

**UNITED STATES DISTRICT COURT  
DISTRICT OF CONNECTICUT**

ALAN FISCHER and DAB THREE LLC,	:	
	:	
Plaintiffs,	:	
	:	
v.	:	NO. 3:07CV1871 (MRK)
	:	
AMERICAN SPECIALTY LINES	:	
INS. CO.,	:	
	:	
Defendant.	:	

**RULING AND ORDER**

This case arises out of an insurance contract between Plaintiffs Dab Three, LLC ("Dab Three") and Alan Fischer, and Defendant American International Specialty Lines Insurance Company (AISLIC).<sup>1</sup> Plaintiffs purchased coverage under a Pollution Legal Liability Select Policy (the "Policy") from AISLIC on August 1, 2000 – the same day that they purchased real property located at 60 High Meadow Road in Brookfield, Connecticut (the "Site"), the property covered by the Policy, and entered into a Purchase and Sale Agreement (the "Agreement") to sell the Site to Iroquois Gas Transmission ("Iroquois"). As part of their agreement with Iroquois, Plaintiffs obligated themselves to clean the Site. In conformance with this obligation, Plaintiffs removed various solid waste materials and debris from the Site. During this clean-up, Plaintiffs sought reimbursement from AISLIC under the Policy. However, AISLIC refused reimbursement on several grounds – all based on interpretations of the insurance contract – and Plaintiffs brought this action

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<sup>1</sup> This case was previously known as *Fischer v. American International Group, Inc.*, but during oral argument on November 10, 2008, Plaintiffs withdrew all claims against AIG, leaving AISLIC as the only Defendant.

seeking to enforce the contract.

Specifically, Plaintiffs assert three claims based on AISLIC's denial of coverage: (1) a breach of contract claim; (2) a claim for declaratory relief; and (3) a claim for breach of the covenant of good faith and fair dealing. AISLIC now moves for summary judgment on all of these claims. *See* Motion for Summary Judgment [doc. # 97]. Each of Plaintiffs' claims rise or fall on an interpretation of the Policy. After carefully considering the parties' briefs and the arguments raised during oral argument on April 21, 2010, the Court concludes that Plaintiffs are not entitled to reimbursement under the Policy. Therefore, AISLIC's Motion for Summary Judgment [doc. # 97] is GRANTED.

### I.

The Court assumes the parties' familiarity with the facts of this case, which are largely undisputed. As the Court is faced with several straightforward questions of insurance policy interpretation, only a brief recitation of the facts is necessary. Other facts will be introduced as needed throughout this ruling.

Plaintiffs purchased the Site on August 1, 2000. On the same day, they purchased the Policy and entered into an Agreement with Iroquois to sell the Site to Iroquois after conducting some clean-up. The Policy provided coverage from August 1, 2000 to August 1, 2002, with an extended reporting period to October 1, 2002. Plaintiffs were aware that the Site had some solid waste deposited on it, and they believed that they could make a profit by purchasing the Site, cleaning it up, and selling it to Iroquois. However, Iroquois insisted that, under the Agreement, Plaintiffs had to conduct more clean up activities than they had anticipated. Specifically, Plaintiffs found buried debris that included such items as household waste, tires, concrete, appliances, vehicle parts, plastics, pipes, trash, and other waste materials; though they did not discover any receptacles that were

leaking hazardous substances. Under the terms of its Agreement with Iroquois, Plaintiffs were required to remediate these conditions.

On June 14, 2001, Plaintiffs sent a letter to AISLIC seeking coverage for the clean-up of the Site. *See* Mem. of Law in Supp. of Mot. for Summ. J. [doc. # 98] ("Def.'s Mem.") Ex. M. AISLIC responded on August 30, 2001, with a letter denying coverage. *See id.* Ex. N. In response, Plaintiffs sent AISLIC a letter dated September 25, 2001, and attached a letter from Iroquois to Plaintiffs dated August 27, 2002, in which Iroquois stated that it intended to enforce its rights under the Agreement and require Plaintiffs to remediate the Site.<sup>2</sup> *See id.* Ex. P; *id.* Ex. Q. AISLIC responded on November 8, 2002, again denying coverage.<sup>3</sup> *See id.* Ex. S.

In order to satisfy its obligation to Iroquois, Plaintiff participated in the Voluntary Remediation Program (VRP) with the Connecticut Department of Environmental Protection (DEP). In accordance with the VRP, Plaintiffs submitted an Environmental Condition Assessment Form (ECAAF) to the DEP in June 2003. Iroquois took title to the Site on June 26, 2003, although Plaintiffs remained responsible for completing the VRP and they engaged in substantial solid waste clean-up efforts after transferring the Site to Iroquois.

## II.

The summary judgment standard is a familiar one. Summary judgment is appropriate only when "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a

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<sup>2</sup> Obviously, the dates of these letters do not make sense. From the context, it appears that the second letter from Plaintiffs was actually sent on September 25, 2002 – not 2001.

<sup>3</sup> There were several other letters exchanged between June 14, 2001 and March 27, 2006. The exchanges mentioned above are the most relevant to this case.

matter of law." Fed. R. Civ. P. 56(c). "A dispute regarding a material fact is genuine if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Williams v. Utica Coll. of Syracuse Univ.*, 453 F.3d 112, 116 (2d Cir. 2006) (quotation marks omitted). "The substantive law governing the case will identify those facts that are material, and '[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.'" *Bouboulis v. Transp. Workers Union of Am.*, 442 F.3d 55, 59 (2d Cir. 2006) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).

The moving party bears the burden of demonstrating that no genuine issue exists as to any material fact, *see Celotex Corp. v. Catrett*, 477 U.S. 317, 323-25 (1986), and the Court must resolve all ambiguities and draw all inferences in favor of the nonmoving party, *see Anderson*, 477 U.S. at 255; *Holcomb v. Iona Coll.*, 521 F.3d 130, 137 (2d Cir. 2008). If the moving party carries its burden, the party opposing summary judgment "may not rely merely on allegations or denials." Fed. R. Civ. P. 56(e)(2). Rather, the opposing party must "set out specific facts showing a genuine issue for trial." *Id.* In short, the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). "If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Anderson*, 477 U.S. at 249-50 (citations omitted).

### III.

AISLIC provides four reasons why the Policy does not cover the claim submitted by Plaintiffs. First, AISLIC argues that Plaintiffs did not submit a "claim," as defined by the Policy during the effective dates of the Policy. Second, AISLIC contends that Plaintiffs did not incur "Clean-Up Costs" as defined by the Policy because Plaintiffs were not required to clean-up the site

by environmental laws but only by the Agreement. Third, AISLIC claims that the debris cleaned up by Plaintiffs was not a "Pollution Condition" under the Policy. Finally, AISLIC argues that the Policy's contractual liability exclusion provision precludes coverage. AISLIC also contends that the claim for breach of the duty of good faith and fair dealing fails because Plaintiffs are not entitled to recover under the Policy and Plaintiffs have provided no evidence that AISLIC acted in bad faith.

**A.**

As explained below, the Court agrees with AISLIC that Plaintiffs did not submit a claim under the Policy because they never notified AISLIC that they were required by environmental law to clean up the Site. Therefore, the Court grants summary judgment on that basis and need not decide any of the other issues raised by AISLIC.

In Connecticut, as in most states:

An insurance policy is to be interpreted by the same general rules that govern the construction of any written contract. . . . If the terms of the policy are clear and unambiguous, then the language, from which the intention of the parties is to be deduced, must be accorded its natural and ordinary meaning. . . . Under those circumstances, the policy is to be given effect according to its terms.

*National Grange Mutual Ins. Co. v. Santaniello*, 290 Conn. 81, 88-89 (2009) (quotation marks and citation omitted). However, "[a]s with contracts generally, a provision in an insurance policy is ambiguous when it is reasonably susceptible to more than one reading. . . . Under those circumstances, any ambiguity in the terms of an insurance policy must be construed in favor of the insured because the insurance company drafted the policy." *Id.* at 89 (quotation marks and citation omitted); *see also Connecticut Med. Ins. Co. v. Kulikowski*, 286 Conn. 1, 6 (2008); *Community Action for Greater Middlesex County, Inc. v. Am. Alliance Ins. Co.*, 254 Conn. 387, 399 (2000). Of course, "[t]his rule of construction may not be applied . . . unless the policy terms are indeed

ambiguous." *National Grange*, 290 Conn. at 89 (quotation marks and citation omitted). Finally, "[i]n construing an insurance policy, the court must not ignore or disregard any provision that can be reconciled with other parts of the policy nor should a court interpret a single provision or sentence in a policy and attach to it a greater significance than is intended by the whole terms of a policy." *Schultz v. Hartford Fire Ins. Co.*, 213 Conn. 696, 704 (1990). As is relevant to this decision, the Court does not find the provisions of the Policy to be ambiguous.

Before turning to the merits, and because this case turns on an interpretation of the language of the Policy, it is necessary for the Court set forth that language in some detail. AISLIC agreed to provide coverage as follows:

To pay Loss on behalf of the Insured that the Insured is legally obligated to pay as a result of **Claims** first made against the Insured and reported to the Company, in writing, during the Policy Period, or during the Extended Reporting Period if applicable, for **Clean-Up Costs** on or under the Insured Property which commenced prior to the Continuity Date.

To pay Loss on behalf of the Insured that the Insured is legally obligated to pay as a result of **Claims** first made against the Insured and reported to the Company, in writing, during the Policy Period, or during the Extended Reporting Period if applicable, for **Clean-Up Costs** on or under the Insured Property which commenced on or after the Continuity Date.

Def.'s Mem. [doc. # 98] Ex. K § I. The Policy also includes a contractual liability exclusion provision:

This policy does not apply to Clean-Up Costs, Claims, Loss, Actual Loss, Extra Expense, or loss of Rental Value: . . . arising from liability of others assumed by the Insured under any contract or assignment, unless the liability of the Insured would have attached in the absence of such contract or agreement . . . .

*Id.* § IV(1). Finally, the Policy provides several important definitions:

**Claim** means a written demand received by the Insured seeking a remedy and alleging liability or responsibility on the part of the Insured for Loss under Coverages

A through I.

**Clean-Up Costs** means expenses including reasonable and necessary legal expenses incurred with the Company's written consent, incurred in the investigation, removal, remediation including monitoring, or disposal of soil, surfacewater, groundwater or other contamination: (1) to the extent required by Environmental Laws, or specifically mandated by court order, the government or any political subdivision of the United States of America or any state thereof, or Canada or any province thereof duly acting under the authority of Environmental Law(s) . . . .

**Environmental Laws** means any applicable federal, state, provincial, or local law pursuant to which the Insured has or may have a legal obligation to incur Clean-Up Costs.

**Pollution Conditions** means the discharge, dispersal, release or escape of any solid, liquid, gaseous or thermal irritant or contaminant including smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, medical waste and waste materials into or upon land, or any structure on land, the atmosphere, or any watercourse or body of water, including groundwater, provided such conditions are not naturally present in the environment.

*Id.* § VI.

Most notably for the purposes of this ruling, the Policy requires the insured to make any claim for clean-up costs to AISLIC in writing and during the policy period. Thus, the terms "claim" and "clean-up costs" are intertwined. A claim is not a proper "claim" under the Policy unless it is a claim for "clean-up costs." And a cost is only a "clean-up cost" under the Policy if is required by "environmental laws," which are defined as "any applicable federal, state, provincial, or local law pursuant to which the Insured has or may have a legal obligation to incur Clean-Up Costs." *Id.* In other words, to collect on a claim under the Policy, the insured must inform AISLIC that it has incurred costs because it was required to do so by environmental law.

As an initial matter, the Court notes that there is some dispute whether any environmental laws compelled Plaintiffs to engage in the clean-up of the Site. Plaintiffs conceded at oral argument

that they were under no such obligation to clean up the Site based on either state or federal law. Nevertheless, Plaintiffs argued that the Town of Brookfield had issued notices based on municipal regulations that required Plaintiffs to remediate the Site. The Court asked the parties to file supplemental briefs on this issue, which they did. *See* Pls.' Supplemental Mem. [doc. # 119]; Def.'s Supplemental Mem. [doc. # 117]. Based on these filings, it is clear that Brookfield did in fact issue a cease and desist order in 1981 and two notices of violation in 1996, which warned of illegal dumping on the Site. *See* Pls.' Supplemental Mem. [doc. # 119] Exs. A, B, C. The 1981 order was later rescinded, but there is no evidence that the 1996 notices were ever rescinded. However, according to town officials, the 1996 notices "are not orders requiring compliance with the cited provisions of the Zoning and Wetlands and Watercourse Regulations and do not require any corrective action including the removal of the material identified in the Notices." *See* Aff. of Katherine Daniel [doc. # 117-1] ¶ 14. It is also relevant that the notices were issued to the prior owner of the property almost four years before Plaintiffs purchased the Site.

Therefore, the Court is skeptical that the Brookfield notices required Plaintiffs to clean up the Site. At most, it appears that the notices required the prior owners to stop any further dumping on the property. To the extent that the 1996 Brookfield notices imposed any obligation on Plaintiffs, it was that they also should not allow further dumping on the Site, and at oral argument, counsel for Plaintiffs assured the Court that no further dumping occurred once Plaintiffs acquired the Site.

Nonetheless, the Court need not decide the case on this ground. The Court hesitates to rule on this basis for one reason only – the Policy defines "environmental law" as "any applicable federal, state, provincial, or local law pursuant to which the Insured has *or may have* a legal obligation to incur Clean-Up Costs." Def.'s Mem. [doc. # 98] Ex. K § VI (emphasis added). There is no doubt

that the Brookfield notices imposed no legal obligation on Plaintiffs. But Plaintiffs argue that the 1996 Brookfield notices might have indicated that the owners of the Site *may have* a legal obligation to clean up the Site in the future. The Court is extremely skeptical of Plaintiff's argument for a number of reasons; most importantly because reading the Policy as a whole, it is clear that it intended to cover only those situations where the insured is required to clean-up a site based on environmental laws. If the Court were to give the "may have" term the significance that Plaintiffs suggest, it would risk expanding the scope of the Policy beyond rationality. Furthermore, there is no indication that Brookfield had the power to require, or did in fact require, any clean up activities on the Site. Nonetheless, because the Court need not resolve this issue, it will refrain from doing so. Even assuming that the 1996 Brookfield notices constituted an environmental law under the Policy, Plaintiffs never made any claim based on these notices.

Plaintiffs' letters to AISLIC requesting reimbursement under the Policy all reference Plaintiffs' obligation to Iroquois under the Agreement, but they do not cite to any environmental laws requiring remediation of the Site. *See* Def.'s Mem [doc. # 98] Ex. M, P, Q. Nor is any mention made of the 1996 Brookfield notices. *See id.* While there is passing mention of "environmental regulations," *see id.* Ex. M, it is clear that Plaintiffs' claim is based on their obligation to conduct the clean up the Site as a result of their contract with Iroquois, *see id.* ("DAB Three, LLC is obligated to deliver the property to Iroquois 'environmentally clean."); *id.* Ex. P ("[T]he insured received a written demand from Iroquois Gas seeking the remedy of a clean-up of the subject property based on a contractual liability on behalf of the insured to deliver the property in an environmentally clean conditions. Such a claim fits squarely within the policy definition of a claim . . ."). To put it simply, Plaintiffs never submitted a claim for clean-up costs under the Policy. Their claim was based

entirely on their contractual obligation to Iroquois, which is not cognizable under the Policy.

At oral argument, Plaintiffs argued that environmental laws were incorporated by reference into the Purchase and Sale Agreement. The Court rejects this argument. The relevant language in the Purchase Agreement reads as follows:

Seller agrees to diligently pursue and perform all necessary remediation and monitoring of environmental conditions disclosed by the Investigations, at or under the Premises in order to attain compliance of the Premises with all applicable environmental laws, regulations and Connecticut Department of Environmental Protection guidelines.

*Id.* Ex. L. ¶ 5.b. This language says nothing about whether remediation of the Site is in fact required by environmental laws. Therefore, the Court grants AISLIC's Motion for Summary Judgment [doc. # 97] on the ground that Plaintiffs never submitted a claim for clean-up costs under the Policy.

Because the Court holds that Plaintiffs did not submit a valid claim under the Policy, it need not address AISLIC's alternative arguments that the debris on the Site is not a "pollution condition," and that the contractual liability exclusion precludes recovery. The Court expressed its doubts about the first of these contentions during oral argument. As to the second argument, the relevant language states that AISLIC will not provide coverage for claims "arising from *liability of others assumed by the Insured* under any contract or assignment." Def.'s Mem. [doc. # 98] Ex. K § IV (emphasis added). Thus, all parties at argument agreed that the exclusion applies where the insured has indemnified a third party against liability. However, that is not the case while Plaintiffs owned the property. Plaintiffs did not indemnify Iroquois, but created liability for themselves via contract. *See Nationwide Mutual Ins. Co. v. Lydall Woods Colonial Village, Inc.*, No. X04CV020126640S, 2003 WL 21718376, at \*7 (Conn. Super. Ct. Jul. 14, 2003) (discussing exclusions based on contracts of indemnification). That said, once Iroquois acquired the Site, any obligation to clean the Site imposed

by any environmental laws likely fell to the owner of the property. At that point, it is possible that Plaintiffs' contractual obligation under the Agreement became an indemnification. Again, the Court does not decide this issue – it merely notes that the contractual liability exclusion may be an additional bar to recovery for expenditures incurred by Plaintiffs after the transfer of ownership of the Site to Iroquois.<sup>4</sup>

## B.

Finally, the Court agrees with AISLIC that Plaintiffs' claim for breach of the covenant of good faith and fair dealing cannot survive if Plaintiffs were not entitled to recover under the Policy.

As the Connecticut Superior Court recently put it:

[A]n action for breach of the covenant of good faith and fair dealing requires proof of three essential elements, which the plaintiff must duly plead: first, that the plaintiff and the defendant were parties to a contract under which the plaintiff reasonably expected to receive certain benefits; second, *that the defendant engaged in conduct that injured the plaintiff's right to receive some or all of those benefits*; and third, that when committing the acts by which it injured the plaintiff's right to receive benefits it reasonably expected to receive under the contract, the defendant was acting in bad faith.

*J.E. Roberts Co. v. Signature Properties, LLC*, No. HHDCVX04075026084S, 2010 WL 1225329, at \*9 (Conn. Super. Ct. Mar. 1, 2010) (internal quotation marks and citation omitted, emphasis added). Because Plaintiffs were not entitled to recover under the Policy, they cannot satisfy the second prong of this test – that they were denied a benefit under the contract. A claim for breach of the covenant of good faith and fair dealing arising from an insurance policy is predicated on a right to recover under the policy.

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<sup>4</sup> At oral argument, Plaintiffs seemed to agree that most of the clean-up costs were incurred after June 2003. Therefore, if the contractual liability exclusion does indeed bar coverage after Iroquois took ownership of the Site, Plaintiffs would be unable to recover the majority of their expenditures.

#### IV.

In sum, the Court GRANTS AISLIC's Motion for Summary Judgment [doc. # 97] in its entirety. The Court also DENIES as moot AISLIC's Motion to Partially Exclude Testimony of Plaintiffs' Expert Christina G. Pollock [doc. # 91], AISLIC's Motion to Partially Exclude Testimony of Plaintiffs' Expert Michael E. Hackman [docs. ## 94 & 95],<sup>5</sup> and AISLIC's Motion to Partially Exclude Testimony of Plaintiffs' Expert Michael J. Buckmir [doc. # 99]. **The Clerk is directed to enter judgment for Defendant AISLIC and close this case.**

IT IS SO ORDERED.

/s/ Mark R. Kravitz  
United States District Judge

Dated at New Haven, Connecticut: **May 14, 2010.**

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<sup>5</sup> AISLIC appears to have accidentally filed this motion twice, which explains the two docket numbers.