property damage” to turkeys and hogs “would not have occurred in whole or in part but for the . . . discharge, dispersal, seepage, migration, release or escape” of the lasalocid laced with lascadoil. The Court shall take up each of these issues in turn.

A. The Existence of a Pollutant.

Because the pollution exclusion applies only if “pollutants” were involved in causing the loss at issue here, the Court must determine whether the term “pollutants” encompasses lasalocid laced with lascadoil under the circumstances in this case. The insurance policy issued by Plaintiff Capitol Insurance to Defendant Superior Feed defines the term “pollutants” as follows:

“Pollutants” means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.

See Complaint, Exhibit 1 (CGL Coverage Form, § V(15), Page 15 of 16). This definition seems to be common in the insurance industry, see, e.g., McKusick v Travelers Indemnity Co, 246 Mich App 329, 334 (2001); McGuirk Sand & Gravel, Inc v Meridian Mutual Ins Co, 220 Mich App 347, 351 (1996), so there exists a substantial body of law on the general subject. Beyond that, our Court of

Appeals has held that pollution exclusions like the one invoked in this case extend beyond traditional “claims of environmental pollution, i.e., land, air, water, and other natural resource contamination.” McKusick, 246 Mich App at 337-338. Thus, the pollution exclusion can reach contamination in all forms resulting from discharge, dispersal, seepage, migration, release or escape of “pollutants.” In addition, most courts “that have examined similar exclusions have concluded that they are clear and unambiguous and are just what they purport to be – absolute.” McGuirk Sand & Gravel, 220 Mich App at 354. Therefore, ambiguity does not prevent the Court from ruling on the applicability of the pollution exclusion. But our appellate courts in Michigan have not yet determined whether lasalocid laced with lascadoil is a “pollutant” if it is found in animal feed. Therefore, the Court cannot repair to binding precedent in order to decide how to characterize lasalocid laced with lascadoil.

Plaintiff Capitol Insurance contends that, in the circumstances of this dispute, the lasalocid laced with lascadoil was a “contaminant,” so it constitutes a “pollutant” under the insurance policy. The facts set forth in the first amended complaint in the underlying lawsuit plainly establish that the lasalocid laced with lascadoil constituted a “liquid . . . contaminant” within the contemplation of the pollution exclusion invoked by Plaintiff Capitol Insurance. “The word ‘contaminant,’ given its plain and ordinary meaning, is ‘something that contaminates,’ and ‘contaminate’ is defined as ‘to make impure or unsuitable by contact or mixture with something unclean, bad, etc.’” See City of Grosse Pointe Park v Michigan Municipal Liability and Property Pool, 473 Mich 188, 215 (2005) (Opinion of Young, J.); accord Hastings Mutual Ins Co v Safety King, Inc, 286 Mich App 287, 294 (2009). Consequently, “the definition of ‘contaminant’ connotes a substance that, because of its nature and under the particular circumstances, is not generally supposed to be where it is located and causes undesirable effects.” See Hastings Mutual, 286 Mich App at 294. That definition fits the lasalocid

laced with lascadoil like a glove. Accordingly, the Court concludes that Plaintiff Capitol Insurance has properly presented a request for declaratory relief under the pollution exclusion insofar as its insured has demanded coverage for claims and losses resulting from a “liquid . . . contaminant.”

B. Whether Dispersal Occurred.

The presence of a “pollutant” in the form of the “liquid . . . contaminant” lascadoil does not, by itself, absolve Plaintiff Capitol Insurance of its duty to defend and indemnify Defendant Superior Feed by dint of the pollution exclusion. The pollution exclusion requires an additional showing that the “pollutant” at issue caused property damage “which would not have occurred in whole or in part but for the actual . . . discharge, dispersal, seepage, migration, release or escape” of the “pollutant,” *i.e.*, lascadoil. Superior Feed describes as “unreasonable” any “attempt to characterize the sale of lascadoil, or the subsequent mixing of lascadoil with feed by the farm to be a ‘discharge, dispersal, seepage, migration, release or escape’ of lasalocid.” Turning to the allegations in the first amended complaint in the underlying action, the turkey and hog producers that sued Superior Feed alleged that “the soyoil which Restaurant Recycling and Superior obtained from Glycerin Traders, which was eventually sold to Sietsema Farms, was contaminated Lascadoil.” See Complaint for Declaratory Relief, Exhibit 2 (First Amended Complaint, ¶ 46). In other words, some supplier in the channel of distribution provided lasalocid laced with lascadoil, mistakenly thinking it was soyoil. According to Capitol Insurance, that event constituted a “dispersal” of a “pollutant,” so the pollution exclusion defeats coverage under the insurance policy issued to Superior Feed.

In determining the meaning of the word “dispersal,” the Court must employ the “commonly used, ordinary, and plain meaning[]” of that word, as opposed to treating that word as a term of art.

See McKusick, 246 Mich App at 338. Despite the paucity of precedent interpreting “dispersal” in the context of unintentionally contaminated animal feed, the Court has found sufficient authority to decide the matter in favor of Plaintiff Capitol Insurance. In a dispute virtually identical to the instant action, the United States District Court for the District of Delaware found that a “dispersal” occurred for purposes of a pollution-exclusion clause when a carcinogen known as heptachlor found its way into chicken feed. Townsend of Arkansas, Inc v Millers Mutual Ins, 823 F Supp 233, 241-241 (D Del 1993), aff’d, 26 F3d 123 (3rd Cir 1994). As the federal court explained, “heptachlor, a pollutant, was ‘dispersed’ through the chicken feed manufacturing process” because the “heptachlor-treated milo was placed in the milo bins and then dispersed throughout the milo bin contaminating untreated milo.” Id. “Then, the contaminated milo was mixed with other feed ingredients, further dispersing the heptachlor throughout the chicken feed.” Id. The Court adopts this analysis, which applies with equal force to the manner in which the lasalocid laced with lascaldoil wound up in the animal feed for turkeys and hogs in the instant case. Thus, the Court concludes that the claims against Defendant Superior Feed resulted from the “dispersal” of a “pollutant.” See id.; see also Pure Tech Systems, Inc v Mt Hawley Ins Co, 95 Fed Appx 132 (6th Cir March 26, 2004).

C. Causation of Loss Concerning Swine.

Finally, Defendant Superior Feed contends that, despite the Court’s determinations, Plaintiff Capitol Insurance has a duty to defend Superior Feed because the “property damage” concerning the delay in getting the swine to market did not result from the lascaldoil contamination. Superior Feed has framed this argument as follows: “Part of the claims in the White Acre Complaint are for losses associated with holding back hogs from market while testing for lasalocid, however, those tests were

negative for any contamination.” The problem with this argument is that it does not square with the capacious causation language in the pollution exclusion, which excludes “‘property damage’ which would not have occurred in whole or part but for the actual, alleged or threatened . . . dispersal . . . of ‘pollutants’ at any time.” See Complaint, Exhibit 1 (Total Pollution Exclusion Endorsement). Manifestly, the expensive delay in getting the hogs to market would not have occurred “but for” the dispersal of lasalocid laced with lascadoil, which necessitated the testing that prompted the hold on shipping the hogs. See McKusick, 246 Mich App at 340-341 (presenting similar causation analysis under pollution exclusion). Consequently, the Court must reject Superior Feed’s final argument and award summary disposition under MCR 2.116(C)(9) to Capitol Insurance.

III. Conclusion

For the reasons set forth in this opinion, the Court concludes that Plaintiff Capitol Insurance is entitled to summary disposition pursuant to MCR 2.116(C)(9) on Count One of its complaint for declaratory relief. Specifically, the Court holds that the pollution exclusion in the policy issued to Defendant Superior Feed absolves Capitol Insurance of its duty to defend and indemnify Superior Feed with respect to claims and losses arising from the unintentional contamination of animal feed with lasalocid laced with lascadoil. The Court invites Capitol Insurance to submit a proposed final declaratory judgment that memorializes the Court’s ruling and closes the case.

IT IS SO ORDERED.

Dated: January 31, 2017



HON. CHRISTOPHER P. YATES (P41017)
Kent County Circuit Court Judge