IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

WESTERN NATIONAL ASSURANCE COMPANY, a Washington corporation, Respondent, v. MAXCARE OF WASHINGTON, INC., a Washington corporation, Appellant.	)	No. 67952-0-I UNPUBLISHED OPINION FILED: December 24, 2012

Verellen, J. — Maxcare of Washington, Inc. appeals the trial court ruling that its insurer had no duty to defend a homeowner's lawsuit alleging that Maxcare contaminated their house with potentially toxic chemicals while repairing smoke damage. The trial court relied upon the total pollution exclusion in Maxcare's commercial general liability policy. Maxcare argues unfolding discovery in the homeowner's litigation provided its insurer with actual knowledge of potential theories of liability not present on the face of the homeowner's complaint and not governed by the pollution exclusion. But Maxcare provides no compelling authority for such an expansive view of the "actual knowledge" exception to the face-of-the-complaint standard for the duty to defend. Because the unambiguous allegations on the face of

the homeowner's complaint all fall within the pollution exclusion, the insurer had no duty to defend. We affirm.

FACTS

Maxcare provides disaster restoration and cleaning services. Western National Assurance Company (Western) issued a commercial general liability insurance policy to Maxcare providing coverage for "those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies."[1] The policy excludes coverage for "'[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."[2] "Pollutants" are defined as "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals, and waste."[3]

On February 23, 2009, Latisha Cueva left an unattended pot of chicken broth cooking on the stove while she ran errands. When she returned home, the house was filled with smoke. The incident caused smoke and odor damage. The Cuevas notified their property insurer, Garrison Property & Casualty Insurance Company (USAA), which hired Maxcare to clean and repair the Cueva house.

[1] Clerk's Papers at 240.

[2] Clerk's Papers at 275.

[3] Clerk's Papers at 253.

Ms. Cueva told Maxcare that her daughter had been diagnosed with chemical sensitivity and asked Maxcare to obtain her approval of the substances it chose to use. Maxcare allegedly agreed to refrain from using chemicals in the home. Ms. Cueva testified in her deposition that Maxcare nevertheless "cleaned our house with chemicals when they weren't supposed to."[4] Those cleaning substances included Dawn, Windex, Degrease All, Double O, Unsmoke, and 9-D-9.

The Cuevas moved back home in April. They began experiencing symptoms including runny noses, headaches, and shortness of breath and moved out of their house in June.

USAA hired MDE Inc., an industrial hygiene services provider, to test the levels of formaldehyde and volatile organic compounds (VOCs) in the house. It reported that "[t]he concentrations [of formaldehyde] observed in the Cueva home are consistent with expected formaldehyde concentration."[5] MDE also found that the concentrations of VOCs "are not unexpected and should be considered 'normal.'"[6] MDE, however, recommended "a bake-out of the residence."[7] After the bake-out, MDE reported slightly lower levels of formaldehyde and VOCs. These levels, in MDE's opinion, were expected and satisfactory.

---

[4] Clerk's Papers at 761.

[5] Clerk's Papers at 59.

[6] Clerk's Papers at 62.

[7] Clerk's Papers at 66. "[A] bake-out is performed by raising temperatures in the home and cross-ventilating to exchange air laden with VOCs with that from the outdoors." Id.

In October, the Cuevas returned to their house, where they allegedly continued to experience symptoms they attributed to Maxcare's work. In a letter to USAA, the Cuevas' attorney stated that the home was "contaminated" and "toxic."[8] USAA refused to pay for further testing or living expenses. In March 2010, the Cuevas filed a lawsuit against USAA and Maxcare. In part, the Cuevas alleged that

> Maxcare, with full knowledge of the danger, contaminated plaintiffs' home during its efforts to repair damage caused by the fire. Maxcare did this after promising plaintiffs it would not use certain potentially toxic chemicals, which it negligently, intentionally, and recklessly used in violation of its promises to and clear instructions from plaintiffs.[9]

The complaint alleged that the defendants were liable for damages for "severe and potentially permanent injuries."[10] Maxcare tendered the defense to Western. Based on the pollution exclusion, Western refused to defend Maxcare against the Cuevas' claims.[11]

Western instituted this declaratory judgment action, seeking a determination that Western had no duty to defend or indemnify Maxcare in the Cuevas action. The trial court ruled for Western on cross motions for summary judgment.

---

[8] Clerk's Papers at 136.

[9] Clerk's Papers at 92.

[10] Clerk's Papers at 94.

[11] The denial letter, dated May 6, 2010, states, "The toxicity of various cleaning agents is alleged to have caused damages, physical and bodily. That is at the core of the suit's allegations against Max[c]are, along with the allegation that those chemicals and cleaners 'contaminated' the home. . . . [S]ince the whole case is based on the ramifications of 'pollutants' released into the claimant residence, the policy exclusions noted above will apply." Clerk's Papers at 120.

Maxcare appeals.

ANALYSIS

We review summary judgment orders de novo, engaging in the same inquiry as the trial court.[12] An insurer's duty to defend, which is broader than its duty to indemnify,[13] "arises at the time an action is first brought, and is based on the potential for liability."[14] "A lawsuit triggers the duty to defend if the complaint against an insured alleges facts that could, if proven, impose liability upon the insured within the policy's coverage."[15] We liberally construe an ambiguous complaint in favor of the insured.[16] But if the alleged claims are clearly outside the policy's coverage, then the insurer has no duty to defend.[17]

There are two exceptions to the general rule that an insurer determines whether it has a duty to defend from the complaint. First, "[i]f coverage is not clear from the face of the complaint but may exist, the insurer must investigate the claim and give the insured the benefit of the doubt in determining whether the insurer has an obligation to defend."[18] Second, "facts outside the complaint may be considered if '(a) the

---

[12] Hadley v. Maxwell, 144 Wn.2d 306, 310, 27 P.3d 600 (2001).

[13] Woo v. Fireman's Fund Ins. Co., 161 Wn.2d 43, 52, 164 P.3d 454 (2007).

[14] Truck Ins. Exch. v. Van Port Homes, Inc., 147 Wn.2d 751, 760, 58 P.3d 276 (2002).

[15] Wellman & Zuck, Inc. v. Hartford Fire Ins. Co., 170 Wn. App. 666, 285 P.3d 892, 898 (2012).

[16] Woo, 161 Wn.2d at 53.

[17] Truck Ins. Exch., 147 Wn.2d at 760.

allegations are in conflict with the facts known to or readily ascertainable by the insurer or (b) the allegations of the complaint are ambiguous or inadequate.'"[19] Where it is clear from the face of the complaint that the allegations are not covered by the insurance policy, there is no obligation to consider extrinsic facts.[20]

Here, the allegations in the complaint clearly fall within the pollution exclusion. The Cueva complaint alleged that Maxcare "negligently, intentionally, and recklessly" contaminated the Cuevas' home by using potentially toxic chemicals to repair the damage caused by the fire, resulting in "severe and potentially permanent injuries."[21] The pollution exclusion specifically precludes coverage for "bodily injury" caused by the release, dispersal, or discharge of "pollutants."[22] The policy's definition of "pollutants" is broad and includes "chemicals."[23] Harm caused by the use of "potentially toxic chemicals" fits within the plain language of the exclusion. Thus, even viewed most favorably to Maxcare, the Cuevas' claims were clearly outside of the policy's coverage.

Maxcare contends that Western was required to consider facts extrinsic to the

---

[18] Id. at 761.

[19] Id. (internal quotation marks omitted) (quoting Atl. Mut. Ins. Co. v. Roffe, Inc., 73 Wn. App. 858, 862, 872 P.2d 536 (1994)).

[20] See R.A. Hanson Co., Inc. v. Aetna Ins. Co., 26 Wn. App. 290, 295-96, 612 P.2d 456 (1980) ("[A]ssuming no ambiguities in the pleadings, the insurer need not look beyond the face of the pleadings."); Holly Mountain Resources, Ltd. v. Westport Ins. Co., 130 Wn. App.635, 648, 104 P.3d 725 (2005) ("Neither exception applies here, however, because it is clear from the face of [the] complaint against Holly Mountain that there was no coverage under the Westport insurance policy.").

[21] Clerk's Papers at 92, 94.

[22] Clerk's Papers at 275.

[23] Clerk's Papers at 253.

complaint under the actual knowledge exception.[24] Specifically, Maxcare contends "additional facts obtained through discovery effectively become part of the complaint that the insurer must consider in evaluating its duty to defend."[25] But Maxcare provides no compelling authority for this expansive view of the actual knowledge exception.

Specifically, Maxcare claims that the discovery revealed three potential bases for liability that trigger the actual knowledge exception. First, Maxcare claims that it is potentially liable for failure to clean organic particulate matter—*e.g.* skin flakes, dust, clothing fiber, dog dander, insect parts, etcetera—from the Cuevas' house based on the testimony of Laurence Lee, a certified industrial hygienist retained by the Cuevas. Lee opined that "[t]he particulate matter found in the air and on surfaces in the residence may be contributing to the Cueva family symptoms."[26] Second, Maxcare contends that it could be liable for the failure to investigate and then warn the Cuevas that their home contained formaldehyde. Dr. Edward Faeder testified in deposition that Maxcare should have undertaken certain steps to determine the preexistence of formaldehyde once they learned that the daughter was chemically sensitive.[27] Third,

---

[24] Maxcare acknowledges that Western had no duty to investigate the complaint's allegations under the first exception. See Reply Br. at 10-11.

[25] Reply Br. at 8 (emphasis omitted).

[26] Clerk's Papers at 489.

[27] Dr. Faeder testified, "[T]hey should have determined what the levels of materials in the house were before. They should have done a test afterward. They should have determined that formaldehyde is high and a sensitizer to people that are chemically sensitive to different things, and they should have made a recommendation that you investigate or you do something about the level of formaldehyde to reduce it to an acceptable range for a chemically sensitive individual." Clerk's Papers at 624.

Maxcare claims it "faces potential liability for injury and damage caused solely by the fear created by *the manner in which Maxcare conducted its operations*."[28] It relies on Ms. Cueva's deposition testimony that Maxcare's disregard of her instructions not to use certain chemical products caused her to mistrust Maxcare and fear potential health consequences. Maxcare also points to Dr. Victor Van Hee's deposition testimony where he discussed how Ms. Cueva's continued physical symptoms might be triggered by her previous exposure or fear of exposure rather than anything harmful currently in her house. He testified that Ms. Cueva's anxiety was "at least a significant contributing factor to her claimed manifestation of physical issues in relation to exposure to chemicals."[29]

Maxcare does not establish that the Cuevas have adopted any new potential theories of liability revealed in discovery. Neither does the discovery effectively amend the complaint or otherwise constitute actual knowledge, triggering Western's duty to defend.

The duty to defend arises at the time the complaint is filed.[30] Maxcare asserts that Western's actual knowledge is based on the discovery that "was brought to Western's attention by Maxcare."[31] But the discovery occurred long after the complaint was filed.

---

[28] Appellant's Br. at 32.

[29] Clerk's Papers at 542.

[30] An amended complaint may be the basis for a new tender of defense, but that has not occurred here.

[31] Reply Br. at 10-11.

Maxcare cites CR 15(b), but that rule allows a party to amend its pleadings to conform to the evidence when "issues not raised by the pleadings are tried by express or implied consent." No issues have been tried in the homeowner's lawsuit. To the extent that Maxcare suggests the duty to defend is not resolved until the discovery cutoff or even the close of evidence at trial, it cites no authority supporting that proposition.[32]

Maxcare cites no authority that the experts' statements in their depositions constitute new theories of recovery adopted by the homeowners in their lawsuit against Maxcare. The homeowners have not amended their complaint to add new theories and no other pleadings suggest that they have adopted additional theories of recovery based on statements by the deposed experts. In their own depositions, the Cuevas continue to assert that it was Maxcare's choice of cleaners that lead to their health problems.[33] Nor did Maxcare tender the defense a second time to Western alerting it to

[32] At oral argument, Maxcare cited McMahan & Baker, Inc. v. Continental Casualty Co., 68 Wn. App. 573, 843 P.2d 1133 (1993), as a case that looked to discovery to trigger the duty to defend. There, we said, "Even if such allegations are ambiguous or inadequate, the record contains other material indicating that the true nature of the complaint went to the heart of Baker's engineering analysis." McMahan, 68 Wn. App. at 580. This statement, however, stands for the ordinary proposition that insurers may look beyond the complaint when faced with ambiguity. Additionally, our statement in McMahan was a response to the insured's assertion that the insurer failed to investigate and is not an application of the actual knowledge exception. We therefore do not find it to be compelling authority for the actual knowledge discovery theory advanced by Maxcare.

[33] Mr. Cueva stated that he believed formaldehyde contributed to his symptoms. He, however, did not espouse Faeder's testimony or state that Maxcare should have warned him there was preexisting formaldehyde in his home. Rather, he stated that his wife told him that formaldehyde was the cause of the family's symptoms. See Clerk's Papers at 444. He also stated he believed that Maxcare used formaldehyde in his

any new potential theories of recovery. Maxcare, as a party to the underlying litigation, had the means available to require the homeowners to more precisely identify all of their theories of liability. Western is not a party to that lawsuit and, as conceded by Maxcare, had no duty to investigate.

Maxcare contends that discovery clarifies there was no release of pollutants as contemplated by the pollution exclusion. But a series of Washington decisions have construed nearly identical pollution clauses to exclude coverage for claims similar to the Cuevas' claims. Cook v. Evanson involved injuries resulting from exposure to toxic fumes after an insured contractor applied a concrete sealant to the outside of a building without closing off an air intake vent.[34] In denying coverage, the insurer argued that a pollution exclusion clause in the insurance contract applied.[35] We agreed, holding that the "injuries fall squarely within the pollution exclusion clause."[36]

In Quadrant Corp. v. American States Insurance Co., our Supreme Court adopted the Cook court's reasoning and held that a pollution exclusion applied to preclude coverage for claims based on injuries sustained when fumes from

---

home. See Clerk's Papers at 454-55.

[34] 83 Wn. App. 149, 151, 290 P.2d 1223 (1996).

[35] Id. at 152.

[36] Id. at 154. In full, the court stated, "The policy defines 'pollutants' as 'any solid, liquid, *gaseous* or thermal *irritant or contaminant, including* smoke, *vapor,* soot, *fumes,* acids, alkalis, chemicals and waste.' (emphasis added). This language is not ambiguous on its face as there are not two reasonable interpretations. White Roc 10's product literature describes it as an irritant and a vapor. Appellants themselves alleged that "toxic vapors" caused their injuries. White Roc 10 meets the definition of a "pollutant" and the appellants' injuries fall squarely within the pollution exclusion clause." Id. at 153-54.

waterproofing sealants entered the plaintiff's home.[37] In determining whether the insurer properly denied the request to defend and indemnify, Quadrant distinguished Kent Farms, Inc. v. Zurich Ins. Co.,[38] a case that Maxcare relies upon. In Kent Farms, a fuel deliveryman was significantly injured when a shutoff valve malfunctioned, driving fuel into the man's eyes, lungs, and stomach.[39] The court held that a pollution exclusion contained in the defendant's insurance policy did not apply because the injury arose from the faulty equipment, not the fuel itself.[40] The court noted that the fuel was not acting as a pollutant when it injured the deliveryman: "It struck him, it engulfed him, it choked him. It did not pollute him."[41] The Quadrant court determined that Kent Farms was distinguishable because there the injury was caused by negligently maintained or operated equipment, not by the polluting material itself.[42] In that situation, the injuries were beyond the scope of the pollution exclusion.[43]

Quadrant and Cook are more like this case than Kent Farms. Here, the cleaning supplies, which fall within the definition of "pollutants," are alleged to be the direct cause of the Cuevas' injuries.[44]

---

[37] 154 Wn.2d 165, 167-68, 110 P.3d 733 (2005).

[38] 140 Wn.2d 396, 998 P.2d 292 (2000).

[39] Id. at 397-98.

[40] Id. at 399. The court framed the issue as whether the mere fact that a pollutant appears in the causal chain can trigger the application of a pollution exclusion.

[41] Id. at 401.

[42] Quadrant, 154 Wn.2d at 184.

[43] Id.

[44] See id. at 182 ("[T]he Kent Farms court distinguished between cases in which

Maxcare also argues that pollution exclusion is limited to traditional environmental harms. It cites several out-of-state cases holding that use in a confined space during normal business operations did not trigger a pollution exclusion provision. These courts expressed concerns about expanding a pollution exclusion beyond historical environmental cleanup liability.[45] But similar concerns were explicitly rejected by the Quadrant court,[46] which held that the pollution exclusion clause extends to injuries arising from "normal business operations."[47] Quadrant controls. Maxcare's reliance on contrary decisions in other states is not persuasive.

Maxcare also claims that a reasonable insured would not interpret the word "pollutant" to include ordinary cleaning supplies. But here, "pollutant" is defined in the insurance policy to include "chemicals." Maxcare does not argue that cleaning supplies are not encompassed by an ordinary understanding of that word. Additionally, the cleaners that Maxcare used included more than just ordinary household cleaners. For example, like the sealant used in Cook, the material safety and data sheet for 9-D-9 states that it is a respiratory irritant in low concentrations and applications are to be made while wearing a respirator.[48] The complaint alleges Maxcare used potentially toxic chemicals. And even going beyond the face of the complaint, 9-D-9 is clearly a

---

the substance at issue was polluting at the time of injury and cases in which the offending substance's toxic character was not central to the injury.").

[45] See, e.g., Meridian Mut. Ins. Co. v. Kellman, 197 F.3d 1178 (6th Cir. 1999).

[46] Quadrant, 154 Wn.2d at 183.

[47] Id. at 174-75.

[48] See Clerk's Papers at 1012.

toxic chemical.

Finally, Maxcare claims that interpreting the pollution exclusion to preclude coverage renders the insurance contract illusory because of the nature of its business. A promise is illusory if its performance is optional or discretionary.[49] The general liability policy extends to other risks that could arise from Maxcare's business, such as a slip and fall. And Maxcare does more than provide cleaning services. In its application for insurance coverage, Maxcare identified its operations as "custom hardwood floors installed & refinished. Also home interior repairs from fire damage for various insurance company[ies]."[50] In the "Schedule of Hazards" portion of the application, Maxcare listed interior carpentry, interior finish, interior paint, and interior janitorial. Because the scope of Maxcare's business is broader than janitorial work, Maxcare faces the potential for claims unrelated to cleaning activities. The pollution exclusion does not render the contract illusory.[51]

CONCLUSION

Because the unambiguous allegations in the homeowner's complaint clearly fall within the total pollution exclusion, and Maxcare does not demonstrate the actual knowledge exception applies to the unfolding discovery in the homeowner litigation, Western had no duty to defend.

---

[49] Metro. Park Dist. of Tacoma v. Griffith, 106 Wn.2d 425, 434, 723 P.2d 1093 (1986).

[50] Clerk's Papers at 327.

[51] See Quadrant, 154 Wn.2d 186.

Affirmed.

WE CONCUR: