



Analysis

As of: Jun 06, 2011

**EMPLOYERS INSURANCE OF WAUSAU, et al., Plaintiff, v. TRICO PRODUCTS CORPORATION, et al., Defendants.**

**93-CV-402A(H)**

**UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF  
NEW YORK**

*1997 U.S. Dist. LEXIS 19680*

**May 29, 1997, Decided  
May 30, 1997, Filed**

**DISPOSITION:** [\*1] Recommended that this summary judgment motions of Wasuau (Item 379), AMMIC (Item 360) and Hartford (Item 359) granted.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** An action was filed by plaintiff insurers seeking declaratory judgment as to the rights and obligations of it and defendant insurers, and other insurers, with respect to insurance coverage for a lawsuit which involved defendant corporation's alleged discharge of pollutants. Plaintiffs and defendants moved for summary judgment as to their respective obligations concerning certain insurance claims. The matter was referred to a magistrate.

**OVERVIEW:** The suit filed against the corporation involved its alleged discharge of pollutants at its manufacturing facilities at two locations. The pleadings were later amended to include numerous claims for declaratory judgment with respect to the corporation's insurance coverage for its liability as a defendant in 12 private lawsuits alleging bodily injury and property

damage as a result of pollution from various sites. A judge previously granted summary judgment in favor of plaintiffs and several other defendant insurance companies on the ground that the policies under which the corporation sought coverage contained absolute pollution exclusion clauses. Plaintiffs and defendants relied on these same clauses in seeking summary judgment regarding claims arising out of certain sites. The plaintiffs in the actions involving those sites alleged that the corporation caused bodily harm and/or property damages by failing to properly dispose of its waste or in failing to prevent the escape of contaminants into the environment. The court held that these allegations placed the suits squarely within the clear and unmistakable language of the pollution exclusion clauses contained in the policies.

**OUTCOME:** The magistrate recommended that the summary judgment motions of plaintiffs and defendants be granted.

**CORE TERMS:** site, chemical, pollutants, pollution exclusion, summary judgment, disposal,

recommendation, lawsuit, insurance coverage, hazardous, remedial, insured, policies covering, hazardous chemicals, waste disposal sites, waste products, following allegation, disposed, pollution, coverage, inactive, actions arising, obligations to provide, contaminant, remediation, neutralize, landfill, detoxify, monitor, clean

#### LexisNexis(R) Headnotes

*Civil Procedure > Summary Judgment > Standards > General Overview*

*Civil Procedure > Summary Judgment > Supporting Materials > General Overview*

*Insurance Law > Claims & Contracts > Premiums > General Overview*

[HN1] Under New York law, on a motion for summary judgment in a case involving an insurance claim, a court looks only to the facts in an underlying complaint to determine if it alleges any facts or grounds which would bring it under an insurance policy.

**COUNSEL:** For Plaintiff: KARL S. VASILOFF, ESQ., Zelle & Larson, Waltham, Massachusetts.

For Hartford Accident & Indemnity, Defendant: JOHN R. SIEGART, ESQ., Melito & Adolfsen, P.C., New York, New York.

For American Manufacturers Mutual, Defendant: JOHN F. MAHER, ESQ., Tressler, Soderstrom, Maloney & Priess, Chicago, Illinois.

For Trico, Defendant: RALPH L. HALPERN, ESQ., Jaeckle, Fleischmann & Mugel, Buffalo, New York.

**JUDGES:** CAROL E. HECKMAN, United States Magistrate Judge.

**OPINION BY:** CAROL E. HECKMAN

**OPINION**

#### **REPORT AND RECOMMENDATION**

**CAROL E. HECKMAN**

**UNITED STATES MAGISTRATE JUDGE**

#### **REPORT AND RECOMMENDATION**

This matter was referred to the undersigned by the Hon. Richard J. Arcara for all pretrial matters and to hear and report on dispositive motions, in accordance with 28 U.S.C. § 636(b). Plaintiffs Employers Insurance of Wausau Mutual Company and Wausau Underwriters Insurance Company (collectively, "Wausau"), and defendants Hartford Accident and Indemnity Company ("Hartford") and American Manufacturers Mutual Insurance Company ("AMMIC"), [\*2] have moved pursuant to *Fed.R.Civ.P. 56* for summary judgment based on the "absolute pollution exclusion" clauses contained in insurance policies issued to defendant Trico Products Corporation ("Trico").<sup>1</sup> For the reasons that follow, the motions of Wausau, Hartford and AMMIC should be granted.

1 Defendants Trico Products Corporation, Trico Technologies Corporation, and Trico Componentes S.A. de C.V. have been referred to collectively as "Trico" by the parties and the court throughout the course of this litigation. I will continue to do so in this report and recommendation.

#### **BACKGROUND**

The background of this case has been discussed at length in the court's previous decisions, and will be repeated here only as necessary to the determination of the pending motions. The action was filed by Wausau on May 11, 1993 seeking declaratory judgment as to the rights and obligations of the parties with respect to insurance coverage for a lawsuit entitled *Alvear v. Leonard Electric Products Co.*, No. 93-03-1354-A [\*3] (Cameron Co., Tex. 1993) ("*Alvear*"), which involved Trico's alleged discharge of pollutants at its manufacturing facilities in Brownsville, Texas and Matamoros, Mexico. The pleadings in this action have subsequently been amended to include the parties' claims, cross-claims and counterclaims for declaratory judgment with respect to Trico's insurance coverage for its liability as a defendant in twelve private lawsuits alleging bodily injury and property damage as a result of pollution from the Pfohl Brothers Landfill in Cheektowaga, New York, and for governmental remedial actions at several other inactive hazardous waste disposal sites in western New York State.

On May 1, 1996, Judge Arcara granted summary

judgment in favor of Wausau and several defendant insurance companies on the ground that the insurance policies under which Trico sought coverage in the *Alvear* litigation contained absolute pollution exclusion clauses (Item 236, adopting report and recommendation of Magistrate Judge Edmund F. Maxwell (Item 125)). Wausau, Hartford and AMMIC now move for summary judgment as to their respective obligations to provide insurance coverage for claims arising out of Trico's waste disposal [\*4] activities at the western New York sites, again relying on the absolute pollution exclusion clauses in their policies.

## DISCUSSION

### I. Wausau's Motion.

Wausau moves for summary judgment as to its obligation to provide insurance coverage to Trico for twelve private lawsuits arising out of alleged environmental contamination of areas surrounding the Pfohl Brothers site,<sup>2</sup> as well as its obligation to provide insurance coverage to Trico for liability as a potentially responsible party ("PRP") for governmental cleanup, removal or remedial actions at the following sites:

1. Booth Oil Company Inactive Hazardous Waste Disposal Site, located on Robinson Street in North Tonawanda, New York (the "Booth Oil" site);

2. Chem-Trol Pollution Services, Inc. Inactive Hazardous Waste Disposal Site, located on Lake Avenue in Hamburg, New York (the "Chem-Trol" site);

3. Roblin Steel Inactive Hazardous Waste Disposal Site, located on River Road in Tonawanda, New York (the "Roblin Steel" site); and,

4. Envirotek, Ltd. Inactive Hazardous Waste Disposal Site, located on Fillmore Avenue in Tonawanda, New York (the "Envirotek I" site).

(See Item 363, [\*5] Exs. 20-23).

<sup>2</sup> *Thomas R. Cline, et al. v. Occidental Chemical Corp., et al.*, Index No. 3519-93 (filed 3/25/93, Sup.Ct. Erie Co.)("T. Cline"); *Robert W. Pfohl, et*

*al. v. Amax, Inc., et al.*, Index No. 12706-93 (filed 11/12/93, Sup.Ct. Erie Co.)("R. Pfohl"); *Donald Freier and Rosalie Freier v. Amax, Inc., et al.*, Index No. 1994-9752 (filed 9/1/94, Sup.Ct. Erie Co.)("D. Freier"); *Frazer, et al. v. Westinghouse Electric Corp., et al.*, Index No. 1995-195 (filed 1/10/95, Sup.Ct. Erie Co.)("Frazer"); *Raymond Freier, et al. v. Westinghouse Electric Corp., et al.*, No. 95-CV-0020E(F)(filed 1/10/95, W.D.N.Y.)("R. Freier"); *Batt, et al. v. Westinghouse Electric Corp., et al.*, No. 95-CV-0107E(F)(filed 2/14/95, W.D.N.Y.)("Batt"); *Astor, et al. v. Westinghouse Electric Corp., et al.*, No. 95-CV-0247E(F)(filed 3/29/95, W.D.N.Y.)("Astor"); *Ewert, et al. v. Westinghouse Electric Corp., et al.*, Index No. 1995-2-302 (filed 3/29/95, Sup.Ct. Erie Co.)("Ewert"); *Bartlebaugh, et al. v. Amax, Inc., et al.*, Index No. 1995-2637 (filed 4/11/95, Sup.Ct. Erie Co.)("Bartlebaugh"); *Nina Cline, et al. v. Westinghouse Electric Corp., et al.*, Index No. 1995-4024 (filed 5/31/95, Sup.Ct. Erie Co.)("N. Cline"); *Marzec, et al. v. Amax, Inc., et al.*, Index No. 1995-5941 (filed 8/9/95, Sup. Ct. Erie Co.)("Marzec"); *Davies, et al. v. Westinghouse Electric Corp., et al.*, No. 95-CV-0444E(F)(filed 8/10/95, W.D.N.Y.)("Davies").

[\*6] Wausau provided Trico primary comprehensive general liability insurance under five policies covering the period from 4/15/89 through 10/31/93 (Item 363, Sjullie Aft., Exs. 1-5; see also Item 125, p. 8). The Wausau policies covering the period from 4/15/89 through 4/15/92 contain the following pollution exclusion clause:

This insurance does not apply to:

\* \* \*

(1) "Bodily injury" or "property damage" arising out of the actual, alleged or threatened discharge, dispersal, release or escape of pollutants:

(a) At or from any premises you own, rent or occupy;

(b) At or from any site

or location used by or for you or others for the handling, storage, disposal, processing or treatment of waste;

(c) Which are at any time transported, handled, stored, treated, disposed of, or processed as waste by or for you or any person or organization for whom you may be legally responsible; or

(d) At or from any site or location on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations:

(I) if the pollutants are brought on or to the site or location in connection with such operations; or

(ii) if [\*7] the operations are to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize the pollutants.

(2) Any loss, cost, or expense arising out of any governmental direction or request that you test for, monitor, clean up, remove, contain, treat, detoxify or neutralize pollutants.

Pollutants means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.

(See, e.g., Item 363, Ex. 1). The Wausau policies covering the period from 4/15/92 through 10/31/93 contain the following, somewhat more expansive

pollution exclusion clause:

This insurance does not apply to:

\* \* \*

(1) "Bodily injury" or "property damage" arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of pollutants:

(a) At or from any premises, site or location which is or was at any time, owned or occupied by or rented or loaned to, any insured;

(b) At or from any site or location used by or for you or others for the handling, storage, disposal, processing or treatment [\*8] of waste;

(c) Which are or were at any time at any time transported, handled, stored, treated, disposed of, or processed as waste by or for any insured or any person or organization for whom you may be legally responsible; or

(d) At or from any premises, site or location on which any insured or any contractors or subcontractors working directly or indirectly on any insured's behalf are performing operations:

(I) if the pollutants are brought on or to the premises, site or location in connection with such operations by such insured, contractor or subcontractor;

or

(ii) if the operations are to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to or assess the effects of pollutants.

Subparagraphs (a) and (d)(I) do not apply to "bodily injury" or "property damage" arising out of heat, smoke or fumes from a hostile fire.

As used in this exclusion, a hostile fire means one which becomes uncontrollable or breaks out from where it was intended to be.

(2) Any loss, cost, or expense arising out of any:

(a) Request, demand or order that any insured or others test for, monitor, clean up, remove, [\*9] contain, treat, detoxify or neutralize, or in any way respond to or assess the effects of pollutants; or

(b) Claim or suit by or on behalf of a governmental authority for damages because of testing for, monitoring, cleaning up, removing, containing, treating, detoxifying or neutralizing or in any responding to, or assessing the effects of pollutants.

Pollutants means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.

(See, e.g., Item 363, Ex. 4).

These same "absolute pollution exclusion" clauses have already been determined by Judge Maxwell and Judge Arcara to bar Trico's claim against Wausau for defense and/or indemnification in the *Alvear* litigation. As stated by Judge Maxwell in his report and recommendation:

[HN1] Under New York law the court looks only to the facts in the underlying complaint to determine if it alleges any facts or grounds which would bring it under the policy. The *Alvear* plaintiffs allege that Trico . . . [was] negligent in handling chemicals, in controlling the amount and [\*10] method of discharge of toxins, in having inadequate documentation of the disposal and by generally allowing spills and mishaps which resulted in the emission of those toxins into the environment.

(Item 125, pp. 30-31).

Similarly, the plaintiffs in each of the private actions involving the Pfohl Brothers site allege that Trico caused the bodily harm and/or property damage complained of by failing to properly dispose of its waste or in failing to prevent the escape of contaminants into the environment. For example, the complaints in the *R. Pfohl* and *D. Freier* actions contain the following allegation:

Upon information and belief . . . , an occurrence or occurrences took place through the negligence of [Trico] whereby toxic and hazardous chemicals and chemical vapors escaped from [the Pfohl] site, resulting in an unhealthful and unfit condition for habitation, thereby proximately causing a decrease in value of [plaintiffs'] property and causing plaintiffs to lose the use of and enjoyment of said property, and causing a diminution in the quality of plaintiffs' lives, continuing to the present time.

(Item 363, Ex. 10, P 53; Ex. 11, P 42). The complaints [\*11] in the *Frazer*, *Ewert* and *N. Cline* actions contain the following allegations:

[Trico was] negligent in the procedures used to release and dispose of . . . hazardous chemicals into the environment without taking adequate precautionary measures to prevent the escape of hazardous substances from migrating off the Pfohl Brothers landfill. . . . As a direct result of [Trico]'s negligence in failing to provide for the safe release and disposal of

hazardous chemicals, the plaintiffs came in contact with the hazardous toxins through the inhalation of toxic substances released from the Pfohl Brothers landfill and through drinking contaminated water containing toxic chemicals that migrated from the Pfohl Brothers landfill. . . . [These] acts and omissions, taken singularly or collectively, were a direct and a proximate cause of the physical injuries suffered by the plaintiffs . . .

(Item 363, Ex. 13, PP 50, 52-53; Ex. 9, PP 52, 54-55; Ex. 15, PP 52, 54-55). The complaint in the *Bartlebaugh* action contains the following allegation:

The damages sustained by the plaintiffs . . . were caused wholly and solely as the consequence of the carelessness, recklessness, [\*12] and negligence of [Trico], in the disposal of toxic and hazardous chemicals and chemical waste products, in failing to care for and maintain said disposal site up to the present time resulting in the release of toxic and hazardous chemicals and chemical waste products onto plaintiffs' real property, in allowing said chemicals to be disposed of as aforesaid, and in allowing said chemicals to continue to spread to and contaminate plaintiffs' residence.

(Item 363, Ex. 8, P 59). The third-party complaints in the *Astor*, *R. Freier*, *Batt* and *Davies* actions contain the following allegation:

Upon information and belief, chemicals and chemical wastes constituting hazardous substances were generated and/or transported to the [Pfohl Brothers] Site by . . . Trico . . . and were present at the Site.

(Item 363, Ex. 19, P 55; Ex. 12, P 57; Ex. 18, P 57; Ex. 17, P 52). The complaint in the *Marzec* action contains the following allegations:

Upon information and belief, [Trico] . . . negligently, carelessly, and improperly disposed of . . . chemicals and chemical waste products . . . and as a result, said chemicals and chemical waste products

were allowed [\*13] and caused to be dispensed into the air and water throughout the surrounding area. . . . Some time after disposal and continuing to the present time, chemical and chemical waste products disposed of . . . have escaped and migrated from their site of deposition [sic] to the ground above them and to surrounding areas, via aboveground and other paths.

(Item 363, Ex. 16, PP 59-60). The complaint in the *T. Cline* action contains the following allegation:

Upon information and belief, . . . [Trico] carelessly, recklessly and negligently disposed of toxic and hazardous chemicals and chemical waste products and other materials upon [the Pfohl Brothers sited], and . . . failed to take adequate measures to prevent the escape and spread of said chemicals to the surface of the ground above and to the surrounding areas . . .

(Item 363, Ex. 14, P 41).

These allegations place Trico's claims for coverage in the twelve private lawsuits squarely within the "clear and unmistakable language" of the pollution exclusion clauses contained in Wausau's policies. *Continental Casualty Co. v. Rapid-American Corp.*, 80 N.Y.2d 640, 652, 593 N.Y.S.2d 966, 609 N.E.2d 506 (1993); [\*14] *Seaboard Surety Co. v. Gillette Co.*, 64 N.Y.2d 304, 311, 486 N.Y.S.2d 873, 476 N.E.2d 272 (1984). Indeed, Trico as much as concedes this point in its motion papers, simply incorporating by reference the arguments and authorities it previously presented to Judge Maxwell and Judge Arcara (*see* Item 362). There is nothing in Trico's papers to convince this court that the well-reasoned law of the case should be amended in any way.

The same result is required with respect to the remediation claims at the Booth Oil, Chem-Trol, Roblin Steel and Envirotek I sites. The clear and unmistakable language of Wausau's policies excludes coverage for any loss arising out of a governmental direction for remediating "the effects of pollutants." The correspondence attached as Exhibits 20-23 to Item 363 places Trico's insurance coverage demands for its share of the remediation costs at these sites squarely within the scope of the pollution exclusion.

Accordingly, I find that the pollution exclusions in Wausau's policies bar Trico's claims for insurance coverage with respect to the twelve private actions and the remediation of the Booth Oil, Chem-Trol, Roblin Steel and Envirotek I sites. Wausau's [\*15] motion for summary judgment should be granted, and the court should issue an order declaring that Wausau has no duty to defend Trico in the private lawsuits and remedial actions arising out of Trico's waste disposal activities at the Pfohl, Booth Oil, Chemtrol, Roblin Steel and Envirotek I sites.

## II. AMMIC's Motion.

AMMIC joins in Wausau's motion, and seeks summary judgment with respect to its obligation to defend and/or indemnify Trico in the twelve private lawsuits and four remedial actions listed above. AMMIC provided primary comprehensive general liability insurance to Trico under two policies covering the period from October 31, 1993 through October 31, 1995 (Item 344, Exs. 1 & 2). These policies each contain pollution exclusion clauses identical to the clauses contained in Wausau's policies covering the period from 4/15/92 through 10/31/93, as set forth above. Applying the law of the case, AMMIC is likewise entitled to summary judgment on Trico's claims for insurance coverage in the private lawsuits and remedial actions arising out of Trico's waste disposal activities at the Pfohl, Booth Oil, Chem-Trol, Roblin Steel and Envirotek I sites.

Accordingly, it is recommended [\*16] that AMMIC's motion for summary judgment be granted, and that the court issue an order declaring that AMMIC has no duty to defend Trico in the private lawsuits and remedial actions arising out of Trico's waste disposal activities at the Pfohl, Booth Oil, Chemtrol, Roblin Steel and Envirotek I sites.

## III. Hartford's Motion.

Hartford moves for summary judgment with respect to its obligation to provide insurance coverage to Trico in each of the private lawsuits and remediation claims discussed above.<sup>3</sup> Hartford issued primary and umbrella general liability coverage to Trico under five policies covering the period from February 15, 1987 through April 15, 1989 (*see* Item 359, Exs. A-E). The primary general liability policies each contain an absolute pollution exclusion clause identical or substantially similar to the clauses contained in Wausau's policies (*see*

*id.*, Exs. A-C). The umbrella policies each contain the following "pollution hazard" exclusion:

3 Hartford also lists the Franklin Chemical and Frontier Chemical sites in Cheektowaga, New York, and the ENRX site in Buffalo, New York, as three additional sites at which Trico "has been named, or may be named, as a potentially responsible party" (Item 359, Memorandum of Law, at p. 3). No documentation has been provided to the court upon which a determination can be made as to whether the claims made against Trico with respect to these additional sites are subject to the pollution exclusions in Hartford's policies.

[\*17] [Hartford] shall have no obligation under this policy:

(1) to investigate, settle or defend any claim or suit against any insured alleging actual or threatened injury or damage of any nature or kind to persons or property which arises out of or would not have occurred but for the pollution hazard; or

(2) to pay any damages, judgments, settlements, loss, costs or expenses that may be awarded or incurred by reason of any such claim or suit or any such injury or damage, or in complying with any action authorized by law and relating to such injury or damage.

As used in this endorsement, "pollution hazard" means an actual exposure or threat of exposure to the corrosive, toxic or other harmful properties of any solid, liquid, gaseous or thermal pollutants, contaminants, irritants or toxic substances, including smoke, vapors, soot, fumes, acids or alkalis, and waste materials consisting of or containing any of the foregoing.

(Item 359, Exs. D & E).

For the same reasons already set forth as to Wausau's and AMMIC's motions for summary judgment, it is recommended that Hartford's motion be granted and that the court issue an order declaring that Hartford has no

duty [\*18] to defend Trico in the private lawsuits and remedial actions arising out of Trico's waste disposal activities at the Pfohl, Booth Oil, Chemtrol, Roblin Steel and Envirotek I sites.

## CONCLUSION

For the foregoing reasons, it is recommended that the summary judgment motions of Wasuau (**Item 379**), AMMIC (**Item 360**) and Hartford (**Item 359**) be granted.

Respectfully submitted,

**CAROL E. HECKMAN**

**United States Magistrate Judge**

**DATED: Buffalo, New York**

**May 29, 1997**

Pursuant to 28 U.S.C. § 636(b)(1), it is hereby

**ORDERED**, that this Report and Recommendation be filed with the Clerk of the Court.

**ANY OBJECTIONS** to this Report and Recommendation must be filed with the Clerk of this Court within ten (10) days after receipt of a copy of this Report and Recommendation in accordance with the above statute, *Fed.R.Civ.P. 72(b)* and Local Rule 72.3(a)(3).

The district court will ordinarily refuse to consider on *de novo* review arguments, case law and/or evidentiary material which could have been, but was not presented to the magistrate judge in the first instance.

*See, e.g., Patterson-Lietch Co., Inc. v. Massachusetts Municipal [\*19] Wholesale Electric Co., 840 F.2d 985 (1st Cir. 1988).*

**Failure to file objections within the specified time or to request an extension of such time waives the right to appeal the District Court's Order.** *Thomas v. Arn, 474 U.S. 140, 106 S. Ct. 466, 88 L. Ed. 2d 435 (1985); Wesolek, et al. v. Canadair Ltd., et al., 838 F.2d 55 (2d Cir. 1988).*

The parties are reminded that, pursuant to Rule 72.3(a)(3) of the Local Rules for the Western District of New York, "written objections shall specifically identify the portions of the proposed findings and recommendations to which objection is made and the basis for such objection and shall be supported by legal authority." **Failure to comply with the provisions of Rule 72.3(a)(3), or with the similar provisions of Rule 72.3(a)(2) (concerning objections to a Magistrate Judge's Decision and Order), may result in the District Court's refusal to consider the objection.**

Let the Clerk send a copy of this Order and a copy of the Report and Recommendation to the attorneys for the parties.

**SO ORDERED.**

**CAROL E. HECKMAN**

**United States Magistrate Judge**

**DATED: Buffalo, New York**

**May 29, 1997 [\*20]**