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

HIGH VOLTAGE BEVERAGES, LLC, Plaintiff, v. HARTFORD CASUALTY INSURANCE COMPANY Defendant.	)))))))))	C.A. No.: 10C-09-002 FSS CCLD **E-FILED**

Submitted: August 26, 2011
Decided: November 30, 2011

ORDER

Upon Defendant Hartford Casualty Insurance Company's Motion to Dismiss - *GRANTED*.

This is an insurance coverage case. High Voltage had liability insurance with Hartford Casualty. High Voltage sued Coca-Cola in North Carolina, claiming trademark infringement. Coca-Cola counterclaimed, pleading champerty and maintenance. Hartford, citing its policy, refused High Voltage's champerty and maintenance defense. High Voltage then brought suit here, seeking a declaration that Hartford must pay for High Voltage's defense against Coca-Cola's counterclaim. High Voltage also alleges Hartford breached its contract in bad faith and committed consumer fraud against High Voltage.

The policy does not expressly or impliedly promise champerty and maintenance coverage. Hartford's policy was not triggered, and its refusal to defend High Voltage was not in bad faith. Moreover, Hartford did not violate Delaware's Consumer Fraud Act.[1]

I.

High Voltage Beverages, LLC is a Delaware limited liability company with its principal place of business in North Carolina. High Voltage markets and distributes beverages, including VOLT, an electrolyte-replacing soft drink. Hartford Casualty Insurance Company, a Connecticut corporation, sells insurance nationwide.

On August 12, 2008, High Voltage sued Coca-Cola in the United States District Court for the Western District of North Carolina, alleging Coke infringed on High Voltage's VOLT trademark rights by using the trademark VAULT on a similar electrolyte-replacing soft drink. On February 17, 2010, Coke raised champerty and maintenance as a counterclaim, alleging High Voltage "secured a litigation-funding investment group and created a complex web of entities to hide the true litigant."

On August 19, 2008, High Voltage bought liability insurance from Hartford, covering liability from August 19, 2008 to August 19, 2009, with an annual renewal to August 19, 2010. The policy's Business Liability Coverage Form

[1] 6 *Del. C.* §§ 2511-2527.

provides coverage for " 'personal and advertising injury' caused by an offense arising out of [High Voltage's] business, but only if the offense was committed during the policy period." Malicious prosecution is listed as a covered "personal and advertising injury." Champerty and maintenance, as such, are not mentioned in the policy. As discussed below, High Voltage contends Hartford's duty to defend Coke's champerty and maintenance counterclaim arises through the malicious prosecution coverage.

On December 3, 2009, Hartford sent High Voltage a letter, asserting bases for disclaiming coverage against Coke's counterclaims. On June 16, 2010, Hartford sent High Voltage a second letter reaffirming its disclaimer. That led to this litigation.

II.

In a Rule 12(b)(6) motion to dismiss, the court must determine whether High Voltage has stated a claim upon which relief can be granted. The court must accept all factual allegations in the complaint, and deny the motion unless the plaintiff could not recover under any reasonably conceivable circumstances.[2]

This case involves contract interpretation. Courts interpret insurance policies as a matter of law.[3] In contract disputes, Delaware courts look to the law of

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[2] *Spence v. Funk,* 396 A.2d 967, 968 (Del. 1978).

[3] *Emmons v. Hartford Underwriters Ins. Co.,* 697 A.2d 742, 745 (Del. 1997).

the state with the "most significant relationship" to the dispute.[4] The parties agree that North Carolina substantive law governs. If the results are the same under the different laws, it is a false conflict and choice-of-law analysis is not needed.[5]

An insurance policy's coverage obligation is determined by its language.[6] If the language is unambiguous, the parties are bound by its general meaning.[7] Insurance contract ambiguities "will be construed most strongly against the insurance company that drafted it."[8] Ambiguity, however, does not exist simply because the parties disagree about a contract's construction.[9] Parties to a contract are also generally presumed to take all existing laws into account when entering into a contract.[10] In this context, it bears mention that North Carolina still recognizes champerty and maintenance.[11]

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[4] *Liggett Group Inc., v. Affiliated FM Ins. Co.,* 788 A.2d 134, 137 (Del. Super. 2001).

[5] *Deuley v. DynCorp Intern., Inc.,* 8 A.3d 1156, 1160 (Del. 2010).

[6] *Woodward v. Farm Family Cas. Ins. Co.,* 796 A.2d 638, 641 (Del. 2002).

[7] *Id.* at 641-42.

[8] *Id.* at 642.

[9] *O'Brien v. Progressive Northern Ins. Co.,* 785 A.2d 281, 288 (Del. 2001).

[10] *Koval v. Peoples*, 431 A.2d 1284, 1285 (Del. Super. 1981). *See also Wise v. Harrington Grove Community Ass'n, Inc.*, 584 A.2d 731, 739 (N.C. 2003).

[11] *See, e.g., High Voltage Beverages, L.L.C. v. Coca-Cola Co.*, 2010 WL 2342458, at *2 (W.D.N.C. June 8, 2010) ("Champerty and maintenance are not dead in North Carolina.").

III.

As presented above, High Voltage seeks a declaration that "Hartford [must] pay on High Voltage's behalf those sums that High Voltage becomes legally obligated to pay as damages because of 'personal and advertising injury.'" Declaratory judgment will be granted only when there is an actual controversy that the is ripe for judicial declaration.[12] Originally, High Voltage demanded defense and indemnification. On April 21, 2011, a North Carolina federal jury found that High Voltage did not commit champerty and maintenance.[13] That mooted the demand for indemnification, but it left High Voltage's demand that Hartford pay for High Voltage's successful defense.

High Voltage also seeks a declaration that "Hartford has a duty to defend High Voltage against any suit seeking such damages," including Coke's champerty and maintenance counterclaim. Courts typically look to the underlying complaint's allegations to decide whether the third party's action against the insured states a covered claim, triggering the duty to defend.[14] A liability insurer's duty to defend is

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[12] *Playtex Family Products, Inc. v. St. Paul Surplus Lines Ins. Co.*, 564 A.2d 681, 687 (Del. Super. 1989).

[13] Verdict Form, *High Voltage Beverages, LLC v. Coca-Cola Co.,* No. 3:08-CV-367 (W.D.N.C. Apr. 21, 2011).

[14] *Continental Cas. Co. v. Alexis I. DuPont School Dist.,* 317 A.2d 101, 103 (Del. 1974).

broader than its policy's terms indicate.[15] But, "this principle does not require that a defense be provided in a case where, interpreting the plaintiff's allegations in the light most favorable to the insured, none of the alleged grounds for recovery would be covered under the policy."[16]

High Voltage's claim is not explicitly covered by the policy's language. When the policy language is clear and unambiguous, a party will be bound by its plain meaning.[17] High Voltage was insured in North Carolina. It brought suit in North Carolina and it was countersued in North Carolina. It is agreed that the substantive controlling law is the law of North Carolina. North Carolina still recognizes champerty and maintenance as distinct causes of action. As discussed in the next section, in many places champerty and maintenance have been engulfed by malicious prosecution, but not in North Carolina.

High Voltage also alleges Coke's counterclaim occurred during the policy coverage period. High Voltage sued Coke before the policy period, and Coke's counterclaim arguably was while the policy was on risk. Coke, however, argues, "High Voltage [was created] as a 'special purpose entity' that was assigned

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[15] *Charles E. Brohawn & Bros., Inc. v. Employers Commercial Union Ins. Co.,* 409 A.2d 1055, 1058 (Del. 1979).

[16] *Id.*

[17] *Woodward,* 796 A.2d at 641-42.

the VOLT trademark rights on or about August 1, 2008, less than two weeks before [it sued Coke]." Coke also argues, "High Voltage's structure clearly constitutes champerty and maintenance, wherein [it] has interfered . . . with a purpose of stirring up strife and continuing litigation." Thus, High Voltage's alleged champertous behavior started before the trademark litigation, and before the policy coverage period.[18]

Put another way, the alleged tort, including the allegedly tortious lawsuit's filing, happened before the policy was on risk. Coke's counterclaim, therefore, was only a claim about an earlier tort. And, as set out above, Hartford's Business Liability Coverage Form does not provide claims-made coverage, only coverage for claims arising during the policy period. The court rejects High Voltage's argument that the alleged champerty and maintenance occurred during the policy's term because it is an on-going tort. The alleged tort was complete, even if its damages continued, when the tortious lawsuit was filed, at the latest.

IV.

As mentioned, the policy lists malicious prosecution as a covered "personal and advertising injury." High Voltage claims champerty and maintenance

[18] *See, e.g., City of Erie, Pa. v. Guar. Nat. Ins. Co.,* 109 F.3d 156, 162 (3d Cir. 1997) ("In [insurance contract] cases, the occurrence takes place when the injuries first manifest themselves.").

are archaic torts, and, following the modern legal trend, have been "engulfed" by malicious prosecution. High Voltage alleges that because Hartford's policy covers malicious prosecution, it necessarily covers champerty and maintenance.

It may be that nowadays, most places view champerty, maintenance, and malicious prosecution as the same species, as they all involve pursuing litigation for an improper motive. North Carolina, however, does not follow the modern legal trend. Malicious prosecution has not engulfed champerty and maintenance in North Carolina.[19]

Under North Carolina law, malicious prosecution occurs when "a defendant initiated the earlier proceeding, that he did so maliciously and without probable cause, and that the earlier proceeding terminated in plaintiff's favor."[20] Champerty and maintenance involve the improper transfer or assumption of a viable lawsuit. Champerty occurs when "a stranger makes a bargain with a plaintiff or defendant to divide the . . . matter sued for between them if they prevail at law, whereupon the champertor is to carry on the party's suit at his own expense."[21] Maintenance requires "an officious intermeddling in a suit . . . by maintaining or

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[19] *High Voltage Beverages, L.L.C.,* 2010 WL 2342458, at *2 ("Champerty and maintenance are not dead in North Carolina.").

[20] *Stanback v. Stanback,* 254 S.E.2d 611, 625 (N.C. 1979).

[21] *Wright v. Commercial Union Ins. Co.,* 305 S.E.2d 190, 192 (N.C. Ct. App. 1983).

assisting either party with money or otherwise to prosecute or defend it."[22]

As mentioned, parties generally are presumed to have taken all existing laws into account when entering into a contract.[23] High Voltage is bound by North Carolina's refusal to follow the modern legal trend.[24] Therefore, High Voltage cannot establish that "[Hartford's] sale of coverage for malicious prosecution must necessarily entail the sale of coverage for champerty and maintenance." As discussed, in North Carolina, champerty and maintenance are not merely other versions of malicious prosecution.

V.

High Voltage also alleges Hartford violated Delaware's Consumer Fraud Act.[25] The claim falls on its face as a matter of law because the insurance was sold in North Carolina, High Voltage sued Coke in North Carolina, and was countersued in North Carolina. And besides, there is no allegation, much less pleaded facts,[26] that Hartford misled or tricked High Voltage into believing it was selling coverage not

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[22] *Id.*

[23] *Koval,* 431 A.2d at 1285; *Harrington Grove Community Ass'n, Inc.*, 584 A.2d at 739.

[24] *Harrington Grove Community Ass'n, Inc.,* 584 S.E.2d at 739 ("[L]aws in force at the time of the execution . . . become a part of the contract . . . [and] affect the contract's validity, construction, discharge and enforcement.").

[25] 6 *Del. C.* §§ 2511-2527.

[26] Super Ct. Civ. R. 9(b).

only for malicious prosecution, but also for champerty and maintenance claims. Much less was Hartford promising to defend a tort allegedly committed by High Voltage before Hartford was on risk.

VI.

For the foregoing reasons, Hartford's Motion to Dismiss is **GRANTED.**

IT IS SO ORDERED.

/s/ Fred S. Silverman
Judge

cc: Prothonotary (Civil)
pc: John S. Spadaro, Esquire
James D. Taylor, Jr., Esquire