IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

BELLAIRE CORPORATION	)	**CASE NO. CV 13 816172**
	)	
Plaintiff,	)	**JUDGE JOHN P. O'DONNELL**
	)	
vs.	)	**JUDGMENT ENTRY GRANTING THE DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT**
	)	
AMERICAN EMPIRE SURPLUS LINES, *et al.*	)	
	)	
Defendants.	)	

John P. O'Donnell, J.:

Plaintiff Bellaire Corporation is a coal mining company suing three of its commercial general liability insurers[1] for costs incurred to prevent pollution from one of its closed mines in Pennsylvania. The plaintiff's complaint asserts a cause of action for breach of contract by denying coverage and a claim for a declaratory judgment that the defendants' policies do cover the claimed occurrence. Each insurance company has filed a motion for summary judgment. The three motions are fully briefed and this decision follows.

The coal mine and acid mine drainage

Bellaire and its corporate predecessor, The North American Coal Corporation, operated the Conemaugh No. 1 mine in west central Pennsylvania from the mid-1960s until it ceased production on December 23, 1981. The mine was officially sealed in September 1982.

[1] The complaint against a fourth defendant, American Insurance Company, was voluntarily dismissed by Bellaire.

Mining is often done below the water table, the point underground below which is saturated with groundwater. That water comes into contact with subsurface metal sulfides, plus air, making it acidic, meaning it has a pH level of less than 7. (Pure water is neutral and has a pH of 7.) While a mine is active the acidic water is pumped out so the mining can take place. Water that contains legally permissible amounts of minerals may be pumped without treatment into the local watershed, but water with an unacceptably high mineral content must be pumped and then treated before being returned to the surrounding environment. Acid mine drainage as it pertains to this case occurs when accumulated water in a closed mine begins to seep out on to the surface of the land surrounding the mine.

Acid mine drainage was anticipated by Bellaire and the environmental regulatory authorities even before the mine opened. The first permit for the mine – Permit 367-MO-45 – set forth requirements regarding allowable pH levels and iron concentration of mine water discharge, and in order to pump acidic mine water in compliance with the permit, Bellaire built the Hices Run Acid Mine Drainage Treatment Plant. The Hices Run plant pumped the acid mine drainage out of the Conemaugh Mine, treated it to bring the water within acceptable iron and pH levels, and then discharged it into the nearby Conemaugh River. The plant was approved for construction in 1967 and was used by Bellaire throughout the life of the mine.

When the mine closed in 1981 Bellaire and the Pennsylvania Department of Environmental Resources formulated a plan to seal the mine. Under the plan, Bellaire remained responsible for any acid mine drainage that seeped from the closed mine, but nothing in the sealing plan required Bellaire to continue to remove and treat water from the mine because it was expected that sealing would prevent the escape of acid mine drainage. Accordingly, shortly after the mine was sealed, Bellaire tore down the Hices Run treatment plant.

The claims of damage

Beginning for about two years in November 1984, Bellaire received multiple reports and complaints from residents near the mine that red water was flowing out of the ground and damaging their property.

In 1987, PADER demanded that Bellaire investigate the complaints and address the cause of the outflow. From then until early 1989 Bellaire investigated the problem and regularly met and shared information with the department. Ultimately, PADER concluded that the leakage was acid mine drainage escaping from unsealed exploratory boreholes near the Conemaugh Mine. Because of that, PADER required Bellaire to construct and operate a 100% pump and treat system, and in 1990 Bellaire built the Hutchison Hollow Treatment Plant for $2,172,061. Since then, and through the time Bellaire made claims under the insurance policies in 2009, Bellaire has spent about $8 million to run the plant and has put $5 million in trust to fund the operation of the treatment plant into the future.

Bellaire asserts that the approximately $15 million it has spent to pump and treat the water at the closed mine is recoverable under the defendants' insurance policies.

The insurance policies

For some of the pertinent time periods Bellaire had commercial general liability policies – both primary and excess – with the three defendants, Federal, American Empire and First State. Although the language of every policy is not identical, the insuring agreements with all three carriers are functionally equivalent: each insurer agrees to pay money that Bellaire becomes legally obligated to pay for property damage resulting from an occurrence during the policy period.

In particular, Federal's primary policy provides that Federal will "pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay as damages because of . . . property damage to which this insurance applies, caused by an occurrence . . ."[2] The American Empire umbrella policy says that it will "indemnify the Insured for all sums which the Insured shall become obligated to pay by reason of the liability . . . imposed upon the Insured by law . . . for damages on account of . . . Property Damage . . . caused by or arising out of each Occurrence happening anywhere."[3] Finally, First State's policy is excess to a policy issued by Integrity Insurance Company. First State provides coverage on the same basis as the Integrity policy, namely that First State "hereby agrees, subject to all terms of this policy, to pay on behalf of the insured all sums . . . for which the insured shall become obligated to pay by reason of liability (a) imposed upon the insured by law or (b) assumed under contract or agreement by the insured, arising out of . . . property damage . . . caused by an occurrence."[4]

LAW AND ANALYSIS

Each defendant gives various reasons why Bellaire is not covered under the policies. Some of the arguments apply to all of the policies and others depend on language unique to a particular defendant's contractual language. I will begin by examining one argument common to the defendants: that the damages being claimed by Bellaire are not recoverable because they do

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[2] Federal issued three $1,000,000 per occurrence primary general liability insurance policies to Bellaire for the period January 1, 1983, to January 1, 1986: GLP (84) 7300-78-18, GLP (85) 7300-78-18 and GLP (86) 7300-78-18.
[3] American Empire issued Policy No. 5 CU 0 56 18 to Bellaire for the period January 1, 1985, to January 1, 1986. It is an umbrella general liability policy which contains a limit of liability of $10,000,000 for each occurrence and in the aggregate above the $1,000,000 covered under the applicable Federal policy.
[4] First State issued two follow-form excess umbrella liability policies to Bellaire. Policy No. RED 102414, issued by the Royal Indemnity Company, was for the period January 1, 1983, to January 1, 1984 , and Policy No. 791315 was for the period January 1, 1984, to January 1, 1985 . Each policy has a per occurrence and aggregate limit of liability of $15,000,000 in excess of $5,000,000 in umbrella liability coverage issued by Integrity Insurance Company and $1,000,000 in primary general liability insurance under the Federal policy. As follow-form policies, they incorporate the terms of the underlying Integrity umbrella policies.

not arise from an occurrence resulting in property damage for which Bellaire is legally liable. If the defendants are right and this threshold to coverage is not crossed then there is no need to consider the application of a policy exclusion from coverage or to decide the effect of Bellaire's failure to give prompt notice of the claim or its failure to comply with other policy conditions on coverage.

Occurrence and property damage

The defendants argue that there has not been an occurrence under the policies.

The Federal policies define "occurrence" as "an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured." They define "property damage" as: "(1) physical injury to or destruction of tangible property which occurs during the policy period, including the loss of use thereof at any time resulting therefrom, or (2) loss of use of tangible property which has not been physically injured or destroyed provided such loss of use is caused by an occurrence during the policy period."

The American Empire policy defines "occurrence" as "an accident, event or happening including continuous or repeated exposure to conditions which results, during the policy period, in . . . Property Damage . . . neither expected nor intended from the standpoint of the Insured." "Property damage" is defined as: "(1) physical injury to or destruction of tangible property which occurs during the policy period, including the loss of use thereof at any time resulting therefrom, or (2) loss of use of tangible property which has not been physically injured or destroyed provided such loss of use is caused by an Occurrence during the policy period."

The Integrity policies underlying the First State policies define an occurrence as "an accident, including continuous or repeated exposure to conditions, which results in . . . property

damage . . . neither expected nor intended from the standpoint of the insured." The policies define property damage, in relevant part, as "physical injury to or destruction of tangible property which occurs during the policy period, including the loss of use thereof at any time resulting thereof . . ."

In short, to qualify as a covered occurrence, each policy requires an accident resulting in property damage, i.e. physical damage to, or the loss of use of, tangible property, for which Bellaire is legally liable. All of the policies exclude coverage for damage to Bellaire's own property.

At one point, there was physical damage to third parties' property because of the mine drainage. Indeed, Federal, as Bellaire's primary insurer, never disputed that the "red water" seepage in the 1980s was an occurrence and that the physical injury that resulted to neighboring properties was property damage covered by insurance. Federal paid claims for the expense to clean up the affected land. But now, the $15 million Bellaire wants from its insurers is not for property damage. Instead, it is for a cost incurred to *prevent* future property damage. The difference is illustrated in *A.Y. McDonald Indus. v. Ins. Co. of N. Am.*, 475 N.W.2d 607 (Iowa 1991).

A.Y. McDonald involved a brass foundry that had dumped sand tainted with lead on its property for more than three decades. The United States Environmental Protection Agency took administrative action against the company for violating the Resource Conservation and Recovery Act. A violation was found and the company and the EPA ultimately entered into a consent order by which A.Y. McDonald agreed to (1) design and construct a clay cap over a specified portion of the property, (2) expand its groundwater monitoring system, and (3) develop and implement a postclosure plan for a period of 30 years. The foundry then sought to recover the

costs of the consent order from its CGL carriers in a federal lawsuit. The federal court certified this question to the Iowa Supreme Court:

> Does the language "all sums which the insured shall become legally obligated to pay as damages because of . . . property damage" . . . include coverage for amounts expended or paid by [A.Y. McDonald] in order to comply with the terms of the EPA's decision issued July 23, 1987, pursuant to RCRA, and to comply with the terms of the consent order . . ? If so, do these words encompass all or only part of such amounts expended or paid? *Id.*, 611.

The *A.Y. McDonald* court observed that federal environmental statutes, including the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, impose liability on any person running a facility where hazardous waste was disposed for two types of costs: removal efforts and remedial actions. Removal efforts typically involve short-term cleanup arrangements while remedial actions – also referred to as "response" actions, the costs of which are called "response costs" – are intended to make sure the pollution doesn't recur. After surveying legal decisions nationwide on the same coverage question, the court said:

> We hold that any injury to the environment resulting from contamination by hazardous waste constitutes "property damage" within the meaning of the CGL policies. We further hold that any injury to the environment resulting from contamination is incurred "because of property damage" and represents the measure of damages to the property.
>
> In addition we hold that response costs for preventive measures employed after pollution has taken place are incurred "because of property damage" under the CGL

policies. However, costs incurred to pay for preventive measures taken in advance of pollution are not incurred "because of property damage."

As far as it goes, that holding is clear enough: where the environment has already been contaminated then response costs to not only clean up the contamination but prevent it in the future are covered damages, but where costs are incurred to prevent pollution before it ever happens there is no coverage. This suggests that once accidental pollution resulting in property damage occurs then every expense to remediate and prevent its recurrence is covered even after the property damage is undone. But the court then blurred its own distinction. Noting that the scant evidentiary record in the case prevented the court from determining for itself what costs were and were not covered, the court said that "legally compelled expenses for the cleanup of existing pollution" were surely covered but "expenditures to prevent future pollution that has not yet occurred, or to prevent pollution from a source that has not yet caused pollution" were not covered because they were not causally related to property damage. *Id.*, 625. This suggests that once the property damage is rectified then the cost to prevent it from happening again is not covered.

Ultimately, the decision in any case depends on the facts. Do they demonstrate that a cost was incurred, and legal liability imposed, because of property damage? In this case, they do not.

The property damage caused to Bellaire's neighbors by acid mine drainage was undone and paid for in the mid-1980s. After that – but before additional property damage occurred – Bellaire became legally obligated to ensure that it didn't happen again by preemptively pumping and treating the water from the mine. That legal obligation existed even in the absence of property damage and was not imposed because of an accident resulting in property damage and

Bellaire's three CGL insurers are not obligated to indemnify Bellaire for the cost to build and run the treatment plant.

While the mine was in use Bellaire was responsible for preventing acid mine drainage and that requirement continued after the mine was closed and sealed. During operations, Bellaire ran the Hices Run treatment plant to fulfill that obligation. When the mine was closed, Bellaire stopped pumping and treating but paid to seal the mine to prevent acid mine drainage. When the sealing proved ineffective and leaks resulting in property damage occurred, the cost to clean up the damage to tangible property owned by others was covered by Federal. But Bellaire still had a legal obligation – independent from the existence of property damage to others – to prevent future leakage and the Hutchison Hollow plant was built to satisfy that obligation. The cost to build and operate the treatment plant does not stem from an accident resulting in property damage.

CONCLUSION

The defendants' argument that the costs of constructing and operating the Hutchison Hollow plant are not damages resulting from an occurrence under the applicable policies is thus well taken and the motions for summary judgment are granted.

On the breach of contract claim there is no genuine issue of material fact about whether the insurers breached their contracts by denying coverage: they do not owe coverage so it was not a breach to deny coverage.

On the declaratory judgment claim, a summary judgment declaring the rights and duties of the parties is entered as follows: The insurance companies are not obligated to indemnify Bellaire for the costs to build and operate the Hutchison Hollow treatment plant and Bellaire does not have a right under the three defendants' policies to indemnification for those costs.

IT IS SO ORDERED:

Judge John P. O'Donnell

August 31, 2017
Date

SERVICE

A copy of this judgment entry was sent by email on August 31, 2017, to the following:

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