IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

CONAGRA FOODS, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No.: 09C-02-170 FSS
	)	**E-FILED**
LEXINGTON INSURANCE CO.,	)	
	)	
Defendant.	)	

Submitted: July 20, 2009
Decided: October 30, 2009

MEMORANDUM OPINION

Upon Cross Motions for Partial Summary Judgment

This insurance coverage case is fallout from a salmonella outbreak caused by contaminated peanut butter. The instant motions for summary judgment stem from the insured's breach of contract claims against its insurance carrier. The court must construe the policy's "Lot or Batch" and "Duty to Defend" provisions.

As to the former, the insured, ConAgra Foods, Inc., considers the triggering event as one occurrence, satisfied by one deductible. The insurer, Lexington Insurance Co., argues the Lot or Batch Provision breaks the trigger into a series of occurrences, calling for multiple deductibles.

As for the latter, ConAgra contends that the claims made against it fall

squarely under the duty to defend provision. Lexington tacitly agrees, but it argues that its policy is merely excess coverage and the duty to defend is not triggered until ConAgra has paid the substantial deductible. Lexington views the deductible as, in effect, primary coverage.

I.

Lexington sold ConAgra an "Umbrella Prime® Commercial Umbrella Liability Policy With CrisisResponse® " covering June 1, 2006 to June 1, 2007. In February 2007, while the policy was on risk, the Centers for Disease Control suspected a link between a rare strain of salmonella and ConAgra's Peter Pan® and Great Value® peanut butter products. ConAgra issued a recall, but the salmonella sickened many consumers. To date, there have been over 24,000 peanut butter claims against ConAgra, thousands of which ConAgra has settled or otherwise resolved. Currently, ConAgra faces approximately 6,000 claims.

The contaminated peanut butter was made at ConAgra's plant in Sylvester, Georgia. For present purposes, it must be assumed that the peanut butter was processed in a continuous production run covering the time when the bad product was manufactured, from summer 2006 until about February 13, 2007. It is Lexington's position that production was broken into shorter periods. Because Lexington is the moving party, however, the court accepts for argument's sake that

production never stopped, as ConAgra claims. Similarly, although the record is scant, the court must assume that: the tainted peanut butter was made over so many weeks from only a single delivery of contaminated peanuts; ConAgra failed to inspect the peanuts on delivery or it only inspected them on delivery; ConAgra failed to sanitize its equipment periodically, and that there was nothing periodic about the tainted peanut butter's manufacture. Thus, there is nothing that lends itself to finding that the peanut butter was produced, as a matter of fact, in identifiable lots or batches.

On February 19, 2009, ConAgra sued Lexington due to Lexington's alleged "failures to meet its insurance obligations to ConAgra with respect to claims and lawsuits brought, or that may be brought, against ConAgra, each alleging bodily injury and or/property damage arising out of the [Peanut Butter Claims]." On March 27, 2009, Lexington filed an answer and counterclaims.

On May 7, 2009, Lexington filed a motion for summary judgment, and ConAgra filed a motion for partial summary judgment on May 14. Oral argument was heard on July 20, 2009.

II.

ConAgra alleges that Lexington breached its contract with ConAgra and breached its duty of good faith and fair dealing. ConAgra also requests the court to declare the scope of the parties' rights and obligations under the insurance policy.

ConAgra contends that the policy "requires Lexington to defend ConAgra and/or pay for ConAgra's defense against potentially covered claims and to pay on ConAgra's behalf those sums in excess of the applicable Retained Limits that ConAgra becomes legally obligated to pay as damages by reason of liability imposed by law[.]"

Lexington requests the court to declare that the "Lot or Batch Provision" of the policy applies to the peanut butter claims. If the provision is applicable, the policy provides a self-insured retention of $5,000,000 "per Occurrence without Aggregate" for lot or batch coverage. Accordingly, Lexington seeks declaratory judgment that "ConAgra has failed to show exhaustion of the $5 million per occurrence retention for any occurrence under the policy" and that Lexington "has no duty to defend or indemnify ConAgra at the present time."

Additionally, Lexington contends that it did not act in bad faith when it denied ConAgra coverage under the insurance policy. Again, Lexington asserts that coverage for ConAgra "has not been triggered because ConAgra has failed to establish exhaustion of a Self-Insured Retention (the deductible) applicable to the policy's 'Lot or Batch Provision.'"

III.

The "Lot or Batch Provision," found in Endorsement 3 of the policy, states:

> With respect to the Products-Completed Options Hazard, all Bodily Injury or Property Damage arising out of one lot or batch of products prepared or acquired by you, shall be considered one Occurrence. Such Occurrence shall be subject to the Each Occurrence and General Aggregate Limits of this policy shown in Item 3 of the Declarations and shall be deemed to occur when the Bodily Injury or Property Damage occurs for the first claim of the claim of that lot or batch.
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> For the purposes of this Endorsement, Lot or Batch is defined as a single production run at a single facility not to exceed a 7 day period.

Under the policy:

> Occurrence means: as respects Bodily Injury or Property Damage, an accident, including continuous or repeated exposure to substantially the same general harmful conditions. All such exposure to substantially the same general harmful conditions will be deemed to arise out of one Occurrence.
>
> . . .
>
> Products-Completed Operations Hazard means all Bodily Injury and Property Damage occurring away from premises you own or rent and arising out of Your Product or Your Work[.]

The policy further states:

> [Lexington] will have the right and duty to defend any Suit against the insured that seeks damages for Bodily Injury, Property Damage or Personal Injury and Advertising Injury covered by this policy, even if the Suit is groundless, false

> or fraudulent when the applicable limits listed in the Schedule of Retained Limits have been exhausted by payment of Loss to which this policy applies.
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> . . .
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> [Lexington] will pay on behalf of the insured those sums in excess of the Retained Limit that the insured becomes legally obligated to pay as damages by reason of liability imposed by law because of Bodily Injury, . . . to which this insurance applies assumed by the insured under an Insured Contract.

Finally as to the policy, there is a $3,000,000 per occurrence self-insured retention regarding general liability coverage, and a $5,000,000 per occurrence self-insured retention for lot or batch coverage. As presented above, the core dispute is over Lexington's contention that regardless of how the peanut butter is actually manufactured, for purposes of the deductible by the policy's terms, continuous production runs cannot exceed one week and each week that ConAgra made contaminated peanut butter calls for a separate, $5,000,000 deductible. ConAgra argues the entire production run only requires one, $5,000,000 deductible.

IV.

A motion for summary judgment will be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that

the moving party is entitled to a judgment as a matter of law."[1] When deciding a motion for summary judgment, a trial court "must view the evidence in the light most favorable to the non-moving party. This means it will accept as established all undisputed factual assertions, made by either party, and accept the non-movant's version of any disputed facts."[2] "From those accepted facts the court will draw all rational inferences which favor the non-moving party."[3] For example, as mentioned above, under this standard of review, the court assumes the fact that the peanut butter was produced continuously over many weeks.

V.

A. Lot or Batch Provision

The dispositive issue for Lexington's motion is whether the insurance policy's "Lot or Batch Provision" applies to the peanut butter claims. "Under Delaware law, the interpretation of contractual language, including insurance policies, is a question of law."[4] Generally, if "relevant contract language is clear and

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[1]Super. Ct. Civ. R. 56(c).

[2]*Merrill v. Crothall-American, Inc.*, 606 A.2d 96, 99-100 (Del. 1992).

[3]*Id.* at 100.

[4]*O'Brien v. Progressive N. Ins. Co.*, 785 A.2d 281, 286 (Del. 2001).

unambiguous, courts must give the language its plain meaning."[5] "The settled test for ambiguity is whether 'the provisions in controversy are reasonably or fairly susceptible of different interpretations or may have two or more different meanings.'"[6] Nevertheless, "[a] contract is not rendered ambiguous simply because the parties do not agree upon its proper construction.' . . . An ambiguity does not exist when a court can determine the meaning of an insurance contract 'without any other guide than a knowledge of the simple facts on which, from the nature of the language in general, its meaning depends.'"[7]

Lexington contends that the court "should declare that the 'Lot or Batch Provision' . . . applies to the Peanut Butter Claims." Lexington argues that "the Peanut Butter Claims are within the Products-Completed Operations Hazard [definition] and, therefore, within Endorsement 3 of the Policy." Also, Lexington states that "the claims concern allegations that consumers were sickened by

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[5] *Lank v. Moyed*, 909 A.2d 106, 110 (Del. 2006) (quoting *Phillips Home Builders v. Travelers Ins. Co.*, 700 A.2d 127, 129 (Del. 1997)); *see also O'Brien*, 785 A.2d at 288 ("The Delaware courts should not 'destroy or twist policy language under the guise of construing it.' '[C]reating an ambiguity where none exists could, in effect, create a new contract with rights, liabilities and duties to which the parties had not assented.'").

[6] *Phillips Home Builders*, 700 A.2d at 129 ("If there is an ambiguity, [ ] the contract language is 'construed most strongly against the insurance company that drafted it.'"); *see also O'Brien*, 785 A.2d at 288 ("It is 'the obligation of the insurer to state clearly the terms of the policy.'").

[7] *Woodward v. Farm Family Cas. Ins. Co.*, 796 A.2d 638, 642 (Del. 2002).

Salmonella-tainted peanut butter and, therefore, allege 'Bodily Injury.'" Lexington further argues that the "claims [ ] arise out of the production of peanut butter identified at ConAgra's facility within the meaning of the 'Lot or Batch Provision,'" and that "the bodily injury claims arose out of peanut butter manufactured in lots or batches."

ConAgra contends that Lexington's interpretation of the "lot or batch" definition is "an impermissible attempt to redraft the Lot or Batch Provision to require that Bodily Injury or Property Damage arising out of multiple lots or batches of products must be considered separate Occurrences for each lot or batch of products." ConAgra asserts that "Lexington's argument fails because the Provision simply does not contain any language that states that requirement."

As mentioned above, ConAgra further states that it "does not make peanut butter in lots, batches, or production runs as the insurance policy uses or defines those terms." The policy defines lot or batch as "a single production run at a single facility not to exceed a 7 day period." ConAgra claims that it "does not make peanut butter in 'production runs,' much less in production runs of less than 'a 7 day period.'" Instead, ConAgra explains that it "makes peanut butter using a continuous manufacturing process." ConAgra also contends that "the Peanut Butter Claims do not 'arise from' a particular 'Lot or Batch' of peanuts that ConAgra acquired."

Additionally, ConAgra argues that "under the Insurance Policy's definition of 'Occurrence,' the Peanut Butter Claims all arise from a single Occurrence – ConAgra's failure to detect and eliminate Salmonella bacteria from its Plant[.]" Thus, ConAgra claims, "because there is only a single Occurrence, there is nothing for the Lot or Batch Provision to aggregate, and the Lot or Batch Provision does not apply."

The court finds that the insurance policy is not ambiguous. If the policy only defined "occurrence," ConAgra would be correct that there was only one occurrence, because the bodily injury claims arose collectively out of one cause – salmonella-tainted peanut butter made in one plant. And, because the peanut butter was made continuously, ConAgra would still be correct if the policy included an open-ended Lot or Batch Provision. But, the policy seemingly contemplates continuous production and, by its terms, the policy limits a lot or batch to all the product ConAgra manufactures in seven days, or less. Drilling down through the policy's terms hits the seven-day limit at the bottom. ConAgra's reading of the policy renders the seven-day limit meaningless.

Where lots or batches take longer than seven days, including the sort of continuous production ConAgra asserts, after seven days, for insurance purposes, a new lot or batch begins. The occurrence was not the delivery of a bad batch of

peanuts. That is between ConAgra and the peanuts' supplier. The occurrence was ConAgra's negligently making defective peanut butter and putting it on the market, thereby causing bodily injury. In other words, although ConAgra did not segregate finished jars of peanut butter according to lots or batches, the insurance that it purchased segregates the production by runs of no more than seven days, each. The policy allows aggregation of the injured consumers' claims, but only to a point.

Even if, as ConAgra asserts, peanut butter's production is different from the other products manufactured by ConAgra that are also covered under the policy's umbrella, the seven day provision makes sense and it cannot simply be read out of the policy. The court appreciates ConAgra's point that its insurance policy will not respond until the claim is much larger. But, that is consistent with the policy's character as umbrella coverage. And, again, Lexington made it clear that there is no such thing as a production run lasting more than seven days for policy purposes.

B. Duty to Defend

Lexington argues that "this court should declare that Lexington has no duty to defend or indemnify at the present time." Lexington asks that "this court [ ] declare that the applicable self-insured retention is $5 million per occurrence, without aggregate, and that ConAgra has not established exhaustion of the self-insured retention." As mentioned, the policy contains a $3,000,000 per occurrence self-

insured retention regarding general liability coverage, and a $5,000,000 per occurrence self-insured retention for lot or batch coverage.

The duty to defend language in the policy is clear. As mentioned, the provision states:

> [Lexington] will have the right and duty to defend any Suit against the insured that seeks damages for Bodily Injury, Property Damage or Personal Injury . . . covered by this policy, even if the Suit is groundless, false or fraudulent when the applicable limits listed in the Schedule of Retained Limits have been exhausted by payment of Loss to which this policy applies.

Lexington concedes that, if the applicable self-insured retention is exceeded, it has a duty to defend. According to Lexington, if ConAgra can point to a seven-day period where it has settled claims for more than $5,000,000, Lexington "would have a duty to defend. And then, with respect to that lot or batch, possibly indemnify in excess of the retained limit."

Furthermore, Lexington categorizes the insurance as an "excess policy," and it argues that "in the case of excess or secondary insurance, coverage only attaches after a predetermined amount of primary coverage or self-insured retention is exhausted." Accordingly, because the Lot or Batch Provision applies to the peanut butter claims, ConAgra must demonstrate that it has exceeded the retention for each seven-day lot or batch, under the policy's definition of a lot or batch. To trigger

Lexington's duty to defend, ConAgra must show that it paid more than $5,000,000 for damages arising out of a particular, contractually defined, lot or batch.

ConAgra states that it has incurred approximately $20,000,000 in liability payments. Relying on a Georgia case, *Penn-America Insurance Co. v. Disabled American Veterans, Inc.*,[8] ConAgra argues that "Lexington must defend ConAgra against a suit if *any* allegation in the complaint is 'even arguably within the policy's coverage.'" As presented above and discussed below, the policy provides that Lexington has the "duty to defend any Suit against the insured that seeks damages for Bodily Injury [or] Property Damage . . . covered by this policy . . . when the applicable limits listed in the Schedule of Retained Limits have been exhausted by payment of Loss to which this policy applies." ConAgra, however, is reading the "when applicable limits . . . have been exhausted . . ." condition out of the policy.

Generally, "'[i]n construing an insurer's duty to indemnify and/or defend a claim asserted against its insured, a court [ ] looks to the allegations of the complaint to decide whether the third party's action against the insured states a claim covered by the policy, thereby triggering the duty to defend.'"[9] "The test is whether the underlying complaint, read as a whole, alleges a risk within the coverage of the

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[8] 481 S.E.2d 850, 852 (Ga. App. 1997).

[9] *Pac. Ins. Co. v. Liberty Mut. Ins. Co.*, 956 A.2d 1246, 1254 (Del. 2008).

policy."[10] To determine whether an insurer is bound to defend an action against an insured, the following principles apply:

> (1) where there is some doubt as to whether the complaint against the insured alleges a risk insured against, that doubt should be resolved in favor of the insured; (2) any ambiguity in the pleadings should be resolved against the carrier; and (3) if even one count or theory alleged in the complaint lies within the policy coverage, the duty to defend arises.[11]

An "excess insurer" is "an insurer whose coverage of a given loss is activated only after the magnitude of the loss exceeds the limits of applicable 'primary' insurance."[12] "Many policies (especially umbrella/catastrophe policies) are explicitly written to be excess insurance for most or all coverages under the policy, and make specific reference to 'underlying' coverages that must be exhausted before the excess policy will provide coverage."[13] "Umbrella policies are regarded as a true excess over and above any type of primary coverage," and "are designed to provide coverage only when the amount of the insured loss reaches a predetermined level,

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[10] *Id.*

[11] *Id.* at 1254-55.

[12] 1 *Couch on Insurance* § 1:4 (3d ed. 2009).

[13] *Id.*

such as in the event of a catastrophe."[14]

"[T]he express purpose of an umbrella policy is to protect the insured in the event of a catastrophic loss in which liability exceeds available primary coverage."[15] "Because such policies are not an attempt by a primary insurance company to limit a portion of its risk by labeling it 'excess' nor a device to escape responsibility, they are regarded as a true excess over and above any type of primary coverage[.]"[16] Significantly, "an umbrella policy is not required to contribute to the payment of a settlement until all other applicable policies have been exhausted[.]"[17]

Additionally, while Delaware has not addressed it squarely, other jurisdictions have reasonably concluded that "[a] self-insured retention endorsement 'effectively transforms the policy from a primary policy into an excess policy

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[14]46 *C.J.S. Insurance* § 1618 (2009)*; see also Travelers Indem. Co. v. Overseas Ace Hardware, Inc.*, 550 So. 2d 12, 13 (Fla. App. 3 Dist. 1989) ("Primary insurance can be in the form of a separate policy to cover the deductible limit in the catastrophic policy, or simply self-insurance by the purchaser.").

[15]46 *C.J.S. Insurance* § 1618.

[16]*Id.*; *see also Fireman's Fund v. Structural Sys. Tech., Inc.*, 426 F. Supp. 2d 1009, 1026 (D. Neb. 2006); *Occidental Fire & Cas. Co. of N.C. v. Brocious*, 772 F.2d 47, 53 (3d Cir. 1985) ("Because such policies are not an attempt by a primary insurer to limit a portion of its risk by [labeling] it 'excess' nor a device to escape responsibility, they are regarded as a 'true excess over and above any type of primary coverage, excess provisions arising in regular policies in any manner, or escape clauses.'").

[17]46 *C.J.S. Insurance* § 1618.

covering only amounts in excess of the self-insured retention.'"[18] As presented above, the policy here has just that sort of self-insured retention endorsement. Furthermore, it is prominently named: "Umbrella Prime® Commercial Umbrella Liability Insurance With CrisisResponse®."

The court is mindful of the admonition to construe insurance policies against the drafter, i.e. Lexington.[19] And, the court is troubled by the policy's gratuitously using the word "Prime" in its name. Moreover, the policy's avoidance of the word "excess" is a concern. If Lexington had sold this policy to an individual consumer, the court would more closely scrutinize the way Lexington wrote the policy. But, ConAgra is a major corporation and this is a $25,000,000 commercial policy. The court is satisfied that the policy's repeatedly calling itself "umbrella" coverage and the plain language in the duty to defend provision are clear enough that a consumer like ConAgra should not have been confused or mislead. Accordingly, Lexington qualifies here as "an insurer providing coverage in excess of a self-insured retention [and as such] has no duty to defend until the self-insured retention is

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[18] *Trinity Homes LLC v. Ohio Cas. Ins. Co.*, 2007 WL 1021825, at *15 (S.D. Ind. Mar. 30, 2007) (citing 2 Barry R. Ostrager & Thomas R. Newman, *Handbook on Insurance Coverage Disputes* § 13:13[a] (13th ed. 2006)).

[19] *Phillips Home Builders*, 700 A.2d at 129.

exhausted in accordance with the terms of the policy."[20]

C. Bad Faith Claims

Finally, Lexington contends that "ConAgra's bad faith claims should be dismissed." Relying on *Casson v. Nationwide Insurance Co.*,[21] Lexington maintains that "[b]ecause [it] has asserted a reasonable coverage position supported by the clear language of the Policy, ConAgra cannot establish bad faith as a matter of law." Furthermore, Lexington provides that its "refusal to defend ConAgra or pay its defense costs in connection with the Peanut Butter Claims [does not] constitute bad faith" because, as it claims, "Lexington has no duty to defend ConAgra as a matter of law until it has exhausted the $5 million Self-Insured Retention."

ConAgra responds that "Lexington did not thoroughly investigate or process ConAgra's coverage claims for an extended period of time" and that "th[ose] facts raise a question of whether Lexington acted in bad faith when it misled ConAgra

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[20] *Trinity Homes LLC*, 2007 WL 1021825, at *15.; *see also Monroe Guar. Ins. Co. v. Langreck*, 816 N.E.2d 485, 495 (Ind. Ct. App. 2004) ("In a policy with a retained amount, the insurer has no claims handling responsibility, particularly with respect to claims not exceeding the retained amount."); *Nabisco, Inc. v. Transp. Indem. Co.*, 192 Cal. Rptr. 207, 210 (Cal. Ct. App. 1983) ("Even where an excess carrier's defense and indemnity obligations do arise, the primary insurer remains responsible for defense expenses attributable to its coverage. . . . A self-insurer is likewise responsible for the defense costs attributable to the extent of its self-insured retention.").

[21] 455 A.2d 361, 369 (Del. Super. 1982) (holding that bad faith requires a showing that "the insurer's refusal to honor its contractual obligation was clearly without any reasonable justification.").

regarding its intent to cover the Peanut Butter Claims."[22] ConAgra contends that "Lexington's commitment to defend ConAgra followed by the approximately two-year delay in denying coverage, is more than sufficient evidence to warrant discovery regarding the parameters of Lexington's investigation regarding the Peanut Butter Claims, what Lexington knew and when, and how Lexington acted in light of that knowledge."

At this stage, viewing the evidence in the light most favorable to ConAgra, the court will not grant summary judgment on the bad faith claims. As presented above, there arguably is a genuine issue of fact regarding them. Thus, discovery can go forward on the bad faith claims.

VI.

Counsel for Lexington has leave to submit an order, after approval as to form.

/s/ Fred S. Silverman
Judge

oc: Prothonotary (Civil)
pc: John E. James, Esquire
Denise S. Kraft, Esquire

[22] *See Homsey v. Vigilant Ins. Co.*, 496 F. Supp. 2d 433, 437 (D. Del. 2007) (holding that an insurer acts in bad faith when it has "failed in bad faith to investigate or process the claim or to have delayed in its payment obligation.").