



Analysis

As of: Jun 06, 2011

ROSKAM BAKING COMPANY, a Michigan corporation, Plaintiff, v NORTHERN INSURANCE COMPANY OF NEW YORK, a New York corporation dba The Maryland Insurance Group; MARYLAND CASUALTY COMPANY, a Maryland corporation; and ZURICH INSURANCE COMPANY (US Branch), a New York corporation, Defendants.

Case No. 1:97 CV 707

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

1999 U.S. Dist. LEXIS 7972

**May 19, 1999, Decided
May 19, 1999, Filed**

DISPOSITION: [*1] Plaintiff's Motion for Partial Summary Judgment (dkt # 171) GRANTED. Northern's Motion for Judgment Dismissing Count III (dkt. # 174) GRANTED in part and DENIED in part. Northern's Motion for Partial Summary Judgment Regarding Roskam's Contract Packaging Claim (dkt. # 175) and Motion for Partial Summary Judgment Regarding its Entitlement to Salvage Value Credit (dkt. # 177) DENIED and Motion for Partial Summary Judgment Regarding Period of Extended Business Income (dkt # 176) GRANTED.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff baking company and defendant insurer both moved for partial summary judgment in plaintiff's action to recover for losses caused by fire.

OVERVIEW: Defendant insurer issued a policy to

plaintiff baking company. Plaintiff sued defendant to recover for losses caused by fire. Both parties moved for partial summary judgment. Defendant's motion for partial summary judgment regarding the period of extended business income was granted, because the period of extended business income was controlled by the date of actual repair, rebuilding, or replacement, which was effected by moving certain lines to other facilities. The extended period began to run regardless of whether the initial business income period had expired. The court denied defendant's motion for partial summary judgment regarding plaintiff's contract packaging claim, because there were factual issues and an ambiguity in the contract regarding what were the premises described that suffered suspension and direct physical loss of or damage to property. The court granted plaintiff's motion for partial summary judgment regarding its entitlement to a salvage value credit, because there was an ambiguity regarding what constituted a temporary extra expense. The court granted defendant's motion as to any bad faith action in

tort, because the bad faith claim was a contract claim.

OUTCOME: The court granted defendant insurer's motion for partial summary judgment regarding the period of extended business income and any bad faith action in tort. The court denied defendant's motion for partial summary judgment regarding plaintiff baking company's contract packaging claim. The court granted plaintiff's motion regarding its entitlement to a salvage value credit, due to contract ambiguity.

CORE TERMS: business income, packaging, insured, temporary, summary judgment, bad faith, premises described, physical loss, ambiguity, replaced, suspension, insurer, replacement, repair, attorneys fees, penalty interest, restoration, repaired, partial, rebuilt, insurance policy, bad faith, extended period, salvage value, declaration, resumption, coverage, consequential, contractual, property damage

LexisNexis(R) Headnotes

Civil Procedure > Discovery > Methods > General Overview

Civil Procedure > Summary Judgment > Standards > Legal Entitlement

Civil Procedure > Summary Judgment > Standards > Materiality

[HN1] *Fed. R. Civ. P. 56(c)* provides that summary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

Civil Procedure > Summary Judgment > Opposition > General Overview

Civil Procedure > Summary Judgment > Standards > Appropriateness

Civil Procedure > Summary Judgment > Standards > Genuine Disputes

[HN2] A party seeking summary judgment bears the initial burdens of specifying the basis upon which it contends judgment should be granted and of identifying that portion of the record which, in its opinion, demonstrates the absence of a genuine issue of material fact. Once this initial burden is met, it becomes the

burden of the non-moving party to come forward with specific facts, supported by the evidence in the record, upon which a reasonable jury could find there to be a genuine fact issue for trial. Mere conclusory assertions or speculation will not suffice to avoid summary judgment, however. The non-moving party must go beyond the pleadings and provide sufficient facts to establish the dispute.

Civil Procedure > Summary Judgment > Evidence

Civil Procedure > Summary Judgment > Standards > General Overview

[HN3] Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences are jury functions, not those of a judge. The evidence of the non-movant for summary judgment is to be believed, and all justifiable inferences are to be drawn in the non-movant's favor. The factual record presented must be interpreted in a light most favorable to the non-movant. A court cannot resolve issues of fact, but is empowered to determine only whether there are issues in dispute to be decided in a trial on the merits.

Civil Procedure > Jurisdiction > Diversity Jurisdiction > General Overview

Constitutional Law > Relations Among Governments > General Overview

Insurance Law > Claims & Contracts > Policy Interpretation > General Overview

[HN4] In a diversity matter, the duty rests upon federal courts to apply state law in accordance with the then controlling decision of the highest state court. The same deference must be shown to the decisions of state intermediate appellate courts.

Contracts Law > Defenses > Ambiguity & Mistake > General Overview

Insurance Law > Claims & Contracts > Policy Interpretation > General Overview

[HN5] An insurance policy is much the same as any other contract. It is an agreement between the parties in which a court will determine what the agreement was and effectuate the intent of the parties. When determining what the parties' agreement is, the court should read the contract as a whole and give meaning to all the terms contained in the policy. The court must give the language contained in the policy its plain and ordinary meaning so that technical and strained constructions are avoided. If

an insurance contract sets forth definitions, the policy language must be interpreted according to those definitions. Where the language of an insurance policy is clear and unambiguous, it must be enforced as written. Courts must be careful not to read an ambiguity into a policy where none exists.

Contracts Law > Defenses > Ambiguity & Mistake > General Overview

Insurance Law > Claims & Contracts > Policy Interpretation > Ambiguous Terms > Construction Against Insurers

[HN6] A contract is ambiguous if the language is susceptible to two or more reasonable interpretations. Although a court cannot create an ambiguity in an otherwise clear policy, if the policy contains an ambiguity, the ambiguity will be construed in favor of the insured.

Civil Procedure > Summary Judgment > Supporting Materials > General Overview

Torts > Business Torts > Bad Faith Breach of Contract > General Overview

Torts > Procedure > Multiple Defendants > Indemnity > Contractual Indemnity

[HN7] A bad faith breach of an insurance indemnity contract itself is not an actionable tort in Michigan.

Contracts Law > Breach > General Overview

Contracts Law > Remedies > Compensatory Damages > Consequential Damages

Insurance Law > Bad Faith & Extracontractual Liability > Remedies > Penalties

[HN8] A bad faith breach does not provide any special consequential damages. The damages available are those that arise naturally from the breach, or which can reasonably be said to have been in contemplation of the parties at the time the contract was made. Foreseeable damages in the commercial contract situation generally results in a limitation of damages to the monetary value of the contract had the breaching party fully performed.

Civil Procedure > Remedies > Costs & Attorney Fees > Attorney Expenses & Fees > Statutory Awards

Insurance Law > Claims & Contracts > Costs & Attorney Fees > General Overview

[HN9] Attorney fees are generally not allowed as either

costs or damages, unless recovery is expressly authorized by statute, court rule, or a recognized exception.

Contracts Law > Remedies > Compensatory Damages > Consequential Damages

Insurance Law > Claims & Contracts > Costs & Attorney Fees > General Overview

Torts > Business Torts > Bad Faith Breach of Contract > General Overview

[HN10] In Michigan, attorneys' fees are not an available item of consequential damages in a bad faith breach of contract claim.

Insurance Law > Bad Faith & Extracontractual Liability > Remedies > Interest

Insurance Law > Bad Faith & Extracontractual Liability > Remedies > Penalties

Torts > Business Torts > Bad Faith Breach of Contract > General Overview

[HN11] In Michigan, a plaintiff's recourse in a bad faith breach of contract claim, is to Michigan's penalty interest statute, *Mich. Comp. Laws* § 500.2006. *Section 500.2006(4)* provides that, in first-party insurance matters, when benefits are not paid on a timely basis the benefits paid shall bear simple interest from a date 60 days after satisfactory proof of loss was received by the insurer at the rate of 12 percent per annum. This penalty does not apply, however, if the claim is reasonably in dispute. *Mich. Comp. Laws* § 500.2006(1). A claim need not be considered in its entirety, however. It appears from the statute that portions of a claim may be reasonably in dispute, while others are not.

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JUDGES: RICHARD ALAN ENSLEN, Chief Judge.

OPINION BY: RICHARD ALAN ENSLEN

OPINION

OPINION

This matter is before the Court on various motions submitted by Plaintiff Roskam Baking Company ("Roskam" or "Plaintiff") and Defendant Northern Insurance Company of New York ("Northern") for partial summary judgment. The matter arises out of a fire at a Roskam facility ("Butterworth"), which resulted in property damage and business losses. These losses were insured through a policy with Northern. The facts of this case are myriad, and familiarity with them is assumed.

Legal Standards

[HN1] "*Federal Rule of Civil Procedure 56(c)* provides that summary judgment is proper 'if the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.'" *City Management Corp. v. U.S. Chemical Co.*, 43 F.3d 244, 250 (6th Cir. 1994). [HN2] "A party seeking summary judgment bears the initial burdens of specifying [*3] the basis upon which it contends judgment should be granted and of identifying that portion of the record which, in its opinion, demonstrates the absence of a genuine issue of material fact." *Pierce v. Commonwealth Life Ins. Co.*, 40 F.3d 796, 800 (6th Cir. 1994) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986)). "Once this initial burden is met, it becomes the burden of the non-moving party to come forward with specific facts, supported by the evidence in the record, upon which a reasonable jury could find there to be a genuine fact issue for trial." *Bill Call Ford, Inc. v. Ford Motor Co.*, 48 F.3d

201, 205 (6th Cir. 1995) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986)). Mere conclusory assertions or speculation will not suffice to avoid summary judgment, however. *Moore v. Philip Morris Cos.*, 8 F.3d 335, 343 (6th Cir. 1993). The non-moving party must go beyond the pleadings and provide sufficient facts to establish the dispute. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.* 475 U.S. 574, 587, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986) (citing *Fed. R. Civ. Pro.* [*4] 56(e)).

[HN3] "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences are jury functions, not those of a judge. The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in [the non-movant's] favor." *Id.* (quoting *Anderson*, 477 U.S. at 255). The factual record presented must be interpreted in a light most favorable to the non-movant. *Matsushita*, 475 U.S. at 587. This Court "cannot resolve issues of fact, but is empowered to determine only whether there are issues in dispute to be decided in a trial on the merits." *Gutierrez v. Lynch*, 826 F.2d 1534, 1536 (6th Cir. 1987).

In an earlier Opinion, the Court determined that Michigan law applies in this diversity matter. In interpreting the terms of the insurance policy entered into by the parties, the Court must therefore apply principles developed by the courts of the state of Michigan. As well, any determination regarding "bad faith" must be made in accordance with Michigan law. [HN4] "The duty rests upon federal courts to apply state law . . . in accordance with the then controlling decision of the highest state court." *Vandenbark v. Owens-Illinois* [*5] *Glass Co.*, 311 U.S. 538, 543, 85 L. Ed. 327, 61 S. Ct. 347 (1941). The same deference must be shown to the decisions of state intermediate appellate courts. *See id.* at n.21 and cases cited therein.

[HN5] An insurance policy is much the same as any other contract. It is an agreement between the parties in which a court will determine what the agreement was and effectuate the intent of the parties. When determining what the parties' agreement is, the court should read the contract as a whole and give meaning to all the terms contained the policy. The court must give the language contained in the policy its plain and ordinary meaning

so that technical and strained constructions are avoided. If an insurance contract sets forth definitions, the policy language must be interpreted according to those definitions. Where the language of an insurance policy is clear and unambiguous, it must be enforced as written. Courts must be careful not to read an ambiguity into a policy where none exists.

Century Surety Co. v. Charron, 230 Mich. App. 79, 82, 583 N.W.2d 486 (1998) (citations omitted). [HN6] A contract is ambiguous if the language is susceptible to two or more reasonable interpretations. [*6] *D'Avanzo v. Wise & Marsac*, 223 Mich. App. 314, 319, 565 N.W.2d 915 (1997). Although a court cannot create an ambiguity in an otherwise clear policy, if the policy contains an ambiguity, the ambiguity will be construed in favor of the insured. *Arco Industries Corp. v. American Motorists Ins. Co.*, 448 Mich. 395, 402-403, 531 N.W.2d 168 (1995).

Extended Business Income

The insurance policy Roskam purchased from Northern includes coverage for loss of business income. This coverage requires Northern to pay for the:

actual loss of Business Income you sustain due to the necessary suspension of your 'operations' during the 'period of restoration.' The suspension must be caused by direct physical loss of or damage to property at the premises described in the Declarations.

The "period of restoration" is defined as the period of time that "begins with the date of direct physical loss or damage . . . at the described premises" and ends "on the date when the property at the described premises should be repaired, rebuilt or replaced with reasonable speed and similar quality." "Operations" are "your business activities occurring at the described premises."

The policy [*7] also provides for "extended business income." This includes coverage of business income loss for the period beginning "on the date property (except 'finished stock') is actually repaired, rebuilt or replaced and 'operations' are resumed," and ending on the earlier of "the date you could restore your 'operations' with

reasonable speed, to the condition that would have existed if no direct physical loss or damage occurred," or 365 days after the beginning date.

Northern seeks a declaration that its liability for "extended business income" can extend no further than April 15, 1997. Roskam contends, in response, that its entitlement to such payments may extend well beyond that date.

Unfortunately, the briefing on this issue fails to adequately develop the two issues most fundamental to the determination of the period of extended business income: (1) what is the "property" which must be "repaired, rebuilt or replaced" under the extended business income provision, and (2) what constitutes repair, rebuilding or replacement for purposes of the insurance contract.

Each party assumes what the relevant property is. Northern assumes it is defined in terms of the production lines at the Butterworth [*8] facility: the Rice Krispy Treat line and the Nugget line. Roskam, on the other hand, assumes it is the Butterworth building itself. The contract does not offer any more specific definition of "the property at the described premises." While the parties take opposing positions on this question, the Court concludes that the term "property" as used in this provision of the policy is not ambiguous. Since this provision is concerned with business income, the only relevant property can be that which is necessary to the creation of income. Here, both the production lines *and* the building are means of production necessary for Roskam to secure income. While the production lines create the product, they must be housed in order to do so. In a sense, then, both sides are right in their assumptions as to the property at issue. This Court is mindful that defining "property" functionally, as "means of production," may not appear to be a "plain" meaning of the word. In the context of the contract, however, with its focus on income, this definition becomes plain.

When we turn to the terms "repair, rebuild, or replace," Northern's position is the more supportable of the two. From the evidence submitted, [*9] there can be no question that the Rice Krispy Treat and Nugget lines were repaired and replaced at Roskam's Broadmoor and Shaffer facilities, respectively. Furthermore, when moved, each line was housed by a building. The question then becomes, was the Butterworth structure "replaced" by the Broadmoor and Shaffer buildings? The Court

concludes that it was. The dictionary offers a variety of definitions of the word "replace:" "1. To put back into a former position or place. 2. To take or fill the place of. 3. to be or provide a substitute for." AMERICAN HERITAGE DICTIONARY 1530 (3d ed. 1996). While Butterworth was not "put back into [its] former position or place" physically, this is irrelevant to Roskam's productive capacity. In terms of capacity, the Broadmoor and Shaffer buildings "replaced" Butterworth by taking its place or substituting for it.

Roskam's contention, that rebuilding of the Butterworth facility was required before the extended period could begin, ignores the policy's provision for replacement as an event sufficient to set the period running. Certainly, in terms of property damage, the Butterworth facility was not replaced. However, in terms of its function as part [*10] of Roskam's productive capacity, it was.

The Court recognizes that there is not a perfect correlation between the original structures and lines and their replacements. For instance, the Shaffer facility provided the Nugget line with only part of the oven capacity it formerly possessed. As well, the square footage available to Roskam was reduced by the fire. Nonetheless, Roskam's property, its means of production, was actually replaced by the time the Rice Krispy Treat and Nugget lines were moved into the other facilities. It would be unreasonable to interpret the contract to require identity of facilities in order for replacement to occur.

In this regard, the Court notes that the evidence submitted eliminates any question of fact as to the productive capacity at Butterworth. While Roskam does raise the issue of contract packaging as a further activity at Butterworth, there is no evidence that any contract packaging was done on machines other than those making up the two subject lines. In other words, the evidence is clear that if there was contract packaging done at Butterworth, it was done on the Rice Krispy Treat and Nugget lines.¹ Accordingly, the Butterworth physical plant [*11] consisted of the two lines, and the building. They were the property items which were required to be, and were, actually repaired, rebuilt, or replaced before the extended business income period could begin to run.

¹ See, e.g., Kogelschatz Depo. at 34 (describing the Nugget line as "the bread baking operation and the finished packaging line in the rear, so it

was a drawn-out line in the plant."); and 40 (noting that each line contained a packaging component). In a memo from Mark Stephanic to Dorothy Pawloski dated July 10, 1996, reference is made to "the 3 production lines that were in operation at the loss location." This is insufficient to raise a material fact as to production at Butterworth. Instead, seen in light of the other evidence, it is a reference to the different products regularly produced on the lines, not to the physical lines themselves.

The running of the extended business income period is also dependent on the resumption of operations. Resumption, as noted by Defendant, does not require [*12] a return to previous production levels. The word resume has been defined as "to begin or take up again after interruption." AMERICAN HERITAGE DICTIONARY 1539 (3d ed. 1996). One cannot be expected to "begin" at full speed. The contract language further supports a conclusion that resumption may be only a partial return to production. It does so by ending the extended period when operations could be restored. If resumption required productivity at a level equal to previous productivity levels, the extended business income period would appear to end simultaneously with its beginning. Consequently, the Court concludes that "operations" resumed on April 15, 1996,² when Nugget line (the later-resuming of the two) began production.

² This date is derived from the Kogelschatz depo. at 89 and the Ralston memo dated April 17, 1996.

Plaintiff raises another argument against limiting the period of its entitlement to extended business income, which focuses on whether the business income and extended business income periods [*13] can run concurrently, or must run consecutively. The initial business income period runs until the property "should be" repaired, rebuilt or replaced. The extended period runs from the date of "actual" repair, rebuild, or replacement. Plaintiff contends that it should be able to collect business income under the "should be" provision for the amount of time repair should take, and that only when this period ends can the extended period begin.

Plaintiff contends its actions led to a much quicker turnaround than should have been required. This appears true. Plaintiff did take quick, decisive action to resume its business.³ Under the policy, however, this is of no

import. The period of extended business income is controlled by the date of "actual" repair, rebuild, or replacement. Here, actual repair and replacement was effected by moving the Butterworth lines to the other facilities. Regardless of the business income provision, the extended period then began to run. As noted by Defendant Northern, there are three potential juxtapositions of the periods of business income and extended business income. First, as in this case, they can overlap, with the actual repair completed ahead of [*14] schedule, before it "should" have been. Second they can be totally disjointed, with the "should" period expiring before the actual repair is completed. Finally, as noted by Plaintiff, they may dovetail, with the end of the "should" period coinciding with the beginning of the "actual." The final scenario is not required by the contract. While it represents a possible outcome, it is not the outcome arising from the facts of this case. Therefore, the argument that the period of extended business income cannot begin to run until the initial business income period expires is unavailing.

3 Roskam frequently mentions the "windfalls" it believes Northern is attempting to extract from it. While it is true that Northern benefitted from Roskam's prompt action, it should be noted that Roskam did as well. By resuming its operations timely, it was able to maintain the business relationships that are necessary to its long-term success.

In addition, Plaintiff argues that Northern cannot seek to limit payments through limiting [*15] the extended business income period, but must instead seek reduction only through another section of the policy, entitled "resumption of operations." This section provides that Northern will reduce the amount of Roskam's "business income loss, other than Extra Expense, to the extent you can resume your 'operations,' in whole or in part, by using damaged or undamaged property . . . at the described premises or elsewhere." It is, in essence, a mitigation provision. According to Plaintiff, its move into alternate facilities is governed by this provision, rather than the period-defining provision. To so conclude, however, would require a rewriting of the policy, which contains both time-limiting and mitigation provisions.

In conclusion, Northern will be granted summary judgment limiting the period of extended business income to no later than April 15, 1997, one year from the

date when actual repair, rebuild or replacement occurred, and operations resumed.

Contract Packaging

Northern also seeks a declaration that Plaintiff may not recover alleged "contract packaging" losses, because its contract packaging operations did not sustain direct physical loss or damage and were not suspended [*16] as a result of the Butterworth fire.

While Plaintiff is correct that it may be entitled to policy benefits for losses suffered to its contract packaging operations at Butterworth, Plaintiff, in part, misconstrues the evidence in support of its claim. In particular, at pages 4 and 5 of its brief in opposition, Plaintiff attempts to rhetorically create a packaging line at the Butterworth facility, separate from the lines described above. The deposition testimony cited, however, simply reiterates the fact that there were two lines at the facility. The "extra" line counsel describes is, in fact, the Nugget line. *See* Kogelschatz depo. at 34. As the Court has already noted, to the extent contract packaging was performed at Butterworth, it was on the two established lines. That said, there is a question of fact regarding the scope of the work done on the two lines. To the extent contract packaging was performed on them, and disrupted by the fire, resulting losses would appear compensable under the policy.

The more difficult question is the propriety of claims for losses suffered as a result of alleged disruption of contract packaging done at the Broadmoor and Shaffer facilities. Plaintiff [*17] contends that the suspension of operations at Butterworth results, under the policy, in "Business Income Coverage for all operations within the company that are impacted by that suspension." Plaintiff's Brief in Opposition at 18. Defendant argues that since business income losses are permitted only for suspensions caused by "direct physical loss or damage," and since the only facilities to suffer "direct physical loss or damage" were those at Butterworth, the impact on Shaffer and Broadmoor's activities did not derive from the cause required under the policy.

The policy covers suspension caused by damage "to the property at the premises described in the Declarations." Plaintiff argues that since all of the company's facilities are covered under a blanket policy, the entire group of facilities are to be considered as one in considering the impact of the fire. Thus, there is a direct

relationship between the Butterworth fire and the impact at other facilities. Plaintiff's focus, though inexplicit, is on the proper issue. Northern does not address the issue, that is, what are "the premises described" in the policy. There are two ways this could be interpreted. First, as interpreted by [*18] Plaintiff, the "premises described" in the policy could mean *all* of the locations covered in the policy. Under this interpretation, the "premises described" is an indivisible unit comprised of Butterworth, Shaffer, Broadmoor, and other structures listed in the prologue of the policy. Thus, "direct physical loss" to Butterworth is a loss suffered by the greater "premises described" *in toto*. As well, under this interpretation, the impact of a "suspension" suffered as a result of damage to one location may be experienced by the greater "premises described." Support for this interpretation comes from the fact that the policy, indeed, covers more than one piece of property, and is a blanket policy which charges a unified premium. Moreover, the policy language refers to "the premises" rather than "a premises." The use of the definite article appears to treat all of the insured locations contained in the declarations as a single unit.

An alternative interpretation, favorable to Northern, is that the "premises described" are the individual units described in the policy's prologue. Under this interpretation, the "premises described" are separated by location, and losses must be so [*19] examined. Support for this interpretation derives from the fact that the policy explicitly separates the various "premises," listing Butterworth, for instance, as Prem No. 00001.

In any event, there is an ambiguity in the contract regarding what are the "premises described" which must suffer "suspension" and "direct physical loss of or damage to property." Of course, "where an ambiguity exists [a court] will construe the policy in favor of the insured." *Arco Industries v. Amer. Motorists Ins. Co.*, 448 Mich. 395, 403, 531 N.W.2d 168 (1995). Here, however, where: (1) Northern is the movant, and (2) Northern has not specifically addressed this issue, ⁴ the Court concludes that the proper resolution is simply to deny summary judgment on this issue, rather than make any binding determination. Moreover, there are fact questions regarding the extent to which contract packaging operations at the other facilities felt the impact of the Butterworth fire.

4 Northern has, of course, cited numerous cases

for the proposition that separate properties should be considered separately. None of these, however, appear to address in detail the "premises described" question.

[*20] Salvage Value Credit

The insurance policy purchased by Roskam provides coverage for "extra expense," which is defined as "necessary expenses you incur during the 'period of restoration' that you would not have incurred if there had been no direct physical loss or damage to property caused by or resulting from a Covered Cause of Loss." These include expenditures "to avoid or minimize the suspension of business and to continue 'operations' . . . at the described premises; or . . . at replacement premises or at temporary locations." In determining the amount of extra expense, the policy states that the insurer may deduct "the salvage value that remains of any property bought for temporary use during the 'period of restoration,' once 'operations' are resumed."

As an initial matter, the Court determines that the Broadmoor additions and Shaffer oven extensions are extra expense items. No matter how they were treated by the insurer, ⁵ these items were not required, nor paid for, as a result of "direct physical loss or damage," as required by the property damage provision of the policy. Instead, they fit squarely within the extra expense definition noted above. The terms of the contract [*21] control here, not the "suffix" under which Northern reserved and paid for these items. Evidence of Northern's treatment of the items is only relevant to the extent that it might shed light on an ambiguity, and the Court discerns no ambiguity as to the distinction between property damage and extra expense.

5 Plaintiff describes in detail facts which appear to show that Northern believed these items were to be treated as part of the property damage claim rather than as extra expense.

There is an ambiguity, however, regarding the word "temporary" in the salvage value provision. The contract, again, provides a deduction for "property bought for temporary use during the 'period of restoration.'" Plaintiff contends that the additions and oven extension are not "for temporary use," but are, rather, permanent. Indeed, they have turned out that way. The question is what "temporary" means under the contract. Does it mean temporary as envisioned by the insured, the insurer, or both, when bought? Is property still in use [*22] after the

"period of restoration" not demonstrably temporary? Can structural alterations to existing buildings or machinery be "temporary?" In any event, it is reasonable for Plaintiff to believe that property added to its existing buildings and machinery, which remains in use, is not "for temporary use."

The Court is aware of problems with this outcome. First, Plaintiff does indeed gain a windfall. Not only does it have a rebuilt Butterworth, but also a larger Broadmoor. It is, in terms of property ownership, in a better position than before the fire. Second, a rule that temporary facilities may become permanent through mere continued use enables insureds to increase their gain after a covered loss simply by staying put after a temporary loss. Any insured could gain an extra building or buildings without attendant cost. However, in the face of ambiguity as to the meaning of "temporary" in the provision, Plaintiff is entitled to an interpretation in its favor. The insurer is in a position to change the wording of its policies to avoid undesired results.

In conclusion, Plaintiff's motion for summary judgment as to the availability of a salvage value credit for the Broadmoor additions [*23] will be granted. Northern's motion will be denied.

Bad Faith

The Michigan Supreme Court has created and acknowledged a somewhat nebulous "bad faith" cause of action against insurers. See *City of Wakefield v. Globe Indemnity Co.*, 246 Mich. 645, 225 N.W. 643 (1929); *Commercial Union Ins. Co. v. Medical Protective Co.*, 426 Mich. 109, 393 N.W.2d 479 (1986); *Commercial Union Ins. Co. v. Liberty Mutual Ins. Co.*, 426 Mich. 127, 393 N.W.2d 161 (1986). The cause of action appears to be contractual in nature. See *Commercial Union Ins. Co. v. Medical Protective Co.*, 426 Mich. at 116 ("This cause of action originates in the implied covenant of good faith and fair dealing which arises from the contract between the insurer and the insured."). Its elements, however, are tort-like. See *Commercial Union Ins. Co. v. Liberty Mutual Ins. Co.*, 426 Mich. at 136 (defining "'bad faith' for instructional use in trial courts as arbitrary, reckless, indifferent, or intentional disregard of the interests of the person owed a duty.").

In *Kewin v. Massachusetts Mutual Life Ins. Co.*, 409 Mich. 401, 295 N.W.2d 50 (1980), the Michigan Supreme Court held that [HN7] the "bad faith breach of [*24] an

insurance indemnity contract" itself is not an actionable tort in Michigan. *Id.* at 423. The present case, then, is not the sort which may result in tort damages. Here, as in *Kewin*, "the facts alleged in the pleadings [and shown in the summary judgment documents] would not support a finding of tortious conduct and merely demonstrate that the nature of the cause of action [is] for breach of contract, albeit a bad-faith breach." *Id.* at 422. To the extent that bad faith is at issue here, it is as a contract issue: the breach of the (contractual) covenant of good faith and fair dealing. The bad faith moniker is just a characterization of the breach. As Northern concedes, consequential damages may arise from such a breach of contract action. See *Wendt v. Auto-Owners Ins. Co.*, 156 Mich. App. 19, 27-30, 401 N.W.2d 375 (1986). However, as Northern also notes, [HN8] a bad faith breach does not provide any *special* consequential damages. The damages available are those "that arise naturally from the breach, or which can reasonably be said to have been in contemplation of the parties at the time the contract was made." *Kewin*, 409 Mich. at 419. While it is true that the [*25] *Hadley v. Baxendale* rule provides for foreseeable damages, its application "in the commercial contract situation generally results in a limitation of damages to the monetary value of the contract had the breaching party fully performed." ⁶ *Kewin*, 409 Mich. at 414-15.

6 Exceptions to this limitation are rare. They are found, first, in cases presenting circumstances such as those noted above cases, involving failure to settle with third parties. The damages awardable in such a case include excess liability created by the insurer's bad faith failure to negotiate. An exception is also found in the cause of action arising out of the failure to perform the contractual duty to defend. The consequences of such a failure may include a judgment against the insured beyond the policy limits. Damages for such a breach may, therefore, extend beyond policy limits. See *Stockdale v. Jamison*, 416 Mich. 217, 224-25, 330 N.W.2d 389 (1982). The Michigan Court of Appeals has recognized the availability of damages beyond the value of the contract where an insurance company refused to settle an insured's collision damage claim, "knowing the hardship which would be caused to plaintiff through the loss of his vehicle." *Wendt*, 156 Mich. App. at 28.

[*26] The Court will now address a particular item

of damages to which Plaintiff believes it is entitled because of Northern's alleged bad faith.⁷ In a previous Opinion, the Court noted that it was disturbed by certain assertions made by Plaintiff regarding the availability of attorneys fees in this matter. Imagine, then, the Court's surprise at seeing the exact same issue raised again without any mention of the Court's earlier discussion of the matter. The following was contained in this Court's Opinion of January 6, 1999, at page 9:

Plaintiff states that, according to *Kewin*, Plaintiff "may seek" attorney's fees incurred as a consequence of breach. In fact, *Kewin* explicitly avoided that question. 409 Mich. at 421 n.2. It was addressed, just as explicitly, however, by the Michigan Court of Appeals in *Burnside v. State Farm Fire and Casualty Co.*, 208 Mich. App. 422, 528 N.W.2d 749 (1995). There, the court concluded that "the recovery of attorney fees incurred as a result of an insurer's bad-faith refusal to pay an insured's claim is governed by the American rule," 208 Mich. App. at 430, which provides that "attorney fees are generally not allowed, as either costs or [*27] damages, unless recovery is expressly authorized by statute, court rule, or a recognized exception." *Id.* at 426-27. There is no such authorization in Michigan law.

Perhaps Plaintiff believes that by presenting its attorneys' fee claim as an item of foreseeable damages rather than an independently recoverable item, it somehow evades the result of this Court's Opinion, and of *Burnside*. A simple reading of the quoted passage should disabuse counsel of this notion. Again, [HN9] "attorney fees are generally not allowed, as either costs or damages, unless recovery is expressly authorized by statute, court rule, or a recognized exception." *Burnside v. State Farm Fire and Casualty Co.*, 208 Mich. App. 422, 426-27, 528 N.W.2d 749 (1995) (emphasis added). The Court of Appeals' decision in *Burnside* contains this clear statement: "an insured's right to recover attorney fees as an element of damages is not triggered by the foreseeability of loss." *Id.* at 431 (emphasis added). The court noted that while the classic *Hadley* formulation generally controls damages, it is tempered, at least in Michigan, by the American rule on attorneys' fees. *Id.* at 428-30. In other [*28] words,

[HN10] attorneys' fees are not an available item of consequential damages in a bad faith breach of contract claim. While the Sixth Circuit once held that attorneys' fees were available as an item of consequential damages under Michigan law, *Murphy v. Cincinnati Ins. Co.*, 772 F.2d 273 (6th Cir. 1985), after *Burnside*, Michigan law is to the contrary. See *Isagholian v. Transamerica Ins. Co.*, 208 Mich. App. 9, 18, 527 N.W.2d 13 (1995) (holding that Sixth Circuit's opinion in *Murphy* misconstrued Michigan law). In light of this Court's previous Order, and especially in light of *Burnside*, Counsel's contention that Plaintiff might somehow be entitled to fees is completely meritless.

7 The Court is aware that in the context of the pending motions, the following exposition may be, in some sense, advisory. Nonetheless, Plaintiff has raised the issue of attorneys' fees, leading the Court to address it a second time.

Another item of damages raised by the parties in this regard is statutory penalty interest. [HN11] [*29] In Michigan, a plaintiff's recourse in a bad faith breach of contract claim, such as this, is to Michigan's penalty interest statute, *Mich. Comp. Laws* § 500.2006.⁸ See *Burnside*, 208 Mich. App. at 426 (agreeing with defendant's contention that penalty interest is "the exclusive remedy when an insurance company acts in bad faith."). Subsection 500.2006(4) provides that, in first-party insurance matters, "when benefits are not paid on a timely basis the benefits paid shall bear simple interest from a date 60 days after satisfactory proof of loss was received by the insurer at the rate of 12% per annum."⁹ This penalty does not apply, however, if "the claim is reasonably in dispute." *Mich. Comp. Laws* § 500.2006(1); *Arco Industries Corp. v. American Motorists Ins. Co.*, 233 Mich. App. 143, 1998 Mich. App. LEXIS 356, 594 N.W.2d 74 (Mich. App. 1998) (decision on rehearing); *Village of Thompsonville v. Federal Ins. Co.*, 233 Mich. App. 422, 592 N.W.2d 760, 1999 WL 21514 (Mich.App. 1999). A "claim" need not be considered in its entirety, however. It appears from the statute that portions of a claim may be reasonably in dispute, while others are not. Subsection 500.2006(4) refers to the [*30] timely payment of "benefits," rather than to a discrete "claim." Moreover, subsection (3) refers to different parts of a claim: those amounts supported by a satisfactory proof of loss, and those that are not.

8 As noted by Northern, in a case such as this

one, penalty interest is the only remedy available to private litigants under Michigan's Unfair Trade Practices Act. *See Young v. Michigan Mutual Ins. Co.*, 139 Mich. App. 600, 604-06, 362 N.W.2d 844 (1984).

9 In fact, bad faith need not be shown for an insured to be awarded this penalty. For insureds, untimeliness is the standard. Only third party tort claimants need show bad faith under § 500.2006(4). Thus, in terms of available relief, Plaintiff's bad faith claim is superfluous.

For these reasons, the Court concludes that although many of the disputes between the parties certainly appear reasonable, the reasonableness of some does not equal the reasonableness of all. There are issues of fact regarding the reasonableness of the disputes, whether [*31] proofs of loss were "satisfactory," and, as a result, the possibility of penalty interest under *section 500.2006*. There are also questions of fact regarding whether any actions taken by Northern in this matter were taken in "bad faith," that is, "arbitrary, reckless, indifferent, or intentional disregard of the interests of the person owed a [contractual] duty." Again, while such a finding would not result in any special damages, it would represent a species of actionable breach.

In conclusion, Northern's motion will be granted under *Fed. R. Civ. P. 56* as to any bad faith action in tort. It will be denied to the extent Plaintiff's bad faith claim is simply a contract claim, resulting in contract damages. It will also be denied with regard to the availability of penalty interest under § 500.2006.

DATED in Kalamazoo, MI:

May 19, 1999

RICHARD ALAN ENSLEN

Chief Judge

ORDER

In accordance with the Opinion entered this date:

IT IS HEREBY ORDERED that Plaintiff's Motion for Partial Summary Judgment (dkt # 171) is **GRANTED**;

IT IS FURTHER ORDERED that Northern's Motion for Judgment Dismissing Count III (dkt. # 174) is **GRANTED in part** and **DENIED [*32] in part**, to the extent described in the accompanying Opinion;

IT IS FURTHER ORDERED that Northern's Motion for Partial Summary Judgment Regarding Roskam's Contract Packaging Claim (dkt. # 175) is **DENIED**;

IT IS FURTHER ORDERED that Northern's Motion for Partial Summary Judgment Regarding its Entitlement to a Salvage Value Credit (dkt. # 177) is **DENIED**;

IT IS FURTHER ORDERED that Northern's Motion for Partial Summary Judgment Regarding the Period of Extended Business Income (dkt # 176) is **GRANTED**.

DATED in Kalamazoo, MI:

May 19, 1999

RICHARD ALAN ENSLEN

Chief Judge