IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

FARM FAMILY CASUALTY COMPANY, As Subrogee of M. Virginia Richardson and As Assignee of KNICELEY'S INC.,	C.A. No. K11C-07-006 JTV
Plaintiff,	
v.	
CUMBERLAND INSURANCE COMPANY, INC., a foreign corporation, DOWNES INSURANCE ASSOCIATES, INC., a Delaware corporation, HARRINGTON INSURANCE AGENCY, INC., Individually and as successor-in-interest to Downs Insurance Associates, Inc., and Marvel AGENCY, INC., a Delaware corporation,	
Defendants.	

Submitted: June 6, 2013
Decided: October 2, 2013

Michael R. Abbott, Esq., and David C. Malatesta, Esq., Kent & McBride, Wilmington, Delaware. Attorneys for Plaintiffs.

Krista R. Samis, Esq., Eckert, Seamans, Cherin & Mellott, Wilmington, Delaware. Attorney for Defendant Marvel Agency, Inc.

Kashif I. Chowdhry, Esq, Parkowski, Guerke & Swayze, Dover, Delaware. Attorney for Defendant Downes Insurance Associates, Inc.,

Farm Family, et al., v. Cumberland Insurance, et al.
C.A. No. K11C-07-006 JTV
October 2, 2013

James S. Yoder, Esq., and Sean A. Meluney, Esq., White & Williams, Wilmington, Delaware. Attorneys for Defendant Harrington Insurance Agency.

Stephen P. Casarino, Esq., Casarino, Christman, Shalk, Ransom & Doss, Wilmington, Delaware. Attorney for Cumberland Insurance Company.

Upon Consideration of Defendant
Cumberland's Motion For Summary Judgment
GRANTED

VAUGHN, President Judge

OPINION

This motion involves a dispute with an insurer regarding a total pollution exclusion clause contained in a commercial general liability policy. The insurer, defendant Cumberland Insurance Co. ("Cumberland"), relied on the exclusion when it denied coverage for a negligence lawsuit filed against its insured. The lawsuit alleged that the insured negligently failed to remove lead paint from a residence, resulting in injuries to a child. In the case *sub judice*, plaintiff Farm Family Casualty Insurance Co. ("Farm Family" or "Plaintiff") asserts, among other things, that Cumberland was wrong to deny coverage because the total pollution exclusion does not apply to lead-based injuries. Before the Court is Cumberland's motion for summary judgment.

FACTS

As mentioned, the precursor to this action was an underlying lawsuit where a child, Jose LaTorre ("LaTorre"), suffered serious personal injuries and impairment caused by lead poisoning.[1] The child's injuries resulted from exposure to lead paint located within a rental property owned by M. Virginia Richardson ("Richardson").

In November 2004, it was discovered that LaTorre had an elevated blood-lead level. On December 13, 2004, after an inspection of the home indicated the presence of lead-based paint, the Delaware Division of Public Health ordered Richardson to reduce the levels of lead paint present on the property to bring them into compliance with state standards. Richardson hired Kniceley's, Inc. ("Kniceley"), a licensed lead abatement company, to handle the situation. According to the agreement between Richardson and Kniceley, the company was required to:

> (1) remove all windows and doors, strip all paint and reinstall; (2) abate or encapsulate all friction points on window wells, aprons and doorway frames; (3) strip all baseboards and stairways (newel post, stingers, spindles) and lead blocked; (4) window sills inside and outside were to be stabilized; (5) the laundry room was to be stripped of lead paint and lead blocked; (6) Kniceley was also to address all items listed on lead report; (7) remove all hazardous waste on a daily basis; and (8) Batta Environmental Associates, Inc. ("Batta")[2] was to perform dust wipes to ensure the Premises was lead free following

---

[1] *LaTorre ex rel. Diaz v. Richardson*, C.A. No. 06C-05-020 (Del. Super.).

[2] Kniceley retained Batta to collect and analyze lead wipe samples from the property after Kniceley had finished its abatement work.

the completion of Kniceley's responsibilities.[3]

Kniceley performed the work in February and March of 2005, and on March 11, 2005, subcontractor Batta informed Richardson that the work had been completed and that the premises had been "cleared for lead dust."[4] On August 30, 2005, LaTorre again tested positive for high blood-lead levels.[5] The State's subsequent inspection confirmed that lead dust and paint were still present in the house.

A representative of LaTorre filed a lawsuit against Richardson on May 11, 2006. Richardson filed a third-party complaint against Kniceley and Batta on May 20, 2008 that sought contribution for their negligent failure to properly remove the lead-based paint from her home, resulting in injuries to LaTorre. It is not clear from LaTorre's complaint, Richardson's complaint or from the record now before the Court exactly how LaTorre was injured by the lead paint—*i.e.* whether he ingested paint chips, inhaled lead dust or was exposed to the lead in some other way.

From November 11, 2004 to November 11, 2005, Kniceley was the named insured under a commercial general liability insurance policy issued by Cumberland (the "Policy").[6] The Policy provides:

We will pay those sums that the insured becomes legally

---

[3] Cumberland's Op. Br. Supp. Mot. Summ. J., Ex. A ¶ 9 ("Richardson Complaint").

[4] Richardson Complaint ¶ 11.

[5] Richardson alleged that LaTorre's blood-lead levels actually increased after the abatement. Richardson Complaint ¶ 13.

[6] Kniceley's business description in the policy is identified as "painting contractor." Cumberland's Op. Br. Supp. Mot. Summ. J., Ex. B (the "Policy"), Declarations, at 2.

> obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages[.]
>
> . . . .
>
> This insurance applies to "bodily injury" or "property damage" only if . . . [t]he "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory" [and] [t]he "bodily injury" or "property damage" occurs during the policy period.[7]

The parties do not dispute that Richardson's claim against Kniceley falls within the scope of the Policy's general coverage provisions. Thus, Cumberland was required to provide coverage to Kniceley for Richardson's claim unless the claim was otherwise excluded from coverage.

On July 8, 2008, Cumberland informed Kniceley that it was denying coverage for the negligence claim brought by Richardson against Kniceley pursuant to the Total Pollution Exclusion Endorsement (the "total pollution exclusion") contained in the Policy. The total pollution exclusion states that the "insurance does not apply to . . . '[b]odily 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."[8] "Pollutant" is defined in the policy as "any solid, liquid, gaseous or thermal irritant or contaminant, including

---

[7] Policy, Commercial General Liability Coverage Form, at 1.

[8] Policy, Total Pollution Exclusion Endorsement.

smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed."[9] In its letter to Kniceley, Cumberland explained that "there [was] no coverage for the claim as presented" because the lawsuit was "based on [the] allegation of the release of 'pollutants' as a result of the work performed."[10]

On March 30, 2011, Richardson obtained a $350,000 (plus costs and interest) consent judgment against Kniceley after the parties agreed to a settlement.

On July 7, 2011, Farm Family, as subrogee of Richardson and as assignee of Kniceley, filed the complaint in this action against Cumberland, Downes Insurance Associates, Inc. ("Downes"), Harrington Insurance Co. ("Harrington") and Marvel Agency, Inc. ("Marvel"). Farm Family alleges that the Policy covers the claim filed by Richardson, and contends, alternatively, that if it does not, Cumberland, along with Harrington, Downes and Marvel (collectively, the "Broker Defendants"), made erroneous representations that the Policy would provide coverage for Kniceley's lead-based paint activities. Farm Family asserts three counts against Cumberland: (1) breach of contract, (2) breach of the duty of fair dealing, and (3) consumer fraud. The plaintiff asserts five counts against the Broker Defendants: (4) negligence in procuring appropriate insurance coverage, (5) breach of contract, (6) consumer fraud,

---

[9] Policy, Commercial General Liability Coverage Form, at 15.

[10] Pl.'s Resp. to Mot. Summ. J., Ex. C, at 3.

(7) negligent misrepresentation and (8) equitable fraud.[11]

No scheduling order has been entered in this case, as the parties believe that summary judgment will resolve most, if not all, of the issues. Every defendant moved for summary judgment. Oral argument on the motions was heard on October 12, 2012. At the October 12 hearing, the Court granted Marvel's motion for summary judgment, and permitted the remaining parties to submit additional briefing and/or to request additional argument time. The parties all made supplemental submissions and another hearing occurred before the Court on June 6, 2013.

This opinion exclusively addresses Cumberland's motion for summary judgment. Downes' and Harrington's motions will be addressed in separate opinions.

PARTIES' CONTENTIONS

Cumberland contends that the Total Pollution Exclusion Endorsement contained in its policy is analogous to similar total pollution exclusion clauses that Delaware courts have found to be unambiguous and valid; that lead is a "pollutant" as defined in the policy and as established by both case law and the Delaware legislature; that the claims that Richardson asserted against Kniceley indicate that Kniceley's negligence caused the lead paint to escape, disseminate or release in some fashion, resulting in the child's injuries; that courts have held that total pollution exclusions are not limited to only traditional environmental pollution; that the policy contains no language suggesting that the exclusion should be limited in that way; that

[11] Additionally, Harrington has moved to amend its answer and assert two cross-claims against Downes that relate to an alleged indemnification agreement. Harrington's motion to amend its answer will be decided in conjunction with its motion for summary judgment.

courts have found the exclusion to be applicable in lead-paint cases; and that because there was no potential for coverage, Cumberland had no duty to defend.

_____Farm Family contends that Cumberland had a duty to defend and indemnify Kniceley because the total pollution exclusion and the definition of "pollutant" are ambiguous as a matter of law; that the terms "irritant" and "contaminant," used by the policy to define "pollutant," are also ambiguous; that the statutes and cases cited by Cumberland are factually distinguishable from this action; that other courts are split as to the application of the pollution exclusion to injuries resulting from residential lead paint exposure; that the split in authority is indicative of the ambiguity of the exclusion; that courts have found that the total pollution exclusion should not be applied outside the context of a traditional environmental pollution scenario; that a material issue of fact exists as to whether the underlying action actually involved the "release of pollutants," as is necessary to trigger the exclusion; that the injured party could have been injured by intact lead paint, which would not trigger the exclusion; and that another exclusion in the policy specifically addresses lead contamination, which indicates that the total pollution exclusion, a more general provision, was not intended to apply to lead.

STANDARD OF REVIEW

Summary judgment should be granted when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.[12] "[T]he moving party bears the burden of establishing the non-existence of material issues of

[12] Super. Ct. Civ. R. 56(c).

fact."[13] If a motion is properly supported, the burden shifts to the non-moving party to establish the existence of material issues of fact.[14] In considering the motion, the facts must be viewed in the light most favorable to the non-moving party.[15] Thus, the court must accept all undisputed factual assertions and accept the non-movant's version of any disputed facts.[16] Summary judgment is inappropriate "when the record reasonably indicates that a material fact is in dispute or if it seems desirable to inquire more thoroughly into the facts in order to clarify the application of law to the circumstances."[17]

DISCUSSION

Contract Interpretation

The contentions in this case require the Court to examine the language of the total pollution exclusion and decide whether it is ambiguous when applied to the pertinent facts and allegations in the underlying complaints.

In Delaware, the interpretation of contractual language in an insurance policy is a question of law.[18] The Delaware Supreme Court, in *Rhone-Poulenc Basic*

---

[13] *Gray v. Allstate Ins. Co.*, 2007 WL 1334563, at *1 (Del. Super. May 2, 2007).

[14] *Id.*

[15] *Pierce v. Int'l Ins. Co. of Ill.*, 671 A.2d 1361, 1363 (Del. 1996).

[16] *Merrill v. Crothall-American, Inc.*, 606 A.2d 96, 99-100 (Del. 1992).

[17] *Mumford & Miller Concrete, Inc. v. New Castle Cnty.*, 2007 WL 404771, at *1 (Del. Super. Jan. 31, 2007).

[18] *O'Brien v. Progressive N. Ins. Co.*, 785 A.2d 281, 286 (Del. 2001).

Chemicals Co. v. American Motorists Insurance Co., summarized some of the basic tenets of contract interpretation:

> Clear and unambiguous language in an insurance policy should be given its ordinary and usual meaning. Absent some ambiguity, Delaware courts will not destroy or twist policy language under the guise of construing it. When the language of an insurance contract is clear and unequivocal, a party will be bound by its plain meaning because creating an ambiguity where none exists could, in effect, create a new contract with rights, liabilities and duties to which the parties had not assented. To the extent that ambiguity does exist, the doctrine of *contra proferentum* requires that the language of an insurance contract be construed most strongly against the insurance company that drafted it.
>
> A contract is not rendered ambiguous simply because the parties do not agree upon its proper construction. Rather, a contract is ambiguous only when the provisions in controversy are reasonably or fairly susceptible of different interpretations or may have two or more different meanings. Ambiguity does not exist where the court can determine the meaning of a contract without any other guide than a knowledge of the simple facts on which, from the nature of language in general, its meaning depends. Courts will not torture contractual terms to impart ambiguity where ordinary meaning leaves no room for uncertainty. The true test is not what the parties to the contract intended it to mean, but what a reasonable person in the position of the parties would have thought it meant.[19]

[19] 616 A.2d 1192, 1195-96 (Del. 1992) (citations and quotation marks omitted).

In a case such as this, "[w]here 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."[20] Therefore, Cumberland has the burden of proving the elements of the Policy's total pollution exclusion.[21]

The Total Pollution Exclusion

Delaware courts have, on several occasions, been confronted with and addressed coverage issues dealing with total pollution exclusion clauses.[22] For instance, in *E.I. du Pont de Nemours & Co. v. Admiral Insurance Co.*, this Court held that similar total pollution exclusions were unambiguous and precluded coverage.[23] However, in *E.I. du Pont*, the claims at issue "ar[o]se from releases of chemical substances[—including lead—]and wastes causing environmental contamination of soil, groundwater and surface water."[24] The exclusions clearly applied under those circumstances. No Delaware court has had the opportunity to interpret the total

---

[20] *Tyson Foods, Inc. v. Allstate Ins. Co.*, 2011 WL 3926195, at *6 (Del. Super. Aug. 31, 2011).

[21] *E.I. du Pont de Nemours & Co. v. Admiral Ins. Co.*, 711 A.2d 45, 53 (Del. Super. 1995).

[22] *See, e.g.*, *McKnight v. USAA Cas. Ins. Co.*, 871 A.2d 446, 451 (Del. Super. 2005) (holding that "[m]old/fungi are not within the definition of pollutant"), *aff'd*, 900 A.2d 101 (Del. 2006); *Hercules, Inc. v. AIU Ins. Co.*, 784 A.2d 481, 498 (Del. 2001) (holding that the trial court had properly instructed the jury as to the meanings of two total pollution exclusions); *E.I. du Pont,* 711 A.2d at 69.

[23] *E.I. du Pont*, 711 A.2d at 68-69 (finding that two different total pollution exclusions precluded coverage for the claims asserted by the insured and that no exceptions to the exclusion were applicable).

[24] *Id.* at 57.

pollution exclusion's application to the specific situation here, which involves bodily injuries resulting from residential lead paint exposure.

There are two overriding issues in this case. First, for the Policy's total pollution exclusion to apply, two basic elements need to be satisfied: (1) lead or lead paint must qualify as a "pollutant" as defined by the Policy and (2) there must have been an actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape—*i.e.* a specified type of movement—of the lead or lead paint that caused LaTorre's injuries. Second, the Court must consider whether it is appropriate to apply the total pollution exclusion outside of situations involving "traditional" environmental and industrial pollution.

Is the term "Pollutant" ambiguous as applied to lead or lead paint?

Farm Family contends that the term "pollutant" is either ambiguous as a matter of law or is ambiguous because it is susceptible of two reasonable interpretations. In support of this contention, the plaintiff argues that other courts have held that lead paint does not qualify as a pollutant and that the terms used in the Policy to define pollutant, "contaminant" and "irritant," are ambiguous and overly broad.

Other jurisdictions throughout the country, when presented with insurance policies offering similar or identical definitions of "pollutant," are split regarding whether lead or lead paint should[25] or should not[26] be considered pollutants.

---

[25] *See*, *e.g.*, *Kaytes v. Scottsdale Ins. Co.*, 1997 WL 763022, at *2 (E.D. Pa. Dec. 9, 1997) (finding lead paint to be a pollutant within the meaning of the total pollution exclusion); *Shalimar Contractors, Inc. v. Am. States Ins. Co.*, 975 F. Supp. 1450, 1457 (M.D. Ala. 1997) (same), *aff'd sub nom. Shalimar Contractors v. Am.*, 158 F.3d 588 (11th Cir. 1998) (TABLE); *St. Leger v. Am. Fire & Cas. Ins. Co.*, 870 F. Supp. 641, 643 (E.D. Pa. 1994) (same), *aff'd*, 61 F.3d 896 (3d Cir. 1995)

Nonetheless, the focal point of this Court's analysis must be the plain language of the Policy itself. The fact that other courts are in disagreement as to whether or not the term is ambiguous is not relevant.[27]

As mentioned, the term pollutant is defined in the Policy as "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."[28] Notwithstanding some case law to the contrary, I conclude that lead paint clearly falls within the Policy's definition of pollutant.

Although the facts do not indicate how the lead entered LaTorre's system, a reasonable person would infer that the lead was likely in the form of a solid, liquid or gas. Richardson's complaint makes specific reference to the presence of lead paint (presumably intact or deteriorating) prior to the abatement and to the purported clean up of "lead dust."[29] It follows that lead existed at the property in a solid state.

Further, I find that lead and lead paint meet the criteria of being

---

(TABLE); *Peace ex rel. Lerner v. Nw. Nat'l Ins. Co.*, 596 N.W.2d 429, 431 (Wis. 1999) (same).

[26] *See*, *e.g.*, *Lefrak Org., Inc. v. Chubb Custom Ins. Co.*, 942 F. Supp. 949, 956 (S.D.N.Y. 1996) (finding "pollutant" to be ambiguous as applied to lead, and construing the term against the insurer); *Sullins v. Allstate Ins. Co.*, 667 A.2d 617, 623 (Md. 1995) (same); *Atl. Mut. Ins. Co. v. McFadden*, 595 N.E.2d 762, 764 (Mass. 1992) (holding that leaded materials did not fall within the scope of the total pollution exclusion).

[27] *E.I. du Pont*, 711 A.2d at 59.

[28] Policy, Commercial General Liability Coverage Form, at 15.

[29] Richardson Complaint ¶ 11.

"contaminants." "Contaminant" is not defined in the policy, but the Merriam-Webster Online Dictionary[30] defines "contaminant" as "something that contaminates,"[31] and "contaminate" as "to soil, stain, corrupt, or infect by contact or association" and "to make inferior or impure by admixture."[32] It is well-documented that exposure to lead can potentially produce harmful effects, particularly with regards to children. A reasonable person is equipped with the knowledge that lead paint is not innocuous, and would understand it to be capable of "corruption or infection." Moreover, the very next exclusion following the total pollution exclusion in the Policy is labeled "Exclusion - *Lead Contamination*."[33] Farm Family's argument regarding over breadth is not persuasive.[34] "Contaminant" clearly encompasses lead

[30] Delaware courts recognize that it is sometimes appropriate to "look to dictionaries for assistance in determining the plain meaning of terms which are not defined in a contract." *Lorillard Tobacco Co. v. Am. Legacy Found.*, 903 A.2d 728, 738 (Del. 2006).

[31] Merriam-Webster.com, http://www.merriam-webster.com/dictionary/contaminant (last visited Sept. 8, 2013).

[32] Merriam-Webster.com, http://www.merriam-webster.com/dictionary/contaminate (last visited Sept. 8, 2013).

[33] This exclusion applies in different scenarios than does the total pollution exclusion. It is discussed later in the opinion. *See infra*, pp. 22-22.

[34] *See Firemen's Ins. Co. of Washington, D.C. v. Kline & Son Cement Repair, Inc.*, 474 F. Supp. 2d 779, 791 (E.D. Va. 2007) ("The pertinent inquiry is not, as [the insured] contends, whether the policy's definition of 'pollutant' is so broad that virtually any substance, including many useful and necessary products, could be said to come within its ambit. Rather, guided by the principle that ambiguity (or lack thereof) is to be determined by reference to a particular set of facts, we focus on the specific product at issue." (quoting *Madison Constr. Co. v. Harleysville Mut. Ins. Co.*, 735 A.2d 100, 107 (Pa. 1999))).

and lead paint.[35]

Finally, I find that lead is a chemical, and therefore, qualifies under the Policy's exclusive list of pollutants, *i.e.* "smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste."[36] In considering the very same policy definition of "pollutant," the Superior Court found that "[b]y listing the specific items, the insurance company is deemed to have excluded items not listed."[37] Farm Family does not argue that lead does not qualify as an item in the list. I conclude that lead is a chemical, as contemplated by the policy.[38]

Therefore, lead is a pollutant within the meaning of the total pollution exclusion in the Policy.

Was there an there an actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of the lead or lead paint?

---

[35] It is not determinative but worth noting that both this Court, in *E.I. du Pont*, and Congress, in discussing lead-paint abatement, have each used the word "contaminated" to describe conditions resulting from contact and exposure to lead. *See* 711 A.2d at 57 ("DuPont's waste disposal practices over 91 years *contaminated* the Pompton Lakes site *with lead* and mercury.") (emphasis added); 15 U.S.C. § 2681 ("[Abatement] includes . . . the removal of lead-based paint and *lead-contaminated dust*, the permanent containment or encapsulation of lead-based paint, the replacement of lead-painted surfaces or fixtures, and the removal or covering of *lead-contaminated soil*.") (emphasis added).

[36] Policy, Commercial General Liability Coverage Form, at 15.

[37] *McKnight*, 871 A.2d at 451.

[38] *See St. Leger*, 870 F. Supp. at 643 ("'[L]ead is a chemical that irritates and contaminates.' This is widely understood." (quoting *Kaytes v. Imperial Cas. & Indemn. Co.*, 1994 WL 780901, at *1 (E.D. Pa. Jan. 6, 1994))); *Peace*, 596 N.W.2d at 436-37 ("'Lead' is a chemical element with particular properties. It may be 'used in a chemical process.' It clearly fits within the definition of 'chemical.'").

The words discharge, dispersal, seepage, migration, release and escape are not defined in the Policy, and must be assigned their plain and ordinary meanings. I find that the words, themselves, are unambiguous.[39] Each word signifies that there must be some kind of movement or "method of travel"[40] involving the lead that caused the alleged injuries. The other requirement regarding the method of travel is that it be "actual, alleged or threatened." The underlying litigation settled without a factual finding addressing how exactly LaTorre was exposed to the lead, and whether the abatement caused any discharge, release or escape of the lead that caused the injuries to the minor plaintiff. Here, the crucial question to be answered is whether Richardson's complaint *alleged* any movement of the lead, as required to trigger the Policy's total pollution exclusion.

Farm Family contends that there is no express language in Richardson's complaint that alleges that the lead moved in any way as a result of Kniceley's abatement efforts. The plaintiff argues that because there was never a conclusive finding regarding whether the lead exposure following the abatement was from intact lead paint or lead that had disseminated, a genuine issue of material fact exists regarding whether the total pollution exclusion applies to the claim in this case. The plaintiff argues that exposure to intact lead paint does not trigger the exclusion, and that Cumberland breached its duty to defend Kniceley against Richardson's claim.

---

[39] *See Firemen's Ins.*, 474 F. Supp. 2d at 798 (providing dictionary definitions for each of the Policy's "method of travel" terms).

[40] *Id.* ("Common to all of these terms is, obviously, the element of movement." (quoting *Madison Constr.*, 735 A.2d at 108)).

An insurer's duty to defend may be broader than its duty to indemnify an insured.[41] "In assessing either of those duties, 'a court typically looks to the allegations of the complaint to decide whether the third party's action against the insured states a claim covered by the policy, thereby triggering the duty to defend.'"[42] "The test is whether the underlying complaint, read as a whole, alleges a risk within the coverage of the policy."[43] In making this determination, Delaware Courts adhere to three principles:

> (1) where there is some doubt as to whether the 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.[44]

I do not find there to be any doubt or ambiguity in the pleadings regarding whether Richardson alleged that Kniceley's negligent abatement caused lead to disseminate, resulting in injuries. The only reasonable interpretation of her complaint is that her claim against Kniceley encompassed such allegations. It is true that Richardson did not specifically use method of travel terminology in her complaint,

---

[41] *ConAgra Foods, Inc. v. Lexington Ins. Co.*, 21 A.3d 62, 72-73 (Del. 2011); *Tyson Foods*, 2011 WL 3926195, at *5.

[42] *ConAgra Foods*, 21 A.3d at 72-73 (quoting *Pac. Ins. Co. v. Liberty Mut. Ins. Co.*, 956 A.2d 1246, 1254 (Del. 2008)).

[43] *Pac. Ins. Co.*, 956 A.2d at 1254.

[44] *Id.* at 1254-55.

but I find that those allegations were implied by her more general averments.

Richardson's contract with Kniceley described specific actions that the company was required to undertake in order to accomplish the removal of lead from the property. Many of these activities create an easy inference that the release or escape of lead was possible or even likely. Richardson's complaint describes the tasks as follows: "strip all paint and reinstall . . . abate or encapsulate all friction points . . . strip all baseboards and stairways . . . the laundry room was to be stripped of lead paint . . . Batta was to perform dust wipes to ensure the Premises was lead free following the completion of Kniceley's responsibilities."[45] Kniceley's abatement responsibilities were all highly suggestive of conduct that could cause a discharge, dispersal, migration, release or escape of the hazardous lead that they sought to remove.

A review of Richardson's pleading responsibilities in bringing her negligence claim is a useful tool to help understand her allegations. This Court requires plaintiffs to plead allegations of negligence with particularity, according to Superior Court Rule of Civil Procedure 9(b).[46] However, the "underlying purpose of Rule 9(b) is to ensure that the defendant is notified of the 'acts or omissions by which it is alleged that a duty has been violated in order to enable the preparation of a defense.'"[47] To

---

[45] Richardson Complaint ¶ 9.

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

[47] *Doe 30's Mother v. Bradley*, 58 A.3d 429, 443 (Del. Super. 2012) (quoting *State Farm Fire & Cas., Co. v. Gen. Elec. Co.*, 2009 WL 5177156, at *5 (Del.Super. Dec. 1, 2009)).

comply with Rule 9(b), Richardson only needed to allege "sufficient facts out of which a duty is implied and a general averment of failure to discharge that duty."[48] She was not also required to specify in her complaint exactly how the lead exposure and poisoning occurred.

Richardson easily satisfied her pleading burden. It is unreasonable to interpret her failure to explicitly allege that a release or dispersal of lead paint caused LaTorre's injuries as a decision not to pursue her negligence claim under that theory. Richardson did not confine her claim to only seek contribution for injuries caused by intact lead paint remaining in the house. It is clear that she sought contribution for LaTorre's injuries that arose out of Kniceley's abatement work, regardless of how the lead poisoning occurred. In addition, Kniceley was not like Richardson, a homeowner being sued for the mere presence of lead paint. The description of the abatement work that Kniceley performed suggests that a release or dispersal of the lead was probable. Consequently, I conclude that the general negligent abatement allegations in Richardson's complaint adequately alleged the method of travel element required to trigger the Policy's total pollution exclusion.

Does the total pollution exclusion extend beyond the traditional environmental and industrial pollution scenarios?

The residential lead-poisoning incident in this case does not involve "traditional" environmental or industrial pollution. Farm Family urges the Court to find that the total pollution exclusion is ambiguous when applied outside of the

---

[48] *Id.*

traditional context. Cumberland contends that there is no language in the policy that narrows the exclusion's application in the manner contended by the plaintiff. Again, this is an issue upon which courts are split.[49] The California Supreme Court has aptly described the state of the law:

> To say there is a lack of unanimity as to how [a pollution exclusion] clause should be interpreted is an understatement. Although the fragmentation of opinion defies strict categorization, courts are roughly divided into two camps. One camp maintains that the exclusion applies only to traditional environmental pollution into the air, water, and soil, but generally not to all injuries involving the negligent use or handling of toxic substances that occurs in the normal course of business. These courts generally find ambiguity in the wording of the pollution exclusion when it is applied to such negligence and interpret such ambiguity against the insurance company in favor of coverage. The other camp maintains that the clause applies equally to negligence involving toxic substances and traditional environmental pollution, and that the clause is as unambiguous in excluding the former as the latter.[50]

The Delaware Supreme Court has not had the opportunity to address the issue.

---

[49] *See Firemen's Ins.*, 474 F. Supp. 2d at 792-94 nn.5-6 (E.D.Va.2007) (listing courts that fall on either side of the issue).

[50] *MacKinnon v. Truck Ins. Exch.*, 73 P.3d 1205, 1208-09 (Cal. 2003); *see also Firemen's Ins.*, 474 F. Supp. 2d at 796 ("[T]wo contrary philosophies exist concerning the interpretation of 'total' or 'absolute' pollution exclusions. The first school of thought holds that the exclusion does not apply where the pollution in question is not environmental or industrial in nature, whereas the other concludes that the exclusion is indeed absolute and applies to any set of facts that come within the literal meaning of its terms.").

The plain language of the Policy does not expressly limit the application of the Policy's total pollution exclusion to situations involving environmental pollution. If the parties had intended to restrain its scope in that way, they easily could have included words to that effect. For example, one of the pollution exclusions at issue in *E.I. du Pont* provided "[t]his policy does not apply to personal 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 material or other irritants, contaminants or pollutants *into or upon land, or the atmosphere*."[51] There is no equivalent language in the Policy's total pollution exclusion that requires the pollution to occur in an outdoor or environmental setting. I will not insert such a restriction and, in effect, reform the agreement between the parties. The plain language of the exclusion leaves no room for uncertainty. In the absence of any limiting language identifying a precise location or setting where the pollution must take place, I find that the total pollution exclusion applies to the release of pollutants outside of the traditional environmental context.

Farm Family additionally contends that the presence of a specific exclusion addressing lead contamination indicates that the total pollution exclusion does not apply to lead-based claims. The exclusion at issue is entitled "Exclusion - Lead Contamination." It provides, in pertinent part, "[t]his endorsement modifies the above Coverages to exclude occurrences *at the insured premises* which result in . . . 'Bodily Injury' arising out of the ingestion, inhalation or absorption of lead in any

---

[51] 711 A.2d at 52 (emphasis added).

form."[52] The insured premises is identified in the Declarations of the Policy, and includes the "location of all premises you own, rent or occupy [in Kent County and surrounding areas]."[53] The plaintiff contends that this exclusion is rendered redundant and unnecessary if the Court adopts an interpretation of the total pollution exclusion that precludes coverage for lead-based claims. Cumberland contends that the two exclusions can be read in harmony.

I agree with Cumberland. The lead contamination exclusion only applies to lead-based bodily injuries that occur at the insured premises, but it has a broader scope as to those injuries than does the total pollution exclusion. It is apparent that injuries resulting from intact lead paint would be covered by the lead contamination exclusion, but the total pollution exclusion may, in some circumstances, reach such a claim due to the "method of travel" requirement. Additionally, the total pollution exclusion, unlike the lead contamination exclusion, has application beyond the insured premises. There are certainly situations where both of the exclusions will apply, but there are also scenarios, both on and away from the insured premises, where one exclusion will apply but not the other. Therefore, because the exclusions preclude coverage for lead-based injuries under different circumstances, I do not interpret the presence of the lead contamination exclusion as demonstrating the parties' intent that the total pollution exclusion not apply to lead paint.

---

[52] Policy, Exclusion - Lead Contamination (emphasis added).

[53] Policy, Declarations, at 2.

CONCLUSION

The total pollution exclusion precluded coverage for Richardson's claim. Cumberland's motion for summary judgment as to Farm Family's breach of contract claim is ***granted***.[54]

IT IS SO ORDERED.

____
President Judge

oc: Prothonotary
cc: Order Distribution
File

[54] Cumberland's motion did not address the plaintiff's claims alleging breach of the duty of good faith and fair dealing and consumer fraud. Those claims are not dismissed.