IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

TYSON FOODS, Inc., *et al*.,	)	
	)	
Plaintiffs	)	
	)	
v.	)	**C.A. No. 09C-07-087 MJB**
	)	
ALLSTATE INSURANCE COMPANY, *et al*.,	)	
	)	
	)	
Defendants.	)	

Submitted: May17, 2011
Decided: August 31, 2011

Upon Consideration of Plaintiffs' Partial Motion for Summary Judgment; Defendant Hartford's Cross Motion for Summary Judgment; and Defendant Arrowood's Motion to Strike.

Plaintiffs' Motion is GRANTED in part and DENIED in part; Defendant's Cross-Motion for Summary Judgment is DENIED; and Defendant's Motion to Strike is GRANTED.

OPINION AND ORDER

Mark M. Billion, Esquire, The Billion Law Firm, Wilmington, Delaware; OF COUNSEL: Jerold Oshinsky (Argued), Lorelie S. Masters (Argued), Kali N. Bracey, and Bharat Ramamurti of Jenner & Block, LLP, Attorney for Plaintiffs.

James S. Yoder, Esquire, White and Williams, LLP, Wilmington, Delaware; OF COUNSEL: Gary D. Centola, Janice M. Greenberg, and Rivkin Radler of Rivkin Radler LLP, Uniondale, New York. Attorneys for Defendant Fireman's Fund Insurance Company and Interstate Fire and Casualty Company.

Kelly A. Green, Esquire, Klehr Harrison Harvey Branzburg, LLP; OF COUNSEL: James Ruggeri (Argued) and Mark Ostrowski of Shipman & Goodwin, LLP, Hartford, Connecticut. Attorneys for Defendant Hartford Accident and Indemnity Company.

Neal J. Levitsky and Seth A. Niederman, Fox Rothschild, LLP, Wilmington, Delaware; OF COUNSEL: James Rocap, III (Argued), Virginia L. White-Mahaffey, and Sarah D. Gordon of Steptoe & Johnson, LLP, Washington, D.C. Attorneys for Defendant The Travelers Indemnity Company.

Paula C. Witherow, Esquire, Cooch and Taylor, P.A., Wilmington, Delaware; OF COUNSEL: Robert L. Joyce and Sarah J. Edwards of Littleton Joyce Ughetta Park & Kelly, LLP, New York, New York. Attorneys for Defendant Arrowood Indemnity.

BRADY, J.

INTRODUCTION

This is an action for declaratory judgment. Plaintiffs Tyson Foods, Inc., Tyson Poultry, Inc., Tyson Chicken, Inc., and Cobb-Vantress, Inc.[1] (collectively "Plaintiffs") filed the instant Motion for Partial Summary Judgment[2] against Defendants: (1) Fireman's Fund Insurance Company ("FFIC"), (2) Hartford Accident & Indemnity Company ("Hartford"), (3) Arrowood Insurance Company ("Arrowood"),[3] and (4) Travelers Indemnity Company ("Travelers") (collectively "CGL Insurance Companies" or "Defendants" or "Insurers") to enforce their alleged duty to defend Plaintiffs in two other actions,[4] *State of Oklahoma ex. rel. W.A. Drew Edmondson v. Tyson Foods, Inc*., No. 05-CV-329-GKF-SAJ (N.D. Okla. 2005) ("*Edmondson* Litigation" or "*Edmondson*"); and nine separate actions filed in Arkansas state court by residents of Prairie Grove, Arkansas ("Prairie Grove Litigation") (collectively the "Underlying Suits" or "Underlying Litigation").

Responses were filed by FFIC, Hartford,[5] Arrowood, and Travelers. Thereafter, Plaintiffs filed a Reply Brief, which was followed by the Defendants' Sur-Reply Briefs. In addition, on March 28, 2011, Arrowood filed a Motion to Strike the Affidavit of Dennis Connolly, which Plaintiffs attached to its Reply Brief.

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[1] Cobb-Vantress is based in Siloam Spring, Arkansas. FFIC's Resp. Br. 3. It was formed in 1986 as a joint venture between The Upjohn Company and Tyson Foods, Inc, and was independently operated until August 18, 1994, when it became a wholly owned subsidiary of Tyson Foods, Inc. FFIC's Resp. Br. 3. On January 1, 1994, Cobb-Vantress was included as an insured on policies issued to the Tyson entities. FFIC's Resp. Br. Jan. 14, 2011 at pp. 3-4.

[2] Plaintiffs filed their Motion on November 3, 2010, and subsequently filed a corrected brief in support of its Motion on November 5, 2010. See, Docket Items 364-365.

[3] Arrowood is a defendant in this suit as successor-in-interest to Royal Insurance Co. ("Royal").

[4] Plaintiffs' Motion also seeks to enforce a duty to defend against Defendants in a third underlying suit, *Thompson v. Tyson Foods, Inc*., No. CK-01-452 (Okla. Dist. Ct. 2001) ("*Thompson* Litigation" or "*Thompson*"). Plaintiffs have since dropped their pursuit of any duty to defend claim in the *Thompson* Litigation.

[5] Hartford's response also included a Cross-Motion for Partial Summary Judgment.

Upon consideration, and for the reasons set forth in this Opinion, Arrowood's Motion to Strike is **GRANTED**; Plaintiffs' Motion for Partial Summary Judgment is **GRANTED** subject to the conclusions in this Opinion; and Hartford's Cross-Motion for Summary Judgment is **DENIED**.

FACTUAL BACKGROUND

Plaintiffs owned and/or operated "chicken houses" in Arkansas and Oklahoma's Illinois River Watershed ("IRW").[6] The operation of these "chicken houses" resulted in the production of mass quantities of poultry waste.[7] This waste was disposed of, or processed and used as fertilizer, by Plaintiffs in the vicinity of the IRW.[8] The Underlying Suits involve allegations Plaintiffs' conduct caused property damage and bodily injury as a result of Plaintiffs' poultry management practices.

1. *Underlying Litigation*

On June 19, 2005, the State of Oklahoma filed suit against Tyson Foods, Inc., Tyson Poultry, Inc., Tyson Chicken, Inc. and Cobb-Vantress, Inc., and six other poultry producers in the U.S. District Court for the Northern District of Oklahoma.[9] Oklahoma alleged that the Tyson entities have discharged poultry waste "since approximately 1980" which contaminated surface water, groundwater, and drinking water of the IRW with phosphorous from poultry litter.[10] Oklahoma' Second Amended Complaint contained ten causes of action: (1) cost recovery under CERCLA § 107 associated with monitoring,

[6] FFIC's Resp. Br. Jan. 14, 2011 at p. 4.
[7] *Id*.
[8] *Id*.
[9] Pl.'s Br. Nov. 11, 2010, at p. 3. Oklahoma brought claims under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), the Resource Conversation and Recovery Act ("RCRA"), state and federal common law, and other state regulations.
[10] *Edmondson* Compl. Ex. 5.

assessing and evaluating water quality, wildlife and biota in the IRW; (2) natural resource damages under CERCLA § 107 associated with the injury and destruction of natural resources such as land, fish, wildlife, biota, air, water, groundwater, drinking water supplies belonging to the State of Oklahoma; (3) citizen suit under the Solid Waste Disposal Act; (4) state law nuisance; (5) federal common law nuisance; (6) trespass; (7) violation of Oklahoma's Environmental Quality Act; (8) violation of Oklahoma's Animal Waste Management Plan as set forth in the Oklahoma Registered Poultry Feeding Operations Act; (9) violation of the Oklahoma Concentrated Animal Feeding Operation Act; (10) unjust enrichment/restitution/disgorgement.[11]

Oklahoma alleged that the poultry defendants generate hundreds of thousands of tons of poultry waste each year, and that the defendants were aware that the waste was disposed of on lands within the IRW.[12] Oklahoma further alleged that the poultry defendants were aware that the disposal of the poultry waste led to "the run-off and release of large quantities of phosphorous and other hazardous substances, pollutants and contaminants in the poultry waste onto and from the fields and into the waters of the IRW" and that these pullutants and hazardous materials accumulate in the soils and will continue to run-off and cause damage to the IRW.[13]

Oklahoma sought several remedies, including: past monetary damages, as well as costs and expenses it incurred as a result of the poultry defendants' alleged practices; a declaration that the defendants are liable for all future monetary damages suffered by the State and all costs and expenses incurred by the State in connection with the continuing effects of the defendants' alleged practices; a permanent injunction requiring the

[11] FFIC's Resp. Br. Jan. 14, 2011.
[12] FFIC's Resp. Br. Jan. 14, 2011 at p. 5.
[13] *Id*.

defendants to abate their alleged practices, remediate the IRW, take all necessary actions to abate the alleged threat to health and the environment and to pay all costs associated with assessing the foregoing relief; restitution to the State; disgorgement of all gains defendants realized from their alleged practices; punitive and exemplary damages; statutory penalties; and prejudgment interest and all attorneys' fees and costs.[14]

Oklahoma sought compensatory damages of $800 million, injunctive relief, punitive damages, and attorneys' fees and costs against all of the poultry producer defendants.[15]

The *Edmondson* trial commenced in September 2009.[16] Prior to trial, the defendants moved to dismissed Oklahoma's claims for money damages on the basis that the real party in interest was the Cherokee Nation, an indispensable party, and that Oklahoma did not have standing to prosecute claims for property damage that it did not own or hold.[17] On July 22, 2009, the District Court granted the defendants' motion, leaving only Oklahoma's claims for equitable, injunctive and statutory relief, and attorneys' fees related to those claims.[18] Thus, the only remaining claims were the state law public nuisance and nuisance *per se*, violations of RCRA,[19] federal common law nuisance, trespass, and violations of Oklahoma's Environmental Quality Act, Animal Waste Management Plan and Concentrated Animal Feeding Operation Act.[20] After Oklahoma rested its case in chief, the defendants moved for judgment on partial findings pursuant to Federal Rule of Civil Procedure 52(c), and the court dismissed the

[14] FFIC's Resp. Br. Jan. 14, 2011, Citing Greenberg Aff. at Ex. 4, pp. 34-35 ¶¶1-9.
[15] Pl.'s Br. Nov. 3, 2011, at p. 4, Citing Bracey Aff. ¶ 5.
[16] FFIC's Resp. Br. Jan. 14, 2011 at p. 7.
[17] *Id*.
[18] *Id*. The dismissal of the money damages claims was upheld by the Tenth Circuit Court of Appeals.
[19] "RCRA" refers to the Resource Conservation Recovery Act.
[20] *Id*.

Oklahoma's nuisance *per se* claim, RCRA claim and all claims relating to the allegations of bacterial contamination.[21]

On February 5, 2010, the bench trial concluded, but a ruling has not yet been issued. Tyson alleges to have spent approximately $28 million in attorneys' fees and costs defending the *Edmondson* litigation.[22]

The Prairie Grove cases consist of nine separate suits filed by approximately 150 residents of Prairie Grove, Arkansas, against poultry companies, including Tyson.[23] The Prairie Grove plaintiffs alleged to have sustained bodily injury due to the exposure of arsenic and other substances that emanated from Plaintiffs' poultry waste.[24] According to the Prairie Grove plaintiffs, these practices contaminated the air, soil and water, which caused harm to the Plaintiffs and their families.[25] The plaintiffs sought compensatory and punitive damages for bodily injury.[26]

In 2006, the trial court granted summary judgment in favor of several defendants, including Tyson, however, the Arkansas Supreme Court reversed and remanded the case for trial.[27] A jury found in favor of the defendants, and the plaintiffs' appeals is currently

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[21] *Id*. at 7-8.
[22] Pl.'s Br. Nov. 3, 2010, at p. 5. FFIC claims that they have not been provided with any factual support in evidentiary form to support the amounts of costs the Plaintiffs have claimed to have expended related to the *Edmondson* litigation. As a result, FFIC contends that if they are held to have a duty to defend, they are entitled to a complete discovery with respect to the claimed defense costs. Plaintiffs have received a small portion of their defense costs from Travelers and Hartford, both of which tendered costs subject to a reservation of rights.
[23] *Id*. at 6.
[24] Travelers' Resp. Br. Jan. 14, 2011, at p. 6.
[25] Pl.'s Br. Nov. 3, 2010, at p. 7.
[26] *Id*.
[27] *Id*.

pending.[28] Tyson claims to have spent approximately $1.9 million in costs defending the Prairie litigation.[29]

2. Plaintiffs' CGL Policies

Plaintiffs seeks to enforce a duty to defend against Defendants pursuant to two lines of insurance policies: (1) the Tyson Foods Line, and (2) the Cobb-Vantress Line.[30] The Tyson Foods Line was covered from October 1, 1972 – October 1, 1975 by Arrowood,[31] and from October 1, 1975 - October 1, 1980 by Travelers.[32] Cobb-Vantress was covered from May 1, 1986 – July 1, 1987 by Hartford, and from July 1, 1987 – July 1, 1995 by Fireman's Fund.[33]

With minor variations, the CGL policies obligate each Defendant to defend its policyholder, and pay on behalf of the insured all sums which the insured becomes legally obligated to pay as damages as a result of bodily injury or property damage. In addition, each CGL policy excludes coverage. Furthermore, each CGL policy contains a pollution exclusion, which relieves the insurer from providing a defense or coverage.

Neither Plaintiffs nor Arrowood has located a copy of any CGL policies that Tyson alleges it was issued between 1972 and 1975.[34] Arrowood claims that it cannot

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[28] *Id*.
[29] *Id*.. On March 6, 2006, Travelers agreed to assist Tyson Plaintiffs in the defense of the Prairie Grove litigation pursuant to Travelers Policies for the periods of October 1, 1975 to October 1, 1980. Travelers' Resp. Br. Jan. 14, 2011, at p. 7. Travelers' tender of defense costs was subject to a complete reservation of rights and right of recoupment.
[30] Pl.'s Br. Nov. 3, 2010, at p. 8.
[31] As previously stated, the policies were issued by Arrowood's predecessor, Royal.
[32] *Id*. Tyson Foods also purchased primary CGL coverage after Travelers primary insurance went off the risk in 1980. The primary policies in effect from October 1, 1980, through July 1, 1983, were purchased from Insurance Company of North America and from July 1, 1983, through July 1, 1985, were purchased from Northwestern National Insurance Company.
[33] *Id*.
[34] Arrowood's Resp. Br. Jan. 14, 2011, at p. 8. Arrowood acknowledges that it issued three excess policies to Tyson between 1995 and 1998.

confirm the existence and issuance of such policies.[35] However, Arrowood states that any policy that it would have issued between 1972 and 1975 would have contained, among other conditions, prompt notice and cooperation requirements as a condition precedent to coverage; and pollution exclusions.

PARTIES' CONTENTIONS

Tyson's Position

Tyson contends that it is entitled to judgment as a matter of law because there are no material issues of fact in dispute, and all facts that are needed to decide the duty to defend issue are currently before the Court.[36] Specifically, Tyson claims that the underlying litigation seeks damages arising from both bodily injury and property damage that occurred within the relevant policy periods.

Tyson alleges that the Defendants have a duty to defend "if there is any possibility that the injury or damage [alleged] may fall within the policy coverage.[37] Furthermore, Tyson claims that if there are any ambiguities with respect to whether the allegations contained in the complaint against the insured fall within the policy, they are to be construed in favor the insured.[38]

Tyson further claims that, if there is at least a possibility that the CGL policies cover the underlying claims, the Defendants have a duty to defend Tyson in the

[35] *Id*.
[36] Pl.'s Br. Nov. 3, 2010, at pp. 11, 13.
[37] *Id*. at 12.
[38] *Id*.

underlying suits.[39] Tyson notes that in the *Edmondson* Litigation the plaintiffs have alleged that Tyson's poultry litter management has resulted in injury to the IRW.[40] Similarly, in the *Thompson* litigation the plaintiffs have alleged damage to property.[41] In addition, in *Green*, the plaintiffs alleged that Tyson's conduct has caused bodily harm, including various forms of cancer.[42]

Defendants' Positions

FFIC contends that it has no duty to defend its insured Cobb-Vantress in *Edmondson* because the pollution exclusions contained in its policies preclude coverage.[43]

Hartford has filed a Cross-Motion for Summary Judgment based on its position that the pollution exclusions in their policies preclude coverage for its insured, Cobb-Vantress, in the *Edmondson* litigation.

Travelers maintains that there is no duty to defend in either *Edmondson* or the Prairie Grove suits because the pollution exclusions preclude coverage. Moreover, Travelers contends that they have no duty to defend Tyson in *Edmondson* for property damage and bodily injury that occurred outside of their policy periods.

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[39] *Id*. at 13-14.
[40] *Id*. at 14.
[41] *Id*.
[42] *Id*. at 15. Tyson also argues that some insurers have provided a small portion of defense costs, and that act operates as an admission that they have a duty to defend. However, provision of those costs were subject to a complete reservation of rights, and thus, Tysons' argument is without merit.
[43] Defendants each argue that if the Court finds that it does have a duty to defend, then they are only liable for their equitable portion of Plaintiffs' defense costs.. Furthermore, FFIC, and the other defendants, argue that their policies limit coverage in *Edmondson* because their policies only cover claims seeking "amounts the insured may become legally obligated to pay as damages." The foregoing arguments addresses not whether the insurers have a duty to defend Plaintiffs, but for how much. As previously stated, the Court will address these issues at a later time.

Arrowood contends that they do not owe Tyson a duty to defend in *Edmondson* or Prairie Grove because Tyson has failed to prove both the existence and terms of their policies. Alternatively, Arrowood contends that Tyson's eight-year failure to provide notice relieves Arrowood of its defense obligations.[44] In addition, Arrowood contends that the *Edmondson* complaint allegations property damage and bodily injury that occurred subsequent to the expiration of any policies Tyson claims it was issued. Arrowood also argues that pollution exclusions preclude any obligation to defend Tyson in the underlying suits.

STANDARD OF REVIEW

Summary judgment is granted only if the moving party establishes that there are no genuine issues of material fact in dispute and judgment may be granted as a matter of law.[45] All facts are viewed in a light most favorable to the non-moving party.[46] Summary judgment may not be granted if the record indicates that a material fact is in dispute, or if there is a need to clarify the application of law to the specific circumstances.[47] When the facts permit a reasonable person to draw only one inference, the question becomes one for decision as a matter of law.[48]

[44] Arrowood also argues that it is under no obligation to reimburse Tyson for defense costs incurred prior to January 4, 2010.
[45] Super. Ct. Civ. R. 56(c).
[46] *Hammond v. Colt Industries Operating Corp.,* 565 A.2d 558, 560 (Del.Super. Jun. 23, 1989).
[47] Super. Ct. Civ. R. 56(c).
[48] *Wootten v. Kiger,* 226 A.2d 238, 239 (Del.1967).

DISCUSSION

1. Arrowood's Motion to Strike

On March 28, 2011, Arrowood filed a Motion to Strike the Affidavit of Dennis Connolly, which Plaintiffs attached to its Reply Brief. In essence, the Connolly Affidavit addresses three issues: (1) Arrowood's missing policy argument; (2) FFIC's missing policy argument;[49] and (3) whether the pollution exclusions are ambiguous. At oral argument, Tyson waived reliance of the Connolly Affidavit with respect to all issues except Arrowood's missing policy issue. However, the applicable standard of proof with respect to a missing insurance policy is a question of law, which the court can resolve without reference to the Connolly Affidavit. Therefore, Arrowood's Motion to Strike consideration of the Connolly Affidavit when resolving the pending motions, is **GRANTED**.

2. Choice-Of-Law

Under general conflict of laws principles, the forum court will apply its own conflict of laws rules to determine the governing law in a case.[50] In Delaware, courts have adopted the "most significant relationship" test to determine which law governs.[51] In the context of insurance contract disputes, Delaware courts also consider the RESTATEMENT (SECOND) of Conflicts § 193, which provides:

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[49] At oral argument, counsel agreed that FFIC's missing policy is only relevant to allocation, which will be addressed appropriately, at a subsequent time.
[50] *Lumb v. Cooper*, 266 A.2d 196, 197 (Del. Super. Ct. Apr. 20, 1970).
[51] *Burlington Northern R. Co. v. Allianz Underwriters Ins. Co*., 1994 WL 637011, *4 (Del. Super. Aug. 25, 1994).

> The validity of a contract of fire, surety or casualty insurance and the rights created thereby are determined by the local law of the state which the parties understood was to be the principal location of the insured risk during the term of the policy, unless with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the transaction and the parties, in which event the local law of the other state will be applied.

"In cases like these, where a company obtains insurance for risks and operations in a variety of jurisdictions, Delaware courts have placed great weight on where an insured has its headquarters as the 'situs which link[s] all the parties together.'"[52] This is because the insured's headquarters staff is typically involved in the contracting, negotiation, and performance of an insurance contract.[53]

The parties agree that if any conflict of law exists, Arkansas law governs.[54] The Court concurs. In this case, the CGL policies issued to Plaintiffs were procured, negotiated, and delivered to Cobb-Vantress and Tyson at their respective Arkansas headquarters.[55] Moreover, although Arrowood contests whether they in fact issued policies to Tyson, it concedes that if a policy was issued, it was likely negotiated, issued, and delivered in Arkansas.[56]

Other than the fact that the Tyson entities are incorporated in Delaware, this state has no real interest in applying its own laws, to insurance policies that were issued in Arkansas, to determine coverage liability related to underlying actions that arose from Plaintiffs' operations in Arkansas and Oklahoma.[57] Therefore, where any conflict of law exists, Arkansas law will govern. However, when the result is the same under the law of

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[52] *Viking Pump, Inc. v. Century Indem. Co.*, 2009 WL 6657794, at*87 (Del. Ch. Oct. 14, 2009), Citing *Monsanto Co. v. Aetna Cas. & Sur. Co.,* 1991 WL 236936, at *3 (Del.Super. Oct. 29, 1991).
[53] *Id*. at *88.
[54] Pl.'s Rep. Br. Mar. 10, 2011, at p. 3.
[55] FFIC's Resp. Br. Jan. 14 , at p. 12, n. 24.
[56] Arrowood's Resp. Br. Jan. 14, at p. 14.
[57] FFIC's Resp. Br. Jan. 14 , at p. 12, n. 24.

any of the possible jurisdictions involved, the Court need not engage in a choice of law analysis.[58] The Restatement (Second) contemplates first an issue-by-issue approach to determining choice of law.[59]

3. Duty To Defend

In general, Delaware and Arkansas law are in accord with respect to an insurer's duty to defend, therefore, the Court will apply Delaware law.[60] When determining an insurer's duty to indemnify and/or defend a claim asserted against a policy holder, the Court will look to the allegations in the underlying complaint to decide whether the action against the policy holder states a claim covered by the policy.[61] Generally, an insurer's duty to defend is broader than its duty to indemnify an insured.[62] An insurer has a duty to defend where the factual allegations in the underlying complaint potentially support a covered claim.[63] The insurer will have a duty to indemnify only when the facts in that claim are actually established.[64]

The Court generally will look to two documents in its determination of the insurer's duty to defend: the insurance policy and the pleadings of the underlying

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[58] *Parlin v. Dyncorp Int'l, Inc.*, 2009 WL 3636756, *3 (Del. Super. Ct. Sept. 30, 2009).
[59] *Liggett Group Inc. v. Affiliated FM Ins. Co.*, 788 A.2d 134, 137 (Del. Super. Ct. 2001). With respect to some issues, the parties disagree whether a conflict exists. The Court has engaged in a conflict of law analysis regarding those issues.
[60] Plaintiffs argues that, under Arkansas law, a court may look beyond allegations in the underlying complaint to determine whether a duty to defend exists. Pl.'s Br. Nov. 3, at p. 11, n. 8. To support their position, Plaintiffs rely upon *Commercial Union Ins. Co. v. T. Henshall*, 553 S.W.2d 274 (Ark. 1977), a case in which the Arkansas Supreme Court decided to look beyond the underlying complaint to determine whether the insurer had a duty to defend. However, the court limited this exception to cases where the insurer closes its eyes to facts that "were easily ascertainable." In the context of complex mass tort litigation, facts are not "easily ascertainable." The *Henshall* case involved a simple negligence claim, a situation easy to distinguish from the Underlying Suits.
[61] *Am. Ins. Group v. Risk Enter. Mgmt., Ltd.,* 761 A.2d 826, 829 (Del.2000).
[62] *Liggett Group,* 798 A.2d 1024, 1030.
[63] *DynCorp v. Certain Underwriters at Lloyd's, London,* 2009 WL 3764971, at *3 (Del. Super. Nov. 9, 2009).
[64] *LaPoint v. AmerisourceBergen Corp.,* 970 A.2d 185, 197 (Del.2009)

lawsuit.[65] The duty to defend arises where the insured can show that the underlying complaint, read as a whole, alleges a risk potentially within the coverage of the policy.[66]

The insured bears the burden of proving that a claim is covered by an insurance policy.[67] Where the insured has shown that a claim is covered by an insurance policy, the burden shifts to the insurer to prove that the event is excluded under the policy.[68]

4. Arrowood's Lost Policy Issue

Arrowood contends that Tyson is required to, and has not, proven both the existence and contents of any CGL policies Arrowood allegedly issued to Tyson between 1972 and 1975.[69] Further, Arrowood contends that there is a conflict between Arkansas and Delaware law because Arkansas law requires an insured to prove both the existence and terms of a lost policy by clear and convincing evidence, while Delaware law is not clear on this point.[70] Tyson argues that no conflict exists, and therefore, Delaware law governs, which, according to Tyson, applies the preponderance of the evidence standard to lost insurance policies.

As a threshold matter, the Court must determine whether a conflict between Arkansas and Delaware law exists. If so, Arkansas law applies. If not, Delaware law governs.

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[65] *See KLN Steel Products Co., Ltd. v. CAN Ins. Cos.,* 278 S.W.3d 429, 434 (Tex.App. 2008).
[66] *Cont'l Cas. Co. v. Alexis I. duPont Sch. Dist.,* 317 A.2d 101, 103 (Del.1974).
[67] *E.I. du Pont de Nemours & Co. v. Allstate Ins. Co.,* 693 A.2d 1059, 1061 (Del.1997).
[68] *State Farm Fire & Cas. Co. v. Hackendorn,* 605 A.2d 3, 7 (Del.Super.1991).
[69] A lost policy defense has also been raised by FFIC. However, both FFIC and Plaintiffs agree that with respect to FFIC, the lost policy issue is only relevant to an allocation determination. Therefore, as previously stated, the Court need not engage in that inquiry at this time.
[70] Arrowood's Resp. Br. Jan. 14, at p. 12.

Arrowood relies upon four cases to support its position that, under Arkansas law, a party making a claim under an allegedly lost insurance policy bears the burden of proving both the existence and terms of the policy by clear and convincing evidence. However, all four of those cases deal with instruments other than insurance policies.[71] Specifically, the cases address the standard of proof required by a party making a claim under a lost will, contract, and deed.[72] Thus, no case law in Arkansas addresses the standard of proof required for a lost insurance policy. Likewise, there is no case establishing Delaware law regarding this issue.

Since neither jurisdiction has decided the issue using its own laws,[73] the Court will not read a conflict where none exists, and will apply the law of the forum state, Delaware.[74] Since no court in Delaware has previously articulated what standard of

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[71] The Court appreciates that the court in *Monsanto Co. v. Aetna Cas. and Sur. Co*., 1993 WL 563244 (Del. Super. Dec. 21, 1993), in applying Missouri law, found that lost pre-nuptials and notes were analogous to lost insurance policies. However, as discussed below, these instruments are very different in nature than commercial insurance policies. Therefore, the Court finds that Arkansas has not addressed the issue of what standard of proof is required to prove the existence and terms of a lost insurance policy.

[72] *See Avington v. Hammons*, 2001 WL 1626927 (Ark. App. 2001); *Abdin v. Abdin*, 94 Ark. App. 12 (Ark. App. 2006); *Witt v. Graves*, 302 Ark. 160 (Ark. 1990); *Schwartz v. Hardwicke*, 229 Ark. 134 (Ark. 1958). Arrowood also cites in a footnote, several cases from other jurisdictions for the position that the clear and convincing standard is a majority view. Arrowood's Br. Jan 14, p. 15, n. 54.

[73] In *Monsanto Co. v. Aetna Cas. and Sur. Co*., 1993 WL 563244 (Del. Super. Dec. 21, 1993), the court applied Missouri, not Delaware, law. In addition, in *Remington Arms Company v. Liberty Mutual Insurance Company*, 810 F.Supp. 1420 (D.Del. 1992) the Delaware District Court held the preponderance of the evidence standard applied to claims of lost insurance policies. However, the court in that case was interpreting the burden of proof under the Federal Rules of Evidence. As the court in Monsanto explained in dicta, the holding in Remington is persuasive concerning the Delaware Rules of Evidence.

[74] *In re Teleglobe Comm. Corp*., 493 F.3d 345, 358 (3d. Cir. 2007) (explaining that a court should only engage in a choice-of-law analysis when there is an actual conflict among the proffered legal regimes). Moreover, if the Court were to consider Plaintiffs' burden of proof a procedural issue instead of substantive, the same result would occur, Delaware law would apply. *Monsanto Co. v. Aetna Cas. and Sur. Co*., 1993 WL 563244 (Del. Super. Dec. 21, 1993) (explaining that "as a general rule in Delaware, when the law of a foreign state is applied to substantive issues, the law of Delaware is usually applied to procedural issues."). In Monsanto, the court was applying Missouri law to all substantive issues in the case, and further held that Missouri's clear and convincing standard was substantive because it was "so inseparably interwoven with the substantive rights as to render a modification" of the rule that the forum state's procedural law applies. However, the court's holding was based upon the fact that ordinarily a claimant must prove the elements of his case by a preponderance of the evidence, and "[w]hen a rule singles out a narrow issues and gives the issue special treatment, the rule may be designed to affect the trial's outcome." In this case, Arkansas has not declared the clear and convincing standard applies to lost

proof is required to prove the existence and terms of a lost insurance policy, this Court must decide which standard to apply while considering the principles supporting the application of each proffered standard.

Ordinarily, a plaintiff is required to prove the elements of a case by a preponderance of the evidence standard.[75] However, as noted previously, in rare circumstances, the more demanding clear and convincing evidence standard may be required.

In *Remington Arms Company v. Liberty Mutual Insurance Company*, the United States District Court for the District of Delaware explained that the clear and convincing standard is used in cases involving lost wills or oral contracts because the "danger of fraud is highly prevalent."[76] In contrast,

> [m]issing insurance policies are in no way analogously vulnerable to fraud because the nature of the documents used to prove the existence and contents of lost or missing insurance policies are inherently more reliable than the majority of papers offered into evidence.[77]

The Court finds the reasoning of the District Court relevant and persuasive. The considerations supporting the application of the heightened clear and convincing standard of proof are absent in the context of a lost insurance policy. Therefore, Plaintiffs are required to demonstrate both the existence and terms of the missing policies by a preponderance of the evidence.

Whether, in fact, Tyson has met that standard necessitates an evaluation of the evidence, which "requires numerous inferences to be drawn and the drawing of those

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insurance policy issues, thus, the general rule that the standard of proof is procedural and the forum state's law applies governs this case. Either way, the result is the same.

[75] *Remington Arms Company*, 810 F.Supp. 1420, 1425.

[76] *Id*.

[77] *Id*.

inferences rightly belongs to the province of the finder of fact."[78] Therefore, whether Tyson has met its burden of proof will be an issue that is to be resolved at trial. As a result, the Court will not address any remaining issues arising under CGL policies Arrowood allegedly issued until Plaintiffs have met their burden of proof as to the existence and terms of those policies.

5. Underlying Complaints Have Triggered the CGL Policies

To trigger the duty to defend under a CGL policy, the allegations in the underlying complaint must allege bodily injury or property damage occurred during the policy period.[79] In addition,

> [d]etermining whether an insurer is bound to defend an action against its insured requires adherence to the following principles: (1) where there has been doubt as to whether his complaint against the insured alleges a risk insured against, that doubt should be resolved in favor of the insured; (2) any ambiguity in the pleadings should be resolved against the carrier; and (3) if even one count or theory alleged in the complaint lies within the policy coverage, the duty to defend arises.[80]

Hartford and FFIC provided CGL insurance to Cobb-Vantress, which is a defendant only in the *Edmondson* litigation.[81] Neither Hartford nor FFIC have argued that the operable complaint in *Edmondson* failed to allege claims of property damage or bodily harm outside of their respective policy periods.

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[78] *Id.* at 1422.
[79] *Monsanto Co. C.E. Health Comp. & Liab. Ins. Co*., 652 A.2d 30, 34-35 (Del. 1994). No party has contended Arkansas and Delaware law conflict with respect to triggering the duty to defend, nor has the Court found a conflict. In the absence of a conflict, Delaware law applies. *Parlin v. Dynacorp Int'l, Inc*., 2009 WL 3636756, *3. (Del. Super. Sep. 30, 2009)
[80] *Pacific v. Liberty*, 956 A.2d at 1254-55 (Del. 2008).
[81] FFIC's Resp. Br. Jan. 14, 2011, at p. 1. n.1.

However, Travelers contends that its duty to defend has not been triggered in *Edmondson* because the complaint in that case alleges property damage that it claims postdates all of its policy periods. Specifically, Travelers contends that "there is simply *no* allegation in *Edmondson* that the alleged practices resulted prior to October 1, 1980 (the end of the last Travelers Policy) in any property damage for which the State now seeks relief."[82] However, Exhibit 5 of the *Edmondson* complaint alleges that Tyson's poultry litter disposal practices began in "approximately 1980," which is the last year Travelers' policy was in effect. This is sufficient to trigger Travelers' duty to defend in *Edmondson* because any doubts of coverage are to be resolved in favor of the insured.[83]

In sum, Plaintiffs have made an initial showing that Hartford, FFIC, and Travelers's duty to defend has been triggered in *Edmondson*. In addition, Travelers has not contested Plaintiffs' claim that the allegations in the Prairie Grove cases occurred during Travelers's policy periods.[84]

6. Pollution Exclusions

Defendants each assert that they do not have a duty to defend because their respective pollution exclusions precludes coverage for the underlying actions. In response, Tyson contends that the exclusions do not preclude coverage because they are ambiguous as a matter of law, and therefore, there is at least a possibility that the underlying claims are covered by the CGL policies, which means the duty to defend is triggered. Specifically, Tyson claims that the exclusions in FFIC and Hartford's policies, which defined "pollutant" similarly, are ambiguous as a matter of law. In addition,

[82] Travelers Resp. Br. Jan. 14, 2011, at p. 26.
[83] *Pacific v. Liberty*, 956 A.2d at 1254-55.
[84] Travelers has not claimed that the Prairie Grove cases allege damages occurring outside of their policies.

Tyson argues that Travelers has not met its burden that its pollution "expected or intended" exclusion bars coverage in the Prairie Grove cases. Further, Tyson claims that Travelers, with respect to the *Edmondson* case, has failed to prove that their "sudden and accidental" exclusion precludes coverage.

a. CGL Pollution Exclusions

The FFIC and Hartford pollution exclusions contain similar language. The FFIC pollution exclusion states:

> This insurance does not apply to:
>
> f.(1) Bodily injury or property damage arising out of the actual, alleged or threatened discharge, dispersal, release or escape of pollutants…
>
> * * * * *
>
> f.(2) Any loss, cost or expense arising out of any:
>
> (a) Request, demand, order or statutory or regulatory requirements that any insured or others test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of pollutants, or
>
> (b) Claim or suit by or on behalf of a governmental authority for damages because of testing for damages for, monitoring, cleaning up, removing, containing, treating, detoxifying or neutralizing, or in any way responding to, or assessing the effects of pollutants.
>
> Pollutants means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.

Hartford's CGL policies contain the following pollution exclusion:

> The company shall have no obligation under this policy:
>
> (1) to investigate, settle or defend any claim or suit against any insured alleging actual or threatened injury or damage of any nature or kind to persons or property which arises out of or would not have occurred but for the pollution hazard;
>
> (2) to pay any damages, judgments, settlements, loss, costs or expenses that may be awarded or incurred by reason of any such claim or suit or any such injury or damage in complying with any action authorized by law and relating to such injury or damage.
>
> As used in this endorsement, "pollution hazard" means an actual exposure or threat of exposure to the corrosive, toxic or other harmful properties of any solid, liquid, gaseous or thermal pollutants, contaminants, irritants or toxic substances, including smoke, vapors, soot, fumes, acids or alkalis, and waste materials consisting of or containing any of the foregoing.[85]

The Travelers policies contain pollution exclusions depending on where the alleged bodily injury or property damage occurs. If it occurs outside of Oklahoma (Prairie Grove cases) the following exclusion applies:

> This insurance does not apply…to *bodily injury* or *property damage* arising out of any emission, discharge, seepage, release or escape of any liquid, solid, gaseous or thermal waste or pollutant
>
> (i) if such emission, discharge, seepage, release or escape is either expected or intended from the standpoint of any *insured* or any person or organization for whose acts or omissions any *insured* is liable…[86]

The Travelers policies applicable to the *Edmondson* litigation contain the following language:

> With respect to *bodily injury* or *property damage* occurring in North Caroline, Oklahoma, Texas and West Virginia:

[85] Hartford's Resp. Jan. 14, 2011, at p. 2-3.
[86] Travelers' Resp. Br. Jan. 14, 2011, at p. 11.

> (a) it is agreed that the insurance does not apply to such *bodily injury* or *property damage* arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any watercourse or body of water, *but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental[.]*

b. Under Arkansas law, Pollution Exclusions are ambiguous as a matter of law[87]

Tyson contends that FFIC and Hartford's pollution exclusions are ambiguous as a matter of Arkansas law, and therefore, there is a possibility of coverage, which triggers the insurer's duty to defend. The insurers disagree.

Before interpreting the pollution exclusions in this case, it is important to remember basic rules of insurance contract interpretation under Arkansas law. In general, when the terms of an insurance policy are clear, the language of the policy controls.[88] "If the policy is unambiguous, and only one reasonable interpretation is possible, the court will give effect to the plain language of the policy without resorting to rules of construction."[89] If the language of the policy is fairly susceptible to more than one reasonable interpretation, it is considered ambiguous, and it will be "liberally construed in favor of the insured and strictly against the insurer."[90] To exclude coverage in an insurance policy, the language must be "clear and unambiguous." Whether the insurer has met this standard is a question for the court to resolve.[91] However, "terms of an insurance contract are not to be rewritten under the rule of strict construction against

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[87] All parties have conceded that Arkansas law governs the issue of whether the CGL "pollution exclusions" preclude coverage.
[88] *Anderson Gas & Propane, Inc. v. Westport Ins. Corp*., 140 S.W.3d 504, 507 (Ark. Ct. App. 2004)
[89] *Id*.
[90] *Id*.
[91] *Id*.

the company issuing it so as to bind the insurer to a risk that is plainly excluded and for which it was not paid."[92]

The Supreme Court of Arkansas has interpreted pollution exclusions similar to those relevant in this case. In *Minerva Enterprises, Inc. v. Bituminous Casualty Corp.*, the Arkansas Supreme Court was forced to interpret the term "pollutants" as used in a policy exclusion. In *Minerva*, the insured owned a mobile park home and was responsible for maintaining the septic system on the property. One of the tenants filed suit after their mobile home was flooded with solid and liquid sewage originating from the septic tank. The insured requested defense costs from its insurer pursuant to its commercial liability insurance policy. However, the insurer refused and the insured filed a declaratory judgment action. The trial court granted the insurer's summary judgment on the basis that the policy's pollution exclusion precluded coverage. The endorsement containing the exclusion contained the following definition of "pollutants":

> Pollutants means any solid, liquid, gaseous or thermal irritant or contaminant, including, smoke, vapor, soot, fumes, acides, alkalis, chemicals, and waste. Waste includes materials to be recycled, reconditioned or reclaimed.[93]

The insured appealed to the Supreme Court of Arkansas, and argued that the "definition of 'pollutants' in the policy was intended to exclude industrial wastes, not common household wastes, and, at best, the definition [was] ambiguous."[94] The Arkansas Supreme Court relied upon cases from other jurisdictions, which held that pollution exclusions were "intended to prevent persistent polluters from getting insurance

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[92] *Id*.
[93] *Minerva Enterprises, Inc. v. Bituminous Casualty Corp,* 851 S.W.2d 403, 404 (Ark. 1993).
[94] *Id*.

coverage for general polluting activities."[95] The court found this interpretation "to be a plausible one," and held that "the pollution exclusion in the case before us is, at least, ambiguous."[96] The court then explained that the Court's determination that an ambiguity existed meant that the issue was to be resolved by the presentation of extrinsic evidence to be considered by the finder of fact.[97]

Similarly, in *Anderson Gas & Propane, Inc., Westport Ins. Corp*., the Court of Appeals of Arkansas, Division II, held that an insurance policy's pollution exclusion was ambiguous as a matter of law.[98] In that case, the insured contended that a gasoline leak was the kind of situation to which the pollution exclusion applies. The court held that Minerva "does not hold that, as a matter of law, either position is correct," and therefore, an ambiguity existed requiring a finder of fact to determine the meaning of the term.[99] The court concluded by explaining since there is an ambiguity in the contract, "there is a possibility that the injury or damage may fall within the policy coverage," and therefore, the duty to defend is triggered.[100]

In *State Auto Property & Cas. Ins. Co. v. The Arkansas Dept. of Environmental Quality*,[101] the Arkansas Supreme Court declined to reverse *Minerva*. The court concluded that "[i]n short, this court continues to believe that the pollution-exclusion language is subject to different interpretations."[102]

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[95] *Id*.
[96] *Id*. at 406.
[97] *Id*. at 406.
[98] 140 S.W.3d 504, 505 (Ark. App. 2004)
[99] *Id*. at 508.
[100] *Id*.
[101] 370 Ark. 251 (Ark. 2007).
[102] *Id*. at 258. The pollution exclusion defined "pollutants" to "mean 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." *Id*. at 256.

This Court's task is not to evaluate the merits of the Arkansas Supreme Court's position with respect to its interpretation of pollution exclusions, rather, it is obligated to apply that court's jurisprudence to this case. With that in mind, the Court must hold that FFIC and Hartford's pollution exclusions in the case at bar are ambiguous as a matter of law, and therefore, there is a possibility that those exclusions do not preclude coverage. In the context of a duty to defend claim, that is enough to deny Defendants' argument that the pollution exclusions preclude their duty to defend.

c. "Expected or Intended" and "sudden and accidental"

For property damage or bodily injury occurring outside of Oklahoma, as in the Prairie Grove cases, Travelers's policies exclude coverage for any "emission, discharge, seepage, release or escape of any liquid, solid, gaseous or thermal waste or pollutant…is such emission, discharge, seepage, release or escape is either expect or intended from the standpoint of any insured or any person or organization for whose acts or omissions any insured is liable." Because the Court has found that the term pollutant is ambiguous as a matter of law, the Court need not consider whether Travelers's "expected or intended" exclusion adds any further ambiguity. Likewise, the Court need not consider whether the "sudden and accidental" exclusion in the Travelers's policy applicable to the *Edmondson* case, is ambiguous as a matter of law. The result is the same no matter the analysis.

CONCLUSION

In sum, Arrowood's Motion to Strike is **GRANTED**; Plaintiffs' Motion for Partial Summary Judgment is **GRANTED** subject to the conclusions in this Opinion; and Hartford's Cross-Motion for Summary Judgment is **DENIED**. With respect to the *Edmondson* litigation, FFIC, Hartford, and Travelers have a duty to defend. No insurer has a duty to defend Plaintiffs in *Thompson*. Travelers has as a duty to defend its insureds in Prairie Grove. Arrowood's duty to defend is contingent upon Tyson meeting is burden of proof with respect to the existence and terms of the lost policies. Finally, matters of allocation and monetary liability will be determined once those issues have been properly presented to the Court.

IT IS SO ORDERED.

M. Jane Brady
Superior Court Judge