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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 45

AMERICAN CASUALTY COMPANY OF READING, PA., TWIN CITY FIRE INSURANCE COMPANY, U.S. SPECIALTY INSURANCE COMPANY, and NAVIGATORS INSURANCE COMPANY Plaintiffs, -against- MORRIS GELB, T. KEVIN DENICOLA, EDWARD J. DINEEN, KERRY A. GALVIN, JOHN A. HOLLINSHEAD, JAMES W. BAYER, W. NORMAN PHILLIPS, C. BART DE JONG, DAN F. SMITH, CAROL A. ANDERSON, SUSAN K. CARTER, STEPHEN I. CHAZEN, TRAVIS ENGEN, DANNY W. HUFF, PAUL S. HALATA, DAVID J. LESAR, DAVID. J.P. MEACHIN, DANIEL J. MURPHY, WILLIAM R. SPIVEY, CHARLES L. HALL, KEVIN R. CADENHEAD, and RICK FONTENOT, Defendants.	Index No. 653280/2011 DECISION AND ORDER Motion Sequence No. 001

MELVIN L. SCHWEITZER, J.:

Plaintiffs move for summary judgment on Counts I-III of the Amended Complaint pursuant to CPLR 3212, seeking a declaratory judgment that the insurance policies issued to Lyondell Chemical Company (Lyondell) and its Directors & Officers (D&O) do not provide coverage for defense costs from a claim prosecuted by a Litigation Trust against the Lyondell D&O in the United States Bankruptcy Court in the Southern District of New York (Adversary Proceeding). Defendants move for partial summary judgment seeking a declaratory judgment that the insurance policies in question cover defense costs for the Adversary Proceeding.

Background

The plaintiffs in this case are American Casualty Company of Reading, Pa. (American Casualty), Twin City Fire Insurance Company (Twin City), U.S. Specialty Insurance Company (USSIC) and Navigators Insurance Company (Navigators) (Excess Insurers). The Excess Insurers provided layers of excess directors and officers insurance coverage (in excess of a primary policy from the Zurich American Insurance Company (Zurich)) to Lyondell during two policy periods, running from 2006 to 2007, and then 2007 to 2013 (Excess Policies). With respect to the plaintiffs (except for Navigators), the 2006-07 and 2007-13 Excess Policies have the same limits of liability and underlying coverage thresholds. American Casualty provides up to $15 million of coverage after $25 million of underlying coverage is provided by Zurich. Twin City provides up to $15 million of coverage after $40 million of underlying coverage is provided by Zurich and American Casualty. USSIC provides up to $15 million of coverage after $55 million of underlying coverage is provided by Zurich, American Casualty, and Twin City. In both the 2006-07 and 2007-13 policies, Navigators provides up to $10 million in coverage. For the 2006-07 policy, Navigators' coverage is triggered by $120 million in underlying coverage by Zurich, American Casualty, Twin City, USSIC, and other insurers. For the 2007-13 policy, Navigators' coverage is triggered by $115 million in underlying coverage by Zurich, American Casualty, Twin City, USSIC, and other insurers. Most terms of the Excess Policies mimic those of the Zurich primary policy; those which do not are specifically labeled as distinct in the Excess Policies.

Each of the defendants (Insureds) are individuals who were directors and/or officers of Lyondell and/or certain of its subsidiaries. The Insureds believe the Excess Polices entitle them

to defense costs incurred from defending the Adversary Proceeding. Zurich has paid $25 million to the Insureds for defense costs of the Adversary Proceeding.

Background of the Adversary Proceeding

On July 17, 2007, the Lyondell board announced it had approved an acquisition offer by Basell AF S.C.A. (Basell). On August 20, 2007, before Lyondell's shareholders had approved the transaction, certain Lyondell shareholders filed a class action in Delaware Chancery Court. *See Walter E. Ryan Jr. v Lyondell Chemical Co., et al.*, Case No. 3176 (the Ryan Litigation). The Ryan Action involved a breach of fiduciary duty claim pursuant to *Revlon v MacAndrews & Forbes Holdings, Inc.*, 506 A2d 173 (Del. 1986), where the shareholders alleged that the "merger price [of $48 per share] was grossly insufficient." *Lyondell Chem. Co. v Ryan*, 970 A2d 235, 239 (Del. 2009). According to the *Ryan* court, "[t]here is only one *Revlon* duty—to get the best price for the stockholders at a sale of the company." *Ryan*, 970 A2d at 242. Zurich and the Excess Insurers were informed of the *Ryan* litigation under the 2006-2007 policies. Here, Lyondell's creditors, by contrast, do not assert that Lyondell's directors "failed to obtain the best available price in selling the company," *cf. id.*, but that Lyondell's directors allowed a leveraged transaction for a price that rendered Lyondell insolvent.

The Lyondell-Basell merger closed on December 20, 2007. Lyondell became a subsidiary of Basell, and Basell was renamed Lyondell-Basell Industries AF S.C.A. On January 6, 2009, Lyondell filed for bankruptcy in the United States Bankruptcy Court in the Southern District of New York (Bankruptcy Court). On January 19, 2009, the United States Trustee for the Southern District of New York appointed an Official Committee of Unsecured Creditors (Creditors Committee) in the Lyondell bankruptcy. The Creditors Committee received permission to pursue a course of action exclusive to Lyondell, and commenced such an action

(Adversary Proceeding) in the Bankruptcy Court. *See Official Committee of Unsecured Creditors, on behalf of the Debtors' Estates v Citibank, N.A., London Branch, et al.*, Adv. Proc. No. 09-01375.

On March 12, 2010, the Third Amended Joint Reorganization Plan created a Litigation Trust to prosecute causes of action on behalf of Lyondell against its D&O. The Litigation Trust was assigned rights and standing for these causes of action. Upon approval of the Third Amended Joint Reorganization Plan, the Litigation Trust took control of the Adversary Proceeding from the Creditors Committee. Lyondell agreed to finance the Litigation Trust's prosecution of claims. Lyondell transferred $20 million to the Litigation Trust (and to a separate related trust) to defray the attorney's fees and litigation expenses necessary to pursue Lyondell's causes of action against its D&O. On July 23, 2010, the Litigation Trust filed an amended complaint in the Adversary Proceeding.

Relevant Policy Provisions

Both Zurich primary policies (2006-2007 and 2007-2013) include an express limitation on the scope of coverage known as the insured versus insured exclusion (IVI exclusion). The IVI exclusion bars coverage for "Loss on account of any claim made against any Insured Person . . . brought or maintained by or on behalf of the Company or any Insured Person in any capacity." The "Company" is defined in the policy to include Lyondell if it is "a debtor in possession under United States bankruptcy law." This provision is incorporated into the Excess Policies without modification.

A "Liberalization Endorsement" is incorporated into the Excess Policies without modification for the 2006-07 policies (for the Excess Insurers, with the exception of Navigators)

and the 2007-13 policies (for all Excess Insurers, including Navigators). The Liberalization Endorsement reads as follows:

> "In the event that [Zurich] shall announce either:
>
> (1) a new Directors & Officers Liability Insurance policy form; or
>
> (2) a standard endorsement providing enhancements of coverage to this policy form, which is to be made available to all Insureds or potential Insureds and for which no additional premium is required
>
> then the Company shall have the right to such new policy or such new coverage enhancement endorsement subject to all underwriting information or particulars as [Zurich] may require for such new policy or enhanced coverage. Notwithstanding the above, any existing claims will be controlled by the existing policy form the claim was reported under."

In April 2009, Zurich introduced such a "standard endorsement providing enhancements of coverage to this policy form," which was branded the "Select Form." The Select Form, *inter alia,* provided a broader bankruptcy exception to the IVI exclusion. The original IVI exclusion (in both Excess Policies) stated "[t]he Underwriter shall not be liable for Loss on account of any Claim made against any Insured Person: . . . except for (e) any Claim brought by a receiver, conservator, liquidator, trustee, rehabilitator, or similar official against the Company." The Select Form provides "[t]he Underwriter shall not be liable for Loss on account of any Claim made against any Insured: . . . except [for] (5) a Claim *brought or maintained* by or on behalf of a bankruptcy or insolvency trustee, examiner, receiver, similar official or *creditors committee* for such Company, or any assignee of such trustee, examiner, receiver, or similar official or creditors committee." (emphasis added).

Both Zurich Primary Policies contain a provision addressing multiple claims arising out of the same Wrongful Act or Interrelated Wrongful Acts. The provision (Interrelated Wrongful Acts Provision) states "[f]or the purposes of this policy, all Loss arising out of the same

Wrongful Act and all Interrelated Wrongful Acts of Insured Persons shall be deemed one Loss, and such Loss shall be deemed to have originated in the earliest Policy Period in which a Claim is first made against an Insured Person alleging any such Wrongful Act of Interrelated Wrongful Acts." This provision is incorporated into the Excess Policies without modification.

The Zurich Policy defines Loss as "the total amount which the Insured Persons become legally obligated to pay on account of each Claim and for all Claims in each Policy Period and the Extended Reporting Period, if exercised, made against them for Wrongful Acts for which coverage applies, not limited to, damages, judgments, settlements, and Defense Costs." The total amount of "Loss" the Insurers are expected to pay is capped as outlined in each policy.

The Zurich Policy defines Claim as:

(1) a written demand for monetary damages,

(2) a civil proceeding by the service of a complaint or similar proceeding . . . .

Lastly, the Zurich Policy defines Interrelated Wrongful Acts to mean "all Wrongful Acts that have as a common nexus any fact, circumstance, situation, event, transaction, cause or series of casually connected facts, circumstances, situations, events, transactions or causes."

Discussion

A party may move for summary judgment on any claim after issue has been joined. *See* CPLR 3212(a) (McKinney's 2006). To prevail the movant must (1) make a *prima facie* showing that it is entitled to judgment as a matter of law; and (2) offer evidence demonstrating that there is no genuine issue of material fact. *See JMD Holding Corp. v Cong. Fin. Corp.*, 4 NY3d 373, 384 (2005). If the movant makes its *prima facie* showing, the burden then shifts to the non-moving party to "produce evidence in admissible form to demonstrate the existence of a disputed issue of material fact sufficient to require a trial." *See Michel M. v Bd. Of Educ. Of City*

of New York, 3 AD3d 370, 371 (1st Dept 2004). "[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" to demonstrate a disputed issue of material fact and do not raise issues requiring a trial. *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980).

Unambiguous terms in contracts are interpreted in accordance with their plain meaning. *E.g. W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 163 (1990). Insurance policies should be read using the lenses of "'common speech' and the reasonable expectations of a businessperson." *Belt Painting Corp. v TIG Ins. Co.*, 100 NY2d 377, 383 (2003). A term in an insurance policy is ambiguous if the term "may be reasonably interpreted in two conflicting manners." *Mostow v State Farm Ins. Cos.*, 88 NY2d 321, 326 (1996). In the case of ambiguous terms, they are construed in favor of the reasonable interpretation favoring the insured. *Id.* In order for the Excess Insurers' motion to be granted, the policy must be unambiguously against coverage, considering the "common speech" of the reasonable business person, based on the underlying facts in the complaint. Case law confirms this conclusion holds when analyzing exclusions such as the IVI exclusion. *See Rapid-Am.*, 80 NY2d at 652 ("To negate coverage by virtue of an exclusion, an insurer must establish that the exclusion is stated in clear and unmistakable language, is subject to no other reasonable interpretation, and applies in the particular case."); *Belt Painting*, 100 NY2d at 383 ("Policy exclusions are given a strict and narrow construction, with any ambiguity resolved against the insurer."). Interpreting an unambiguous insurance policy and construing an ambiguous policy in favor of coverage are matters of law. *See e.g. Fed. Ins. Co. v Int'l Bus. Machines Corp.*, 18 NY3d 646 (2012).

The Select Form Applies

The Zurich Policy Liberalization Endorsement allows the Insured to take advantage of any new form, and new terms, announced by Insurers. The Select Form was announced in April 2009; the Adversary Proceeding was commenced in July 2009. However, the Liberalization Endorsement provides that new forms do not apply to "existing claims." If the Adversary Proceeding is an "existing claim", as the Insurers argue, then the Select Form's new terms do not apply.

Regardless of which policy period (2006-2007 or 2007-2013) applies to the Adversary Proceeding, the Select Form's terms apply. Both policies have the same Liberalization Endorsement Provision. The Insurers argue that the Adversary Proceeding and the Ryan Litigation are Interrelated Wrongful Acts and therefore constitute one claim. The Insurers argue because the two litigations constitute one claim, and the Adversary proceeding "shall be deemed to have originated in the earliest Policy Period in which a Claim is first made against any Insured Persons alleging any such Wrongful Act or Interrelated Wrongful Act," that the Adversary Proceeding commenced in 2006 when the Ryan Litigation began. The Insurers misinterpret the Interrelated Wrongful Acts Provision by conflating the terms "Loss" and "Claim."

The Zurich Policies do not contain any provisions that would treat multiple "Claims" as "one" or the "same" Claim, even if the Claims are determined to be based on Interrelated Wrongful Acts. Instead, the original policy language states that "all *Loss* arising out of the same Wrongful Act and all Interrelated Wrongful Acts of Insured Persons shall be deemed one Loss . . . ." (emphasis added). Under this policy language, a finding that two or more Claims are based on Interrelated Wrongful Acts simply means that the "Loss" from those Claims is treated

as "one Loss," triggering only one set of policy limits instead of two. It does not affect the separateness of the Claims themselves.

This policy language differs from other policies which contain Interrelated Wrongful Act Provisions that treat separate claims as one claim. In *Highwoods*, cited by the Insurers, the Primary Policy contained an Interrelated Wrongful Act Provision that stated, "all Related Claims will be treated as a *single Claim* made when the earliest of such Related Claims was first made, or when the earliest of such Related Claims is treated as having been made." *Highwoods Props., Inc. v Exec. Risk Indem., Inc.*, 407 F3d 917, 922 (8th Cir 2005). Zurich could have adopted similar language as the policy in *Highwoods*. Instead, the Zurich Policies treat related claims as "one Loss", not "one Claim." Although the Ryan Litigation and the Adversary Proceeding may be Interrelated Wrongful Acts, and therefore one Loss, they remain separate claims commenced on separate dates.

The Insurers argue that the Select Form cannot modify the 2006-2007 policy language because the Select Form was announced 18 months after the policy period ended. Even if the court assumes that the 2006-2007 policy applies, an issue the court does not decide here, there is nothing in the plain language of the Liberalization Endorsement that prohibits liberalization by a form announced after the expiration of the policy period at issue. The only exemption, as discussed *supra*, in the Liberalization Provision is the "existing claims" restriction.

Continental Casualty Company, an affiliate of plaintiff American Casualty, included a restrictive liberalization clause in its claims made policies issued between 1978 and 1984:

> "*If*, prior to the effective date stated in this certificate or *during the term of this certificate*, the Insurer has adopted, or adopts, revised provisions for the form of the policy renewed by this certificate in order to afford, without additional premium, broader insurance to the types of insureds covered by this policy, the

> insurance afforded for the policy period stated in this certificate shall be construed in accordance with the provisions of such revision."

Bd. of Educ., Yonkers City Sch, Dist. v CNA Ins. Co., 647 F Supp 1495, 1501 (SDNY 1986) (emphasis added). Such language was available to Zurich and the Insurers since at least the late 1970s, yet the Liberalization Endorsement in the Zurich Policy contains no such restriction.

The Select Form Covers the Defense Costs of the Insureds

The Excess Insurers argue the IVI exclusion bars coverage for claims brought or maintained "on behalf of" Lyondell against its own D&O. The plain language of the Select Form's updated bankruptcy exception to the IVI exclusion unambiguously provides coverage for defense costs from "a Claim *brought or maintained* by or on behalf of a . . . *creditors committee* for such Company, or any assignee of such . . . creditors committee." (emphasis added). The Adversary Proceeding was brought by the Creditors Committee and thus covered by the Select Form and the Zurich Policy.

The 2007-2013 policy period and the Select Form apply to Navigators

Navigators differs slightly from the other Insurers in that their Excess Policy from 2006-2007 did not include a Liberalization Endorsement Provision. Navigators did incorporate the Liberalization Endorsement for their 2007-2013 policy. Therefore, if the *Ryan* Litigation and the Adversary Proceeding are Interrelated Wrongful Acts, then the Adversary Proceeding would have commenced during the 2006-2007 policy period and the Select Form terms would not apply.

The Insurers argue that the Adversary Proceeding and the *Ryan* litigation are Interrelated Wrongful Acts because they both deal with the Lyondell-Basell merger. However such a broad

reading of Interrelated Wrongful Act would encompass any Claim that is connected to the merger.

The only real connection between the two proceedings is the Lyondell-Basell merger which was the subject of the *Ryan* Litigation and the cause of the Adversary Proceeding. In the *Ryan* Litigation, a single Lyondell shareholder brought a class action suit against the Lyondell directors seeking an injunction against the Lyondell-Basell merger. The plaintiff in the *Ryan* Litigation alleged that the Board of Directors breached their *Revlon* duties by failing to get the best available price during a merger. In contrast, the Adversary Proceeding was brought by the Debtor's estates seeking damages from Lyondell-Basell. The Adversary Proceeding has nothing to do with inadequate price. Instead, the Debtors allege that the financing obtained to finance the merger overleveraged the company thereby forcing it into bankruptcy. The proceedings are fundamentally inconsistent with one another; the Adversary Complaint alleges that the D&O knew that $48 per share was not justified and would leave the post-Merger entity insolvent whereas the *Ryan* Litigation alleged that the D&O could have gotten more than $48 per share. Thus, for the purposes of the counter-claim against Navigators, the 2007-2013 policy applies. Because Navigators incorporated the Liberalization Endorsement into their 2007-2013, the Select Form's terms apply.

The Insureds motion for partial summary judgment requests a declaration that (1) the Adversary Proceeding is covered under the 2007-2013 policies; (2) the Select Form's IVI exclusion is controlling and does not bar coverage for the Adversary Proceeding, and; (3) alternatively, the original IVI exclusion does not bar coverage for the Adversary proceeding. (2) is correct for the above reasons.

Plaintiffs' motion for summary judgment is denied. Defendants' motion for partial summary judgment is granted.

Dated: June 19, 2014

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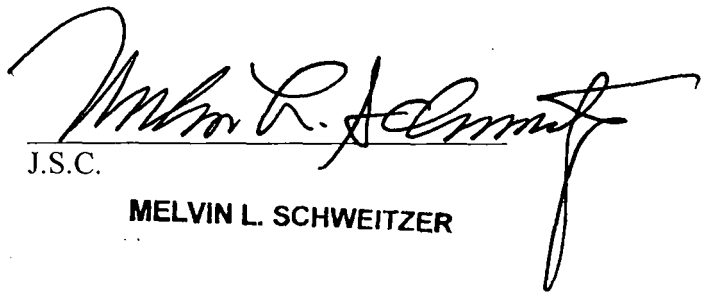

J.S.C.

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