THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS. SUPERIOR COURT

In the Matter of the Liquidation of the Home Insurance Company

No. 03-EQ-106, 2008-HICIL-39

ORDER

The claimants, Sheldon and Melvin Holson,[1] filed a motion to recommit based on an order from the referee affirming the Home Insurance Company's ("Home") determination that it had no duty to defend the Holsons in a 1991 claim brought by K.V.L. Corporation ("KVL"). The Holsons assert that Home had a duty to defend them on the KVL claims and that Home improperly denied them a defense. The Holsons further allege that the Liquidator improperly denied their proof of claim for the expenses they incurred to defend themselves. The Holsons appealed to the referee, who ruled that Home acted properly because the language of the underlying KVL complaint brought the claim within a pollution exclusion in the Home policies. The instant motion to recommit followed. This court heard argument on November 17, 2011. Because the exclusion applied to the KVL complaint, the Holsons' motion to recommit is DENIED and the referee's ruling is AFFIRMED.

Facts

The Holsons ran a family operated photo-album making business on property located in Wilton, Connecticut, along the western side of U.S. Route 7. In 1989, the Holsons sold this property to KVL, formerly Mill's Pride. KVL never operated a business out of this property; instead, it tried to sell it in 1990. On October 1, 1990, however, KVL learned that there was significant

[1] The Holson Company, the Danbury Road Family Partnership, and Melvin and Sheldon Holson (as the sole partners of the partnership) were all defendants in the underlying litigation. For the purpose of this order, the court will refer to the claimant as "the Holsons."

environmental contamination on the property, thereby preventing KVL from selling the property. After KVL became aware of the contamination, it initiated an action against the Holsons.

The Holsons immediately notified their primary insurers about the suit and sought representation. Both of the Holsons primary insurers denied their claim. The Holsons then sought representation from Home, which provided excess liability coverage. Home refused to defend the Holsons for two reasons: (1) the policies the Holsons purchased from Home contained a pollution exclusion; and (2) the Holsons had not exhausted their primary insurance policies.[2] The Holsons spent over $1 million defending the KVL suit. They now bring a claim against Home for this amount.

Analysis

The referee determined that Home had no duty to defend, which is a legal conclusion. *See e.g., Webster v. Acadia Ins. Co.*, 156 N.H. 317, 319–20 (2007). Thus, the court will apply a *de novo* standard of review in analyzing this determination. *In re Liquidation of Home Ins. Co.*, 157 N.H. 543, 546 (2008). In addition, both parties agree that Connecticut law applies because that is the *locus* of the contract between Home and the Holsons, the contract between Holsons and KVL, and the property harm alleged in the KVL action. Thus, this court will apply Connecticut law.

In Connecticut, the duty to defend is broader than the duty to indemnify. *Cmty. Action Greater Middlesex Cnty., Inc. v. Am. Alliance Ins. Co.*, 757 A.2d 1074, 1081 (Conn. 2000). The duty to defend does not, however, extend to occurrences not covered by the underlying policies. *Springdale Donuts, Inc. v. Aetna Cas. and Sur. Co. of Illinois*, 724 A.2d 1117, 1120 (Conn. 1999). The relevant policies here contained a pollution exclusion clause, which provides:

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[2] The instant motion to recommit involves the pollution exclusion, which is dispositive. Thus, the issue of whether the Holsons exhausted their primary insurance policies will not be addressed.

> It is agreed that this insurance does not apply to bodily 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 materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any watercourse or body of water; but this exclusion does not apply, if such discharge, dispersal, release or escape is sudden or accidental.

(CR. at 46). This language makes clear that leaking, improper disposal, or otherwise non-accidental escapes of contaminants are not covered. Thus, the issue here is whether the KVL complaint, when read as a whole, leaves open the reasonable possibility of an accidental occurrence. *Id.* In that event, the pollution exclusion may not apply and Home would have a duty to defend. In Connecticut, the Holsons bear the burden of proving that the exclusion does not apply.

> Once an insurer has satisfied its burden of establishing that the underlying complaint alleges damages attributable to the discharge or release of a pollutant into the environment, thereby satisfying the basic requirement for application of the pollution coverage exclusion provision, the burden shifts to the insured to demonstrate a reasonable interpretation of the underlying complaint potentially bringing the claims within the sudden and accidental discharge exception to exclusion of pollution coverage, or to show that extrinsic evidence exists that the discharge was in fact sudden and accidental.

Buell Indus., Inc. v. Greater New York Mut. Ins. Co., 791 A.2d 489, 505 (Conn. 2002) (indemnity); *see also Schilberg Integrated Metals Corp. v. Cont'l Cas. Co.*, 819 A.2d 773, 782–83 (Conn. 2003) (duty to defend).

The 1991 KVL complaint against the Holsons alleged ten counts: (1) cost recovery under CERCLA; (2) contribution under CERCLA; (3) Connecticut hazardous waste reimbursement; (4) negligence of Holson; (5) negligence of TRC (the environmental consulting company that inspected the property before the Holsons sold it to KVL);[3] (6) breach of contract by the partnership; (7) breach of contract by TRC; (8) strict liability of Holson; (9) nuisance as to Holson; and (10) misrepresentation. CERCLA claims and the Connecticut Hazardous Reimbursement Act

[3] For the purposes of this motion to recommit, claims against TRC are irrelevant.

impose liability on property owners regardless of their level of participation or knowledge of pollution. Thus, KVL was not required to allege whether the actions leading to liability under these statutes were sudden and accidental. With respect to the remaining portions of the complaint, the language relating to how the pollution came to be includes the following:

> 40. The existence of the contamination in the soil and groundwater at the Wilton site is the result of the negligence or other actions of the defendants Holson and/or the Partnership.
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> 41. Upon discovery of the contamination at the Wilton site, Mill's Pride acted to contain, to remove, and/or to otherwise mitigate the effects of these hazardous substances.
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> 42. Because the polluted condition of the Wilton site is a result of negligence or other actions of the defendants....
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> 44. The contamination of the Wilton site was caused by the negligence of the defendant Holson in that it knew or should have known that the improper disposal of the substances found in and around the "vaults" and associated piping was likely to cause the type of harm discovered by Mill's Pride, and the defendant Holson was, therefore, obligated to use due care.
>
> 45. The defendant Holson failed to exercise the required care in disposing of the substances found on the Wilton site.
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> 46. As a result of the negligence of the defendant, Mill's Pride has suffered damages....
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> 51. The defendant Partnership breached the terms of the purchase and sale agreement it entered into with Mill's Pride in that the defendant Partnership violated or permitted to be violated environmental laws and/or standards at the Wilton site....
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> 57. Regardless of the lawful purpose of the defendant Holson' activities at the Wilton site or its exercise of due care, the defendant Holson engaged in an abnormally dangerous activity by disposing or leaking several substances which are classified as hazardous by the federal government....
>
> 61. The disposal or leakage of the hazardous substances discovered at the Wilton site had an inherent tendency to create damage or inflict injury upon persons or property in the area and were an unreasonable use of the site.

KVL Complaint at 12–16.

At the November 17, 2011 oral argument, the Holsons argued that the complaint leaves open the possibility that the harm alleged was accidental or sudden because the claims do not affirmatively assert that the harm was slow or over time. Silence alone, however, does not bring a claim within the category of events possibly covered by a policy. *Buell*, 791 A.2d at 505. Although the complaint language is silent regarding the possibility of an accident, it does not allege an accident. To interpret the complaint this way would require a tortured reading of the pleading.

> The relevant inquiry … is not whether the substance of the … allegations rules out the possibility of a sudden and accidental discharge … but, rather, whether the plaintiff has demonstrated that a reasonable interpretation of the substance of the … allegations potentially would bring the claims within the purview of the sudden and accidental discharge exception in the policies…. In determining whether the underlying complaint can be read as even potentially bringing the claim within the sudden and accidental [discharge] exception to the exclusion of pollution coverage, a court should not attempt to impose the duty to defend on an insurer through a strained, implausible reading of the complaint that is linguistically conceivable but tortured and unreasonable….

Schilberg, 819 A.2d at 259–60, citing *Northville Indus. Corp. v National Union Fire Ins. Co. of Pittsburgh, Pa.*, 679 N.E.2d 1044, 1049 (N.Y. 1997). In *Northville*, the New York Court of Appeals further elaborated that "a court may look to judicial admissions in the insured's responsive pleadings in the underlying tort action or other formal submissions in the current or underlying litigation to confirm or clarify the nature of the underlying claims." *Id.*

The KVL complaint language clearly contemplates non-accidental pollution. KVL alleged negligence, improper disposal, failure to remediate, failure to supervise employees properly, leaking, and strict liability. The complaint describes an ongoing course of conduct causing the resulting harm of a contaminated manufacturing site.

The release of pollutants over an extended period of time cannot qualify as "sudden" for purposes of the exception to the pollution exclusion. *Buell*, 791 A.2d at 505. Consequently, the sudden and accidental policy exception to the pollution exclusion does not apply. The KVL

complaint did not trigger a Home duty to defend the Holsons for the asserted claims. Accordingly, the Holsons' motion to recommit is DENIED and the referee's ruling is AFFIRMED.

So ORDERED.

Date: December 29, 2011

LARRY M. SMUKLER
PRESIDING JUSTICE