In the

United States Court of Appeals

For the Seventh Circuit

Nos. 21-1775, 21-1925 & 21-1926

INDEMNITY INSURANCE COMPANY OF NORTH AMERICA,
Plaintiff-Appellant, Cross-Appellee,

v.

WESTFIELD INSURANCE COMPANY and STAR INSURANCE COMPANY,
Defendants-Appellees, Cross-Appellants.

Nos. 21-1776, 21-1927 & 21-1928

WESTFIELD INSURANCE COMPANY and STAR INSURANCE COMPANY,
Plaintiffs-Appellees, Cross-Appellants,

v.

INDEMNITY INSURANCE COMPANY OF NORTH AMERICA,
Defendant-Appellant, Cross-Appellee.

Appeals from the United States District Court for the
Central District of Illinois.
Nos. 14-cv-03040 & 16-cv-03298 — **Sue E. Myerscough**, *Judge.*

ARGUED DECEMBER 5, 2022 — DECIDED JANUARY 19, 2023

Before BRENNAN, SCUDDER, and ST. EVE, *Circuit Judges*.

ST. EVE, *Circuit Judge*. Three insurance companies—Indemnity Insurance Company of North America, Westfield Insurance Company, and Star Insurance Company—dispute their respective obligations to defend a swine farm in a state court nuisance case. The underlying lawsuit has since concluded with a verdict in favor of the swine farm, and now, Westfield and Star seek reimbursement from Indemnity for some or all of the costs that they incurred while defending the farm during the litigation. To clarify Indemnity's duty to share in these defense costs, Indemnity and Westfield separately filed declaratory judgment actions in federal court. Star filed a counterclaim against Indemnity in Westfield's action. The cases were consolidated, and each insurer filed a motion for summary judgment. The district court granted in part and denied in part Westfield's and Star's motions and denied Indemnity's motion. For the following reasons, we reverse.

I. Background

A. Factual History

In 2007, Sandstone North, LLC and Sandstone South, LLC (collectively, "Sandstone") began operating large-scale swine farms in Scott County, Illinois. One of the owners of Sandstone, Brian Bradshaw, also owned a business named Red Oak Hills, LLC.

Indemnity, Westfield, and Star each provided commercial general liability insurance to Sandstone at various times during the disputed time period. Between April 2007 and November 2008, Westfield was the sole insurer of Sandstone. Westfield's policies were cancelled and replaced with policies issued by Indemnity running from November 2008 to

November 2009. Indemnity's policies were renewed for another year in November 2009. During the 2008–2009 time period, Star provided commercial general liability insurance to Red Oak Hills. Sandstone was named as an additional insured under Star's policy on August 2, 2009, thus providing coverage to Sandstone for losses due to the actions of Red Oak Hills or someone acting on its behalf. Star renewed its policy with Red Oak Hills for the 2009–2010 policy period.

In June 2010, certain of Sandstone's neighbors in Scott County—including Alvin F. Marsh, Beverly Marsh, and Marsh Enterprises—brought private nuisance claims against Sandstone in state court ("the Marsh action"). They alleged that Sandstone negligently mismanaged its facilities by improperly handling hog waste, resulting in foul and offensive odors and toxic gases. They further alleged that Sandstone negligently allowed runoff of swine effluent, chemicals, antibiotics, and other hazardous substances to come onto their properties and that Sandstone overused nearby roads, causing increased airborne dust.

On August 6, 2010, Sandstone sent letters to the three insurance companies informing them of the Marsh action. The correspondence included forms titled "General Liability Notice of Occurrence/Claim" and copies of the original complaint in the Marsh action. In the letter to Indemnity, Sandstone referenced the policies for both the 2008–2009 and 2009–2010 policy periods.

Each of the insurers agreed to defend Sandstone in the Marsh action subject to a reservation of rights. In its response letters (one to Sandstone North and one to Sandstone South), Indemnity informed Sandstone that its policies may not cover the Marsh action based on a provision excluding coverage for

"'[b]odily injury' or 'property damage' arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release, or escape of 'pollutants.'" Indemnity advised Sandstone that it intended to file a declaratory judgment action to have a court rule on the issue and that if it was "successful with the Court declaring that there is no duty to defend under the policy," it would "seek reimbursement from [Sandstone] for the defense costs and expenses incurred on [its] behalf subject to this reservation of rights." Significantly, Indemnity's response letters referenced only its 2008–2009 policy numbers and not its 2009–2010 policy numbers.

Just two weeks later, Indemnity filed a declaratory judgment action in federal court, claiming that it had no duty to defend Sandstone for several reasons, including that the Marsh action was subject to its policies' pollution exclusion. Like its response letters, Indemnity's complaint described only its policies for the 2008–2009 period and not the 2009–2010 period.

On November 2, 2010, Sandstone sent Indemnity a letter withdrawing its tender of defense. It stated:

> By this letter, Sandstone North [and] Sandstone South … withdraw tender of their defense in the Underlying Case to [Indemnity]. Although my Clients release [Indemnity] from its obligation to provide a defense under the Policies, they are not waiving any rights to indemnification under the Policies in relation to the Underlying Case.
>
> The withdrawal of the Clients' tender of defense resolves all matters related to the Complaint for Declaratory Judgment, and we request that counsel for

> [Indemnity] in the declaratory judgment proceeding provide us with a proposed agreed motion for dismissal.

In the subject line of the letter, Sandstone listed only the 2008–2009 policy numbers.

Indemnity subsequently moved to dismiss its claim without prejudice, and the district court granted the motion. Star and Westfield agreed to split the defense of Sandstone in the Marsh action.

In November 2013, an Illinois appellate court held that odor claims involving a hog facility are not "traditional environmental pollution" and are therefore not excluded under insurance policy pollution exclusions. *Country Mut. Ins. Co. v. Hilltop View, LLC*, 998 N.E.2d 950, 959 (Ill. App. Ct. 2013). This decision foreclosed Indemnity's earlier argument that its policies' pollution exclusion provision excluded the Marsh action from coverage. One month later, Sandstone sent Indemnity two letters informing it of the *Hilltop* decision, updating the insurer on the status of the Marsh action, and "request[ing] that [Indemnity] agree to participate in the defense of its Insureds in [the Marsh action]." Both letters addressed only the 2008–2009 policies.

In response, Indemnity filed another declaratory judgment action in federal court in February 2014. It sought a declaration that it had no duty to defend Sandstone in the Marsh action because (1) Sandstone withdrew its tender of defense to Indemnity, and (2) Indemnity's insurance was excess and Star was obligated to provide primary coverage. Similar to its 2010 declaratory judgment suit, Indemnity's original complaint in the 2014 suit referenced only the 2008–2009 policies.

The state court in the Marsh action authorized the plaintiffs to seek damages against Sandstone for injuries that occurred up to and including November 15, 2013. Sandstone subsequently sent another letter to Indemnity, tendering its defense under its policies for the 2009–2010, 2010–2011, 2011–2012, 2012–2013, and 2013–2014 policy periods. It again "request[ed] that [Indemnity] agree, in writing, to participate in the defense of its Insureds in the underlying suit."

Shortly after receiving this letter, Indemnity moved to amend its complaint in the 2014 declaratory judgment action to include all of its policies. The district court granted the motion, and Indemnity filed the amended complaint on April 24, 2014.

In May 2016, the Marsh action went to trial. The jury returned a verdict in favor of Sandstone and against the Marsh plaintiffs. Following the conclusion of the state court trial, Westfield filed suit in federal court, seeking a declaratory judgment that Indemnity was obligated to reimburse it for some or all of the defense costs it paid in the Marsh action. Star filed a counterclaim against Indemnity, also contending that Indemnity owed it reimbursement for some or all of the defense costs it paid.

B. Procedural History

The district court consolidated Indemnity's and Westfield's declaratory judgment actions for purposes of discovery and the resolution of dispositive motions. The insurers separately filed motions for summary judgment. In its motion, Indemnity argued that it had no duty to defend Sandstone because (1) Sandstone deactivated Indemnity's obligation to defend in its November 2010 letter and (2) Indemnity's policies

were excess over Star's, meaning that Indemnity had no duty to defend Sandstone under its policies' "other insurance" provision. Westfield and Star denied that either Sandstone or Indemnity's "other insurance" provision relieved Indemnity of its duty to defend. On the second point, Westfield and Star contended that Indemnity was estopped from asserting any policy defenses because it breached its duty to defend under the 2009–2010 policies.

The district court granted in part and denied in part Westfield's and Star's motions and denied Indemnity's motion. Although it found that Indemnity was not estopped from asserting its policy defenses to coverage, it concluded that the "other insurance" provision did not relieve Indemnity of its duty to defend Sandstone because the Marsh action included losses that only Indemnity's policy covered. Specifically, the district court found that Indemnity "provided exclusive commercial general liability coverage for losses [from November 2008 until August 2009]" and for losses stemming from "actions committed by Sandstone only, and not by Red Oaks Hills or those acting on its behalf." "Because the Underlying Action Complaint alleged all these possibilities of covered losses," the district court concluded, "Indemnity had a duty to defend Sandstone if Sandstone complied with the notice provisions in the Indemnity Policies."

The district court then turned to Indemnity's contention that Sandstone relieved it of any duty to defend in the November 2010 letter. The court first found that Sandstone's letter was a targeted tender under Illinois law, which recognizes an insured's "paramount right" to select certain insurers for coverage when multiple policies cover the loss. *Alcan United, Inc. v. W. Bend Mut. Ins. Co.*, 707 N.E.2d 687, 692 (Ill. App. Ct.

1999) (citation omitted). Nevertheless, the court concluded that Indemnity had a duty to defend because Sandstone reasonably "retendered … in light of the *Hilltop View* decision." The court rejected Indemnity's argument that Sandstone's deselection under the targeted tender doctrine was irrevocable. Although no Illinois court had addressed the issue, the district court concluded that the Illinois Supreme Court would "decide that an insured should be able to change its position and re-tender a defense to an insurer if the re-tender is reasonable under the circumstances," given its prior emphasis on an insured's right to choose its insurer. The district court found that, under the circumstances, Sandstone's retender was reasonable, and therefore, Indemnity had a duty to defend.

For these reasons, the district court held that "Indemnity must pay a pro rata share of the defense costs for the Underlying Action under the Illinois doctrine of equitable contribution." It concluded that Westfield and Star were also entitled to "prejudgment interest accruing from December 17, 2013 on all fees and costs paid by Westfield and Star prior to that date, and prejudgment interest accruing from the dates Westfield and Star paid additional defense costs and fees thereafter."

The three insurance companies timely appealed the district court's decision.[1] Indemnity argues that the district court erred when it (1) found that the "other insurance" provision

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[1] The appeal numbers are as follows: No. 21-1775 (Indemnity appeal of 2014 case); No. 21-1776 (Indemnity appeal of 2016 case); No. 21-1925 (Westfield appeal of 2014 case); No. 21-1926 (Star appeal of 2014 case); No. 21-1927 (Westfield appeal of 2016 case); and No. 21-1928 (Star appeal of 2016 case).

did not apply and (2) determined that Sandstone could retender its defense following its earlier withdrawal. Westfield and Star contend that the district court wrongly rejected their estoppel argument and that Indemnity owes them full repayment for the Marsh action defense costs.

II. Analysis

This appeal concerns two issues. The first is whether the "other insurance" provision in Indemnity's policies relieves it of any obligation to defend Sandstone in the Marsh action. As part of this analysis, we must address Westfield's and Star's contention that Indemnity is estopped from asserting this defense because it breached its duty to defend under its 2009–2010 policies. The second issue on appeal is whether Sandstone's November 2, 2010, letter withdrawing its tender of defense to Indemnity relieves Indemnity of its duty to defend Sandstone in the Marsh action.

A. "Other Insurance" Provision

Each of Indemnity's policies contains an "other insurance" provision that reads as follows:

> **Other Insurance**
>
> If other valid and collectible insurance is available to the insured for a loss we cover under Coverages **A** or **B** of this Coverage Part, our obligations are limited as follows:
>
> **a. Primary Insurance**
>
> This insurance is primary except when Paragraph **b.** below applies. If this insurance is primary, our obligations are not affected unless any of the other insurance is also primary. Then, we will share with all that other

> insurance by the method described in Paragraph **c.** below.
>
> **b. Excess Insurance**
>
> **(1)** This insurance is excess over:
>
> …
>
> **(b)** Any other primary insurance available to you covering liability for damages arising out of the premises or operations, or the products and completed operations, for which you have been added as an additional insured by attachment of an endorsement.
>
> **(2)** When this insurance is excess, we will have no duty under Coverages **A** or **B** to defend the insured against any "suit" if any other insurer has a duty to defend the insured against that "suit." If no other insurer defends, we will undertake to do so, but we will be entitled to the insured's rights against all of those other insurers.

Indemnity contends that its insurance is excess over Star's and that under the terms of this provision, it has no obligation to defend Sandstone in the Marsh action.

Star and Westfield each offer reasons that the "other insurance" provision should not absolve Indemnity of its obligation to share the defense costs. They further contend that Indemnity is estopped from asserting the defense because it did not timely respond to Sandstone's tender of defense with respect to its 2009–2010 policies.

1. Star's Argument

Star begins by arguing that Indemnity's "other insurance" provision does not apply in this case. The provision applies only "[i]f other valid and collectible insurance is available to the insured for a loss [Indemnity] cover[ed]." Star argues that this condition is not met here because the Marsh action involved two categories of losses that were covered solely by Indemnity's policies. First, Indemnity's policies provided exclusive coverage to Sandstone between November 2008 and August 2009—the period between the cancellation of Westfield's policies and the addition of Sandstone on Red Oak Hills' policies. Second, because the Star policies covered only losses involving the actions of Red Oak Hills, Indemnity provided sole coverage for injuries with no nexus to Red Oak Hills during Indemnity's policy terms.

Star's argument is unavailing. As an initial matter, Star misreads the language of the provision. The "other insurance" provision does not require us to look for some abstract loss that would be covered exclusively by Indemnity's policy. What matters is whether there exists any loss in the Marsh action that is covered under both insurers' policies.[2] And here, Star admits that there is. Star concedes that "the allegations [in the Marsh action] did not completely eliminate the potential that Red Oak may have had some involvement."

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[2] We have not seen Illinois courts address excess versus primary insurance where an excess and a primary insurer have only partially convergent coverage in both the time period and losses covered. So we assume, but do not decide, that the rules apply the same both where the insurer is fully excess and where the insurer is partially excess as to time or coverage.

Therefore, the injury alleged in the Marsh action constituted a loss covered under both Star's and Indemnity's policies, thereby triggering the "other insurance" provision.

Star attempts to circumvent its own admission by breaking the Marsh allegations into discrete parts—some that involve Red Oak Hills, and so fall under both Indemnity's and Star's policies, and some that are attributable solely to Sandstone, and so Indemnity alone must cover them. But such an approach fails. The Marsh action alleged a single harm: a continuous nuisance spanning several years. And because the Marsh plaintiffs did not prevail at trial, the jury did not make any factual determinations regarding Red Oak Hills' or Sandstone's liability. We therefore do not know whether and for what Star would have had to indemnify Sandstone had the Marsh plaintiffs succeeded. *See Sentinel Ins. Co. v. Walsh Constr. Co.*, 298 F. Supp. 3d 1165, 1170–71 (N.D. Ill. 2018) (citing *Travelers Ins. Co. v. Eljer Mfg., Inc.*, 757 N.E.2d 481, 492 (Ill. 2000)). Accordingly, we can look only to the face of the complaint to determine Star's potential liability. Because Star concedes that, based on the complaint, its insurance covered a loss that was also covered by Indemnity's insurance, the "other insurance" provision applies.

2. Westfield's Arguments

Westfield argues that Indemnity cannot use its "other insurance" provision to deny Westfield contribution because even if Indemnity's policies are excess over Star's, they are not excess over Westfield's. This argument, however, misunderstands the plain language of the "other insurance" provision. By its express terms, the provision concerns an insurer's obligations to the *insured*, stating that "[w]hen this insurance is excess, we will have no duty … to defend the *insured* against

any 'suit' if any other insurer has a duty to defend the insured against that 'suit.'" It is thus irrelevant whether Indemnity's policies are excess over all other policies. As long as its insurance is excess over any other policy, Indemnity does not have a duty to defend Sandstone. And an insurer does not have a duty to contribute to a defense if it does not have a duty to defend. *See Bituminous Cas. Corp. v. Royal Ins. Co. of Am.*, 704 N.E.2d 74, 79 (Ill. App. Ct. 1998) ("It is only when an insurer's policy is triggered that the insurer becomes liable for the defense and indemnity costs of a claim and it becomes necessary to allocate the loss among co-insurers.").

Westfield also argues that Indemnity treats its policies as if they were true excess policies when, in fact, they are only excess by coincidence. But nowhere in its briefs does Westfield explain why this distinction matters, and the cases it cites do not support its conclusion. In *Kajima Construction Services, Inc. v. St. Paul Fire & Marine Insurance Co.*, the Illinois Supreme Court explained that true excess coverage "is purchased by the insured in separate contracts that are written by design … as excess coverage" and excess by coincidence coverage occurs "when multiple primary insurance contracts apply to the same loss." 879 N.E.2d 305, 314 (Ill. 2007) (citations omitted). This is all the court wrote about the difference between the two kinds of policies. It said nothing to support Westfield's contention that a policy that is excess by coincidence cannot be excess over one policy by being excess over another with overlapping coverage. *Id.*

3. Estoppel

Both Star and Westfield argue that, in any event, Indemnity is estopped from raising a defense under its "other insurance" provision. Illinois law treats an insurer's duty to defend

as so fundamental that an unreasonable delay in addressing an insured's notice of a claim is a breach of contract estopping the insurer from asserting any policy defenses. *See State Auto. Mut. Ins. Co. v. Kingsport Dev., LLC*, 846 N.E.2d 974, 987 (Ill. App. Ct. 2006); *Emps. Ins. of Wausau v. Ehlco Liquidating Trust*, 708 N.E.2d 1122, 1134–1135 (Ill. 1999). "Where an insurer is uncertain as to the extent its policy provides coverage, it has two options." *Cent. Mut. Ins. Co. v. Kammerling*, 571 N.E.2d 806, 809 (Ill. App. Ct. 1991). It can either "defend under a reservation of rights" or "secure a declaratory judgment as to its rights and obligations before trial or settlement of the underlying action." *Id.*

Although Indemnity sent reservation of rights letters and filed a declaratory judgment action after receiving Sandstone's tender of defense, Westfield and Star contend that Indemnity is estopped from asserting its "other insurance" clause because Indemnity's response focused on its 2008–2009 policies and did not address its 2009–2010 policies. Indemnity does not dispute that it failed to refer to the 2009–2010 policies in its reservation of rights letters and declaratory judgment action. The first time it expressly addressed the 2009–2010 policies was three years and nine months after Sandstone initially notified it of the Marsh action. Indemnity nonetheless argues that estoppel does not apply here because all the parties understood its reservation of rights letters and declaratory judgment action as concerning *all* policies, despite the lack of explicit reference to the 2009–2010 policies.

We agree with Indemnity. Because Indemnity's policies were identical, a single response would have been sufficient to address a tender of defense under each of the policies. The uncontested evidence demonstrates that the parties

interpreted Indemnity's reservation of rights letters and declaratory judgment action as a response under both the 2008–2009 and 2009–2010 policies. Shortly after Indemnity filed the declaratory judgment action, Sandstone sent Indemnity a letter "withdraw[ing] tender of [its] defense" in the Marsh action and "releas[ing] [Indemnity] from its obligation to provide a defense under the Policies." The letter stated that the "withdrawal … resolve[d] *all* matters related to the Complaint for Declaratory Judgment" and "request[ed] that counsel for [Indemnity] … provide [Sandstone] with a proposed agreed motion for dismissal." For three years after the dismissal of the declaratory judgment action, Sandstone, Star, and Westfield litigated the Marsh action without seeking involvement from Indemnity. Sandstone did not ask Indemnity to provide a defense under the 2009–2010 policies, and Westfield and Star did not pursue Indemnity for any defense costs. Given these unique circumstances, it is clear that the parties understood Indemnity's reservation of rights letters and declaratory judgment action to refer to the identical 2008–2009 and 2009–2010 policies.[3] We therefore find that Indemnity is not estopped from asserting its "other insurance" provision defense.

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[3] The testimony that Star and Westfield cite is insufficient to create a genuine dispute. During his deposition, Brian Bradshaw—owner of Sandstone and Red Oak Hills—testified that he understood Sandstone's November 2010 letter to withdraw the tender of defense only under the 2008–2009 policies and not the 2009–2010 policies. This unsupported testimony, however, is inconsistent with all other evidence in the record and, without more, is insufficient to defeat summary judgment. *See Wheatley v. Factory Card & Party Outlet*, 826 F.3d 412, 420 (7th Cir. 2016) (holding that the plaintiff's unsupported testimony, alone, was insufficient to avoid summary judgment).

B. The Targeted Tender Doctrine

The second issue on appeal is whether Sandstone's letter withdrawing its tender of defense to Indemnity relieves Indemnity of its duty to defend Sandstone in the Marsh action. This question involves numerous sub-issues, many of which are unsettled under Illinois law. Indeed, we were unable to find any Illinois state court cases addressing whether an insured can retender its defense following a deselection and in what circumstances an insured may do so. Illinois appellate courts are also in disagreement over whether the targeted tender doctrine applies to cases like this at all—namely those involving consecutive, rather than concurrent, insurance policies. *Compare Ill. School Dist. Agency v. St. Charles Comm. Unit Sch. Dist. 303*, 971 N.E.2d 1099, 1108 (Ill. App. Ct. 2012), *and Greenwich Ins. Co. v. John Sexton Sand & Gravel Corp.*, No. 1-15-1606, 2016 WL 4035709, at *13 (Ill. App. Ct. Jun. 24, 2016), *with Richard Marker Assocs. v. Pekin Ins. Co.*, 743 N.E.2d 1078, 1078 (Ill. App. Ct. 2001). We need not address these unresolved issues of state law, however, because we find that Indemnity's "other insurance" provision relieves it of any duty to defend Sandstone. We therefore reverse on that ground alone.

III. Conclusion

Because its insurance is excess over Star's and Star has a duty to defend, Indemnity's "other insurance" provision relieves it of any duty to defend Sandstone in the Marsh action. Indemnity is not estopped from asserting this defense because it promptly responded to Sandstone's tender of defense with reservation of rights letters and a declaratory judgment action. The decision of the district court is therefore

REVERSED.