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Nos. 23-1167/1195

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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KELLY L. STEPHENS, Clerk

GREAT AMERICAN FIDELITY INSURANCE COMPANY, Plaintiff - Appellant/Cross - Appellee, v. STOUT RISIUS ROSS, INC.; STOUT RISIUS ROSS, LLC, Defendants – Appellees/Cross - Appellants.	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN OPINION

Before: GRIFFIN, BUSH, and LARSEN, Circuit Judges.

JOHN K. BUSH, Circuit Judge. In this insurance dispute, plaintiff Great American Fidelity Insurance Company sought a declaration that it had no duty to defend defendants Stout Risius Ross, Inc. and Stout Risius Ross, LLC (collectively, Stout) in lawsuits related to financial valuations for a bankrupt company and its retirement plan. The district court ruled that Stout's insurance policy obligated Great American to defend Stout in the underlying litigation until only claims falling within an exclusion provision remained, and that Stout had to reimburse Great American for defending Stout after the exclusion applied. We AFFIRM.

I.

Stout's policy obligated Great American to pay, in excess of the deductible, sums that "the Insured becomes legally obligated to pay as Damages and Claim Expenses as a result of a Claim first made against the Insured . . . by reason of an act or omission . . . in the performance of

Professional Services by the Insured or by any person for whom the Insured is legally responsible." Policy, R. 19-1, PageID 583 (emphasis omitted). The policy also gave Great American a "duty to defend any Claim against the Insured . . . even if any of the allegations of the Claim are groundless, false or fraudulent." *Id.* (emphasis omitted). But the policy contained an exclusion provision—Exclusion F—which excluded from coverage any claim "based on or arising out of actual or alleged violation of: (1) The Employee Retirement Income Security Act of 1974; (2) The Securities Act of 1933; (3) The Securities Act of 1934; (4) Any state Blue Sky or Securities law." *Id.*, PageID 591.

Stout then faced two civil actions against it: the *Appvion ESOP* and *Halperin* actions. Both stemmed from Stout's professional services for Appvion, Inc., a paper manufacturing company owned by Paperweight Development Corp. (PDC). As alleged in these actions, Appvion operated an Employee Stock Ownership Plan (ESOP), which owned all of PDC's stock and was governed by the Employee Retirement Income Security Act (ERISA). The ESOP's trustees hired Stout to serve as a financial advisor and value PDC's stock price from December 2004 through 2017. According to these actions, Stout overvalued PDC's stock and induced Appvion employees to invest their retirement savings in the ESOP. When Appvion ultimately declared bankruptcy in October 2017, PDC's stock price collapsed, resulting in hundreds of millions of dollars in losses of funds invested in the ESOP.

Great American agreed to defend Stout in the *Appvion ESOP* and *Halperin* actions. But it reserved the right to seek a judicial declaration regarding its rights and obligations under Stout's policy and to seek reimbursement if it had no duty to defend or indemnify Stout. Great American later sued Stout and others in the United States District Court for the Eastern District of Michigan, seeking a declaration that Stout's policy did not obligate Great American to defend or indemnify

Stout in the underlying litigation. Great American later sought partial summary judgment on its declaratory judgment claims, arguing that Exclusion F precluded coverage for the underlying claims because they were based on actual or alleged violations of ERISA or securities laws.[1] The district court denied the motion—it concluded that Exclusion F did not preclude coverage for the common law claims asserted in the *Appvion ESOP*'s first amended complaint (fraud and negligent misrepresentation). Likewise, the district court determined that Exclusion F did not apply to the claims asserted in the underlying *Halperin* action.

On September 25, 2020, the ESOP filed its second amended complaint in the *Appvion ESOP* action—asserting only federal securities law, not common law, claims—and Great American shortly thereafter again moved for partial summary judgment here. The district court granted the motion: because Exclusion F applied to federal securities law claims, Great American no longer had a duty to defend or indemnify Stout. Great American did not renew its motion for partial summary judgment as to the *Halperin* action.

Great American then moved for partial summary judgment for reimbursement for expenses it incurred in defending the *Appvion ESOP* litigation, seeking bifurcated amounts expended before September 25, 2020 ($563,740.15) and on or after that date ($60,486.34). Its reimbursement claims proceeded under alternative theories: an implied-in-fact contract theory and an unjust enrichment theory. The district court denied the motion for reimbursement of the amounts expended before September 25, 2020, because it had ruled that the policy obligated Great American to defend Stout in the *Appvion ESOP* litigation. But, because the district court

[1] The ESOP's first amended complaint asserted five causes of action against Stout: (1) knowing participation in a breach of fiduciary duty under ERISA § 502(a)(3), (2) common law fraud, (3) common law negligent misrepresentation, (4) Wisconsin securities fraud, and (5) federal securities fraud. As relevant here, the plaintiffs in the *Halperin* action sued Stout for allegedly aiding and abetting breaches of fiduciary duties under state law.

previously concluded that the policy did not obligate Great American to defend Stout in the *Appvion ESOP* action starting September 25, 2020, it held that Great American could recover expenses from that date under the implied-in-fact contract theory.

The parties now appeal the judgments against them. Great American appeals the district court's determinations that the policy obligated it to defend Stout in the *Appvion ESOP* or *Halperin* actions, even before September 25, 2020, and that Stout need not reimburse it for defense expenses incurred in the *Appvion ESOP* action before that date. Stout appeals the district court's determinations that the policy did not obligate Great American to defend or indemnify Stout in the *Appvion ESOP* action as of September 25, 2020, and that Great American could seek reimbursement for costs expended on or after that date.

II.

We review a grant of summary judgment de novo. *Morgan v. Trierweiler*, 67 F.4th 362, 366 (6th Cir. 2023). Summary judgment is appropriate if "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A genuine issue of material fact exists when "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In this analysis, the court "must view all the evidence and draw all reasonable inferences in the light most favorable to the non-moving party." *Rhinehart v. Scutt*, 894 F.3d 721, 735 (6th Cir. 2018) (citing *Anderson*, 477 U.S. at 251–52, 255).

We also review the district court's interpretation of insurance contracts de novo. *BP Chemicals, Inc. v. First State Ins. Co.*, 226 F.3d 420, 424 (6th Cir. 2000).

III.

We first address whether the policy obligated Great American to defend Stout in the underlying actions, then address whether Great American may recover reimbursements for expenses incurred in the *Appvion ESOP* litigation.

A. Great American's Duty to Defend Stout

State law governs the interpretation of an insurance policy for a federal court sitting in diversity, as here. *Westfield Nat'l Ins. Co. v. Quest Pharms., Inc.*, 57 F.4th 558, 561 (6th Cir. 2023). Under Michigan law, applicable here, courts interpret an insurance policy by first determining "whether the insurance agreement generally provides coverage for the occurrence" and then, if so, "whether coverage is negated by an exclusion." *Duato v. Mellon*, --- N.W.3d ---, 2023 WL 7930089, at *3 (Mich. Ct. App. 2023). "The insured bears the burden to demonstrate coverage, while the insurer bears the burden of proving the applicability of an exclusion." *Id.* Although Michigan courts strictly construe exclusions in the insured's favor, "clear and specific exclusions must be enforced as written." *Id.* "An insurer has a duty to defend, despite theories of liability asserted against any insured which are not covered under the policy, if there are any theories of recovery that fall within the policy." *Am. Bumper & Mfg. Co. v. Hartford Fire Ins. Co.*, 550 N.W.2d 475, 481 (Mich. 1996). That duty ends, however, when "the claims against the policyholder are confined to those theories outside the scope of coverage under the policy." *Id.* at 483. Whether an underlying lawsuit implicates an insurer's duty to defend and indemnify its insured "does not depend solely upon the terminology used in a plaintiff's pleadings"; rather, the court must look to the substance of the complaint's allegations, not their form. *Allstate Ins. Co. v. Freeman*, 443 N.W.2d 734, 737 (Mich. 1989).

As noted, Exclusion F denied coverage for any claim "based on or arising out of actual or alleged violation of: (1) The Employee Retirement Income Security Act of 1974; (2) The Securities Act of 1933; (3) The Securities Act of 1934; (4) Any state Blue Sky or Securities law." Policy, R. 19-1, PageID 591. It is undisputed that, but for Exclusion F, the policy would obligate Great American to defend Stout. Thus, the only issue is whether the exclusion negates coverage.

Any claim that Stout violated ERISA or securities laws plainly falls within Exclusion F, as the district court properly concluded. But Great American contends that the common law claims in the *Appvion ESOP* action—negligent misrepresentation and fraud—are also excluded because they are "based on or arise out of" ERISA. The district court disagreed. After assessing Sixth Circuit and Michigan law, the district court concluded that "based on or arising out of" essentially requires a cause-and-effect relationship, such that a legal violation causes a claim to occur. In other words, for Exclusion F to apply to the common law claims in the *Appvion ESOP* action, "a violation of ERISA must have caused Stout to commit negligence and/or fraud." *Great Am. Fid. Ins. Co. v. Stout Risius Ross, Inc.*, 438 F. Supp. 3d 779, 787 (E.D. Mich. 2020). So although the facts underlying the *Appvion ESOP* action's fraud and negligent misrepresentation claims were the same as those supporting the ERISA and securities claims, Exclusion F did not apply to the common law claims because, according to the district court, those claims did not result from Stout's alleged violation of ERISA or securities law.

Great American's duty to defend Stout in the underlying litigation turns on how broadly the phrase "based on or arising out of" extends under Michigan law. "In interpreting an insurance contract containing the language 'arising out of,'" the Michigan Supreme Court has "held that such language requires a causal connection that is more than incidental." *People v. Johnson*, 712 N.W.2d 703, 706 (Mich. 2006) (cleaned up). "Something that 'arises out of,' or springs from or

results from something else, has a connective relationship, a cause and effect relationship, of more than an incidental sort with the event out of which it has arisen." *Id.* (cleaned up). And while Michigan courts apparently have not defined "based on" in the insurance context, Black's Law Dictionary defines the verb "base" as "[t]o use (something) as the thing from which something else is developed." Base, *Black's Law Dictionary* (11th ed. 2019).

With this understanding, the district court's reading of "based on or arising out of" as used in Exclusion F is persuasive: "for a claim to be based on or arising out of a legal violation, the legal violation must cause the claim to occur." *Great Am. Fid. Ins. Co.*, 438 F. Supp. 3d at 785. The common law claims in the *Appvion ESOP* action do not allege that a violation of ERISA or securities law caused Stout to commit fraud or negligent misrepresentation, even if they shared similar factual predicates with the ERISA and securities claims.[2] Likewise, the *Halperin* action's sole live claim against Stout, alleging a state law breach of fiduciary duties, did not stem from a violation of ERISA or securities law. Therefore, the policy obligated Great American to defend Stout as to both the *Appvion ESOP* and *Halperin* actions—at least for a time.

Once the common law claims in the *Appvion ESOP* second amended complaint were dismissed, the district court properly concluded that Great American's duty to defend Stout in that action also ended. Stout argues that Great American's duty to defend did not terminate at that time

[2] Great American and Stout argue whether the Sixth Circuit's decision in *Safety Specialty Insurance Co. v. Genesee County Board of Commissioners*, 53 F.4th 1014 (6th Cir. 2022) clarifies "arising out of" in this case. There, the insurance policy contained several exclusions, most relevantly one excluding claims "[a]rising out of . . . [t]ax collection, or the improper administration of taxes or loss that reflects any tax obligation." *Id.* at 1025 (alterations in original). The *Safety Specialty* court, interpreting Sixth Circuit precedent, concluded that this exclusion applied because "the causal link between the excluded conduct—tax collection—and the subsequent claims is more direct": the excluded conduct "directly caused the injuries underlying [the] claims." *Id.* at 1026–27. Here, unlike the *Safety Specialty* exclusion focused on underlying conduct (tax collection), Exclusion F is tied to violations of particular laws. For example, Exclusion F is not written to exclude claims "arising out of valuation services for an ERISA plan trustee." Thus, *Safety Specialty* does not alter our analysis.

because the substance of the second amended complaint did not differ from the first amended complaint. But an "amended complaint supersedes an earlier complaint for all purposes." *In re Refrigerant Compressors Antitrust Litig.*, 731 F.3d 586, 589 (6th Cir. 2013). And "insurers owe a duty to defend until the claims against the policyholder are confined to those theories outside the scope of coverage under the policy." *Am. Bumper & Mfg. Co.*, 550 N.W.2d at 483. Once the *Appvion ESOP* complaint was amended a second time, asserting only federal securities claims against Stout, the case then expressly fell within Exclusion F, and Great American's duty to defend Stout in that litigation ended.

Because the policy obligated Great American to defend Stout in the *Halperin* action and the *Appvion ESOP* litigation before September 25, 2020, but not after, we affirm the district court's rulings regarding Great American's duty to defend Stout.

B. Stout's Obligation to Reimburse Great American

The parties also appeal the district court's determinations on reimbursement. Great American argues that, because the policy did not obligate it to defend Stout in the *Appvion ESOP* action before September 25, 2020, it should recover expenses incurred in that defense. Since, as discussed above, the district court properly determined that Great American was indeed obligated to defend Stout until that time, this argument lacks merit.

Stout argues that Great American is not entitled, under Michigan law, to reimbursement for expenses incurred in defending the *Appvion ESOP* action on or after September 25, 2020. The policy here did not expressly authorize such reimbursement, but the district court granted the motion for reimbursement on implied-in-fact contract grounds: it concluded that where—as here—an insurer explicitly reserves its right to reimbursement and notifies the insured of the specific possibility of reimbursement, the parties form an implied-in-fact contract for the reimbursement

of costs expended by the insurer for claims that it had no duty to defend. On appeal, Stout does not dispute the facts underlying the district court's decision.

Michigan law has not answered whether an insured must reimburse the insurer for defending claims that the insurer had no duty to defend, so we must make an "*Erie* guess" predicting how the Michigan Supreme Court would resolve this issue. *Brown Jug, Inc. v. Cincinnati Ins. Co.*, 27 F.4th 398, 402 (6th Cir. 2022); *see Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). Michigan law generally recognizes implied-in-fact contracts. *Erickson v. Goodell Oil Co., Inc.*, 180 N.W.2d 798, 800 (Mich. 1970); *Reed v. Yackell*, 703 N.W.2d 1, 7 (Mich. 2005); *Fisher Sand & Gravel Co. v. Neal A. Sweebe, Inc.*, 837 N.W.2d 244, 253 (Mich. 2013) (explaining in dicta that "when one party's assent is inferred from inaction," the arrangement between the parties "operates to form an implied contract"). And the parties have not pointed to, nor have we independently found, any indication that the Michigan Supreme Court would decline to recognize implied-in-fact contracts in the insurance context.[3] To the contrary, Michigan appellate courts have declined to prohibit such contracts in that context. *See TNCMIC Ins. Co. v. Dailey*, 2006 WL 2035597, at *5 n.5, *6 (Mich. Ct. App. July 20, 2006) (allowing recovery on an unjust-enrichment theory and recognizing that some jurisdictions permit an implied-in-fact contract theory). We faced a similar question in *Continental Casualty Co. v. Indian Head Industries, Inc.*, 666 F. App'x 456, 468 (6th Cir. 2016). There, we surveyed Michigan law and noted that "Michigan law allows for implied-in-fact contracts," generally. *Id.* Following from that general rule, we then considered the position of the "majority of jurisdictions" persuasive, concluding that an insurer can be entitled to reimbursement under Michigan law when it issues a timely reservation of rights letter providing

[3] The Pennsylvania, Illinois, and Washington Supreme Court decisions that Stout cites in support of its "minority position" are not binding. *See Am. & Foreign Ins. Co. v. Jerry's Sport Ctr., Inc.*, 2 A.3d 526, 543 (Pa. 2010). They approach reimbursement differently than Michigan does, and we find their analysis unpersuasive to predict Michigan law.

notice of the specific possibility of reimbursement and defends an insured after the policy no longer obligated it to do so. *Id.* Stout has given us no reason to depart from that analysis.

Stout's remaining contentions are unpersuasive. Stout maintains there was no consideration to support a contract, because Great American had a pre-existing legal duty to tender a defense. But that premise fails because Great American had no such duty after the filing of the second amended complaint in the *Appvion ESOP* action. Stout also contends that mutual assent was lacking. But Stout accepted the defense after Great American timely notified Stout that it might seek reimbursement. That is sufficient manifestation of assent under Michigan law. *See Cont'l Cas. Co.*, 666 F. App'x at 468; *cf. DeCaire v. Bishop's Estate*, 47 N.W.2d 601 (Mich. 1951) ("A contract implied in fact arises from the acceptance of beneficial services for which compensation would ordinarily have been paid.").

Although Michigan law does not clearly establish Great American's entitlement to reimbursement here, the "relevant data" suggest that the Michigan Supreme Court would recognize an implied-in-fact contract here. *Combs v. Int'l Ins. Co.*, 354 F.3d 568, 577 (6th Cir. 2004) (quotation omitted). Thus, we affirm the district court's determination that Stout must reimburse Great American for defending it in the *Appvion ESOP* action on or after September 25, 2020, under an implied-in-fact contract theory.

IV.

For these reasons, we AFFIRM the judgment of the district court.