IN THE CIRCUIT COURT OF ST. LOUIS COUNTY
STATE OF MISSOURI

THE DOE RUN RESOURCES CORP.,	)	
	)	
Plaintiff,	)	
	)	Cause No. 10SL-CC01716
vs.	)	
	)	Division 42
AMERICAN GUARANTEE & LIABILITY INSURANACE CO., et al.,	)	
	)	
Defendants.	)	

ORDER/JUDGMENT

This matter is before the Court on Doe Run's Motions for Partial Summary Judgment directed against Defendants Lexington Insurance Company (Lexington), National Union Fire Insurance Co. (National Union), and Beazley Insurance Company (Beazley), as well as Lexington's Motion for Summary Judgment, National Union's Motion for Summary Judgment and Beazley's Motion for Summary Judgment. The issue for the Court's determination is whether Defendants have a duty to defend and/or advance costs to Doe Run under the terms of their respective insurance policies. The Motions were called, heard and taken under submission on August 11, 2011. Having heard the arguments of counsel, having read the memoranda and case law submitted, and being now fully advised, the Court enters the following Order and Judgment.

The Court is guided in its determination by certain general principles. First, the general rules for interpretation of contracts apply to insurance policies. The primary goal of contract interpretation is to ascertain the parties' intent and give effect to that intent. Peters v. Employers Mutual Casualty Co., 853 S.W.2d 300, 301-02 (Mo.banc 1993). Second, if a policy is not ambiguous, its express terms will be enforced as written. Krombach v. Mayflower Ins. Co., 827 S.W.2d 208, 210 (Mo. banc 1992). An ambiguous

policy must be construed in favor of the insured. Id. Policy language is ambiguous when it is reasonably open to different constructions. Id. To test whether language used in the policy is ambiguous, the language is considered in the light in which it would normally be understood by the lay person who bought and paid for the policy. Kellar v. American Family Mutual Ins. Co., 987 S.W.2d 452, 455 (Mo.App. W.D. 1999). Finally, exclusion clauses in insurance policies are strictly construed against the insurer. Walters v. State Farm Mutual Auto. Ins. Co., 793 S.W.2d 217, 219 (Mo.App. S.D. 1990). When seeking to avoid coverage based on a policy exclusion, the burden is on the insurer to establish the exclusion is applicable. American Family Mutual Ins. Co. v. Bramlett ex rel. Bramlett, 31 S.W.3d 1, 4 (Mo. App. W.D. 2000). "Unless an insurance contract is so clear in its meaning that as a matter of law it precludes a plaintiff's recovery, a motion for summary judgment based on the contract should be denied." Northland Ins. Cos. v. Russo, 929 S.W.2d 930, 934 (Mo. App. S.D. 1996).

Doe Run's Motions seek to resolve issues regarding its insurers' defense coverage for the Reid Lawsuits; it is not seeking an adjudication of its right to indemnity under the various policies. The duty to defend is broader than the duty to indemnify and arises whenever there is a potential or possible liability to pay based on the facts at the outset of the case; the duty to defend is not dependent on the probable liability to pay based on the facts ascertained through trial. McCormack Baron Mgt. v. American Guarantee, 989 S.W.2d 168, 170 (Mo.banc 1999). An insurer's duty to defend is determined by comparing the language of the insurance policy with the allegations in the complaint. "If the complaint merely alleges facts that give rise to a claim potentially within the policy's coverage, the insurer has a duty to defend." Id. at 170–71. The presence of some insured

claims in the underlying suit gives rise to a duty to defend, even though uninsured claims or claims beyond the coverage may also be present. Wood v. Safeco Insurance Co. of America, 980 S.W.2d 43, 47 (Mo.App E.D. 1998). See also, Lampert v. State Farm Fire and Casualty Co., 85 S.W.3d 90, 93 (Mo.App. E.D. 2002).

Doe Run's position is that the Reid lawsuits establish the *potential* for coverage when comparing Defendants' policy language with the allegations in those lawsuits. The Reid lawsuits allege various corporate "wrongful acts" by Doe Run in both Missouri and New York relating to the management and operations of the La Oroya Complex in Peru dating back to at least October 1997, including improper acts and omissions concerning decisions on production, use of technology, expenditures and budgets, and policies regarding information dissemination, as well as an alleged conspiracy scheme involving the purported exertion of "complete control, not merely stock control, but complete domination of the finances, policies, and business practices" of Doe Run Peru. The lawsuits further allege these corporate actions and decisions resulted in the release of toxic and harmful substances including lead, cadmium, and arsenic on and around the properties on which the minor Reid plaintiffs were residing, causing "... physical and psychological injuries, learning and other permanent disabilities, pain, mental anguish, emotional distress, the cost of medical, educational, and rehabilitation expenses, and other expenses of training and assistance, and loss of earnings, income, and earning capacity."

Lexington

Generally, Lexington's policies cover "bodily injury" or "property damage" caused by an "occurrence" that takes place in the "policy territory" or "coverage

territory", i.e., the U.S., U.S. territories or possessions, Puerto Rico or Canada (or anywhere in the world with respect to bodily injury or property damage arising out of activities of any Insured *temporarily* outside the U.S). Lexington's policies define "occurrence" generally as "any accident, including continuous or repeated exposure to substantially the same general harmful conditions," but "accident" is not defined. When a liability policy defines occurrence as an accident, Missouri courts consider this to mean "injury caused by the negligence of the insured." Stark Liquidation Co. v. Florists' Mutual Ins. Co., 243 S.W.3d 385, 393 (Mo.App. E.D. 2007), citing Wood v. Safeco Ins. Co. of Am., 980 S.W.2d 43, 49 (Mo.App. E.D. 1998). It is undisputed the alleged injuries and damages giving rise to the Reid Lawsuits took place exclusively in Peru. Missouri courts look to injury to determine *when* an accident occurs, Stark, supra; Shaver v. Ins. Co. of North America, 817 S.W.2d 654, 657 (Mo.App. S.D. 1991), but have not specifically addressed how to determine *where* an accident occurs.

Doc Run's position is that the Reid plaintiffs' injuries were caused by the direct corporate acts of Doe Run in the U.S., and that those direct acts are "occurrences" for purposes of insurance coverage. The Court notes, however, that no Missouri case has defined "accident" as a precipitating negligent act. In fact, the majority of case law, excluding Missouri, addressing this issue holds it is the location of the injury, and not some precipitating cause, that determines the location of the event for purposes of insurance coverage. See, CACI International, Inc. v. St. Paul Fire and Marine Ins. Co., 566 F.3d 150 (4th Cir. 2009); Ace American Insurance Co. v. RC2 Corp., Inc., 600 F.3d 763 (7th Cir. 2010). The Court is persuaded by the reasoning of these cases and finds as a matter of law that the Reid plaintiffs' injuries were occurrences that took place in Peru,

outside Lexington's policy territory.

The Court further finds the "temporary" exception to Lexington's "policy territory" provisions do not apply. Doe Run Peru was a subsidiary of Doe Run from 1997 to 2007. The Court does not consider this to be a "temporary" relationship as such language would normally be understood by the insured. In addition, the Reid lawsuits allege a course of conduct on the part of Doe Run that spans several years, clearly not a short-term activity.

Since the Court finds there is no potential for coverage, the Court need not address the applicability of Lexington's policy exclusions. This finding renders moot the Second and Third Causes of Action of Doe Run's Complaint for Breach of Contract and Unreasonable Refusal to Pay as it relates to Lexington.

National Union

With regard to the First Cause of Action of Doe Run's Complaint for Declaratory Relief, the Court has previously ruled that the potential for coverage standard applies to National Union's policy and that Doe Run's allegations regarding National Union's policy language and the allegations of the Reid Lawsuits were sufficient to find the potential for coverage triggering National Unions' obligation to advance defense costs.

With respect to National Union's argument that the Reid Lawsuits do not allege any "securities claims," a "securities claim," as defined by the policy, encompasses "...a Claim ... made against any Insured ... alleging a violation of any federal, state, local or foreign regulation, rule or statute regulating securities ... " The Reid plaintiffs have alleged violations of the rules of corporate governance and conduct by Doe Run, and that Doe Run conducted "a scheme by which ... they exert complete control, not merely stock

control, but complete domination of finances, policies, and business practices of Doe Run Peru." The Court finds these allegations, together with the broad language of National Union's policy, establish the potential for coverage.

Thus, the issue for the Court's determination concerns the applicability of National Union's policy exclusions, specifically the pollution exclusion, bodily injury/property damage exclusion, emotional distress exclusion, and prior notice exclusion.

The Pollution Exclusion, 4(k), provides:

> "The Insurer shall not be liable to make any payment for Loss in connection with any Claim made against an Insured ... alleging, arising out of, based upon or attributable to, directly or indirectly: (i) the actual, alleged or threatened discharge, dispersal, release or escape of Pollutants; or (ii) any directing or request to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize Pollutants, (including but not limited to a Claim alleging damage to an Organization or its securities holders)."

"Pollutants" is defined broadly as "...any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste." The Court finds this definition of Pollutant is too broad to meaningfully define the term.

Generally, if a term is clearly defined in an insurance policy, the policy definition controls. Hobbs v. Farm Bureau Town & Country Ins. Co., 965 S.W.2d 194, 197 (Mo.App. E.D. 1998). An ambiguity exists when there is "indistinctness or uncertainty" in the meaning of words used in the contract. Id. National Union's definition of Pollutant does not identify lead, arsenic, cadmium or sulfur dioxide as pollutants and there is no language in the Pollution Exclusion from which to infer it was drafted with a view toward limiting liability for injuries related to those substances.

The Court further notes National Union could have excluded lead, arsenic, cadmium and sulfur dioxide as part of its Pollution exclusion, by either including these

substances in the definition of Pollutants or in separate exclusions, but did not. While this omission, by itself, does not automatically make the Pollution exclusion ambiguous, see Hartford Accident and Indemnity Co. v. Doe Run Resources Corp., 2010 WL 1687623*7 (E.D. Mo.), the Court is persuaded by the reasoning of Hocker Oil Co. v. Barker–Phillips–Jackson, Inc., 997 S.W.2d 510 (Mo.App. S.D.1999), where a pollution exclusion was found to be ambiguous. Focusing on the policy's failure to identify gasoline as a pollutant, the Court found the pollution exclusion ambiguous and construed it against the insurer. Id. at 518. The Court explained the insured could have reasonably concluded gasoline was not a pollutant for purposes of the exclusion since it was not specifically identified as such. Id. at 518.

The Court finds National Union has not met its burden to establish that its pollution exclusion, when strictly construed against it, is clearly applicable as a matter of law to bar any coverage to Doe Run based on the Reid lawsuits.

National Union also relies on exclusions for bodily injury and emotional distress to deny coverage to Doe Run. The Bodily Injury and Property Damage Exclusion, 4(h), carves out and preserves for coverage claims for emotional distress *or* mental anguish, providing as follows:

> "The Insurer shall not be liable to make any payment for Loss in connection with any Claim made against an Insured ...for bodily injury (*other than emotional distress or mental anguish*), sickness, disease, or death of any person, or damage to or destruction of any tangible property, including the loss of use thereof." (Emphasis added.)

The Emotional Distress Exclusion, 4(l), excludes coverage for claims for emotional distress only:

> "The Insurer shall not be liable to make any payment for Loss in connection with any Claim made against an Insured ...*for emotional distress* of any person ..." (Emphasis added.)

It is National Union's position that the terms "emotional distress" and "mental anguish" are interchangeable, so that the Reid plaintiffs' claims for emotional distress and mental anguish are barred by Exclusion 4(l). If, as National Union suggests, exclusion 4(l) is read to take away the "carve out" in exclusion 4(h), then the "carve out" is rendered meaningless. A policy is ambiguous on its face when one clause creates coverage and another clause takes it away. Rice v. Shelter Mutual Ins. Co., 301 S.W.3d 43, 49 (Mo. 2009); Seeck v. Geico General Ins. Co., 212 S.W.3d 129, 133, 134 (Mo. 2007); Barron v. Shelter Mutual Ins. Co., 230 S.W.3d 649, 653 (Mo.App. W.D. 2007).

Furthermore, the fact that Exclusion 4(h) sets the terms out separately as "emotional distress *or* mental anguish," signals a difference in the meaning of these terms to the policy holder. Conflicting clauses in a policy should be reconciled so far as their language reasonably permits; when reconciliation fails, however, inconsistent provisions must be construed in favor of the insured. Lutsky v. Blue Cross Hosp. Serv., Inc., of Missouri, 695 S.W.2d 870, 875 (Mo. 1985), citing Bellamy v. Pacific Mutual Life Ins. Co., 651 S.W.2d 490, 496 (Mo.banc 1983). National Union has not met its burden to establish that these exclusions, when strictly construed against it, are clearly applicable as a matter of law to bar any coverage to Doe Run based on the Reid lawsuits.

Finally, National Union contends coverage is barred under its Notice of Claim to Prior Policy Exclusion, 4(d), because its policy succeeds in time to Doe Run's commercial general liability (CGL) policies. Doe Run concedes it gave notice of the Reid lawsuits to its CGL carriers in July 2009, prior to notifying National Union in September 2009. Exclusion 4(d) provides:

> "The Insurer shall not be liable to make any payment for Loss in connection with any Claim made against an Insured ...alleging, arising out of, based upon or attributable to the facts alleged, or to the same or related Wrongful Acts alleged or contained in any

Union has a duty to advance defense costs to Doe Run and that National Union has not met its burden to establish that any policy exclusions are applicable as a matter of law to bar coverage to Doe Run based on the Reid Lawsuits, the Court finds in favor of Doe Run on its Second Cause of Action for breach of contract.

Beazley

The "Exclude Scheduled Person or Entity" endorsement relied on by Beazley to deny coverage to Doe Run based on the Reid lawsuits is not applicable. The Endorsement provides:

> "In consideration of the premium charged for the Policy, the Insurer shall not be liable to make any payment for Loss in connection with or resulting from any claim based upon, arising out of, directly or indirectly resulting from or in consequence of, or in any way involving any actual or alleged Wrongful Act by:
>
> The Renco Group
> Doe Run Cayman Holdings, LLC
> The Doe Run Cayman Ltd.
> The Doe Run Peru SRL"

By its plain terms, the endorsement only precludes claims involving "Wrongful Acts" by The Doe Run Peru SRL. The Reid lawsuits do not concern "Wrongful Acts" by Doe Run Peru. Doe Run Peru is not a party to this litigation and is not the insured seeking coverage. Rather, the insured is Doe Run Resources Corporation, seeking defense coverage in suits against itself and its officers and directors for alleged wrongful acts by Doe Run and its officers and directors. The Court finds the Endorsement does not defeat the potential for coverage for Doe Run and its officers and directors.

The Beazley policies are unique in that they specifically exclude lead by including it in the definition of Pollutants. The Pollution Exclusion provides:

> "The insurer shall not be liable to make any payment for Loss in connection with or resulting from any Claim:
>
> C. based upon, arising out of, directly or indirectly resulting from or in consequence of,

> or in any way involving:
> 1. the actual or alleged or threatened discharge, release, escape, seepage, migration, dispersal or disposal of Pollutants into or on real or personal property, water or the atmosphere."

"Pollutants" is defined as:

> "[*a*]*ny substance located anywhere in the world exhibiting any hazardous characteristics as defined by or identified on a list of hazardous substances issued by the United States Environmental Protection Agency* or any federal, state, county, municipality or locality counterpart thereof. Such substances shall include, without limitation, solids, liquids, gaseous or thermal irritants, contaminants or smoke, vapor, soot, fumes, acids, alkalis, mold, spores, fungi, germs, chemicals or waste materials. Pollutants shall also mean any other air emission, odor, waste water, oil or oil product, infectious or medical waste, asbestos or asbestos product, *lead or lead product*, noise, and electric, magnetic or electromagnetic field." (Emphasis added.)

The record before the Court demonstrates the substances identified in the Reid Lawsuits as causing the minor plaintiffs' injuries, i.e., lead, arsenic, cadmium and sulfur dioxide, are all identified on the United States Environmental Protection Agency's list of hazardous substances codified at 40 C.F.R. § 302.4. The Court finds the policy language specifically and unambiguously defines lead as a pollutant and incorporates by reference to the EPA list the other metals alleged to have caused the injury/damage to the Reid plaintiffs, namely, arsenic, cadmium and sulfur dioxide. Thus, the Court finds Beazley's Pollution Exclusion precludes coverage to Doe Run for the claims of the Reid plaintiffs. Because this finding is dispositive of Beazley's duty to defend Doe Run, the Court need not consider the applicability of Beazley's Bodily Injury Exclusion.

JUDGMENT

WHEREFORE, the Court hereby **ORDERS, ADJUDGES AND DECREES**:

Doe Run's Motion for Partial Summary Judgment on the First and Second Causes of Action of the Petition for Declaratory Relief and Breach of Contract directed against Defendant Lexington Insurance Company is DENIED. This ruling renders Doe Run's

Third Cause of Action for Unreasonable Refusal to Pay Pursuant to section 375.420, RSMo., moot and said claim is dismissed with prejudice.

Lexington's Motion for Summary Judgment is GRANTED. Judgment is hereby entered in favor of Lexington Insurance Company and against Doe Run Resources Corporation on the First, Second and Third Causes of Action of the Petition for Declaratory Relief, Breach of Contract, and Unreasonable Refusal to Pay Pursuant to section 375.420, RSMo.

Doe Run's Motion for Partial Summary Judgment on the First and Second Causes of Action of the Petition for Declaratory Relief and Breach of Contract directed against Defendant National Union Fire Insurance Co. is GRANTED. Judgment is hereby entered in favor of Doe Run Resources Corporation and against National Union on the First and Second Causes of Action of the Petition.

National Union's Motion for Summary Judgment is DENIED.

Doe Run's Motion for Partial Summary Judgment on the First and Second Causes of Action of the Petition for Declaratory Relief and Breach of Contract directed against Defendant Beazley Insurance Company is DENIED. The Court's ruling renders Doe Run's Third Cause of Action for Unreasonable Refusal to Pay Pursuant to section 375.420, RSMo., moot and said claim is hereby dismissed with prejudice.

Beazley's Motion for Summary Judgment is GRANTED. Judgment is hereby entered in favor of Beazley Insurance Company and against Doe Run Resources Corporation on the First, Second and Third Causes of Action of the Petition for Declaratory Relief, Breach of Contract, and Unreasonable Refusal to Pay Pursuant to section 375.420, RSMo.

The court hereby sets Doe Run's Third Cause of Action for Unreasonable Refusal to Pay Pursuat to section 375.420 RSMo., against National Union Fire Insurance Co. for trial on November 30, 2011 at 10:00 a.m.

The court hereby sets a hearing for the determination of covered defense costs and supplemental expenses incurred by Doe Run under the National Union Fire Insurance Co. policy for November 30, 2011 at 10:00 a.m.

SO ORDERED:

11/7/11
Date

Sandra Hemphill, Judge
Div. 42

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