IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSISSIPPI

EVANSTON INSURANCE COMPANY **PLAINTIFF**

VS. **CAUSE NO. 2015-00,082(2)**

OMEGA PROTEIN, INC. **DEFENDANT**

REPORT AND RECOMMENDATION

The undersigned was appointed Special Master by Order of this Court dated July 21, 2019. The Order stated that the Special Master "shall prepare a report and recommendation to the Court pursuant to *Mississippi Rules of Civil Procedure* 53(c)-(g). The undersigned has reviewed the numerous motions filed and pending before this Court and held a Status Conference, where counsel for the parties presented arguments on various motions. After argument of counsel and being fully informed in the premises, the undersigned submits this Report and Recommendation.

I. Background of Case

Before the Court is a declaratory action originally filed by Colony Insurance Company ("Colony") seeking a declaration that it had no coverage for bodily injuries suffered in an explosion at a facility owned by Omega Protein, Inc. ("Omega"). Evanston Insurance Company ("EIC") intervened also seeking a declaration of no coverage for the injuries. EIC provided a $5,000,000 excess liability policy, which provided coverage after Colony's $1,000,000 policy was exhausted. Because Colony settled one of the underlying personal injuries cases and exhausted its coverage, Omega seeks excess coverage from EIC for the injuries which occurred at its plant.

II. UNDERLYING FACTS

On July 28, 2014, an explosion occurred at the Omega plant while certain Accu-Fab's workers were welding and grinding on a large metal tank which was used for the temporary storage of stickwater. Stickwater is a liquid composed of water, fish oil and fish solids. One of Accu-Fab

worker, Jerry Lee Taylor, II ("Taylor") was killed, another, Joshua Walls ("Walls") was seriously injured and others Rusty Gabel ("Gabel"), Clay Davis ("Davis") and Lloyd McGill ("McGill") claimed less serious injuries.

Taylor's Estate sued Omega alleging that the explosion was caused by the ignition of explosive gases inside the storage tank. Taylor alleged that decomposition of stickwater in Tank 10 produced flammable gases – methane, hydrogen sulfide and methanethiolk – which were ignited by cutting, welding or other "hot work" being performed by Accu-Fab and that Omega was negligent for failing to warn them about flammable gases before Accu-Fab began "hot work" on the tank. Omega tendered defense and indemnity of the *Taylor* lawsuit to Colony, as primary insurer, and EIC, as following-form excess insurer. Colony filed this declaratory judgment action seeking a declaration of no coverage for bodily injury based on the Pollution Exclusion in its policy. EIC intervened and denied coverage based on, among other things, the substantially similar Pollution Exclusion in its own policy. Omega and Taylor's Estate settled the *Taylor* litigation. Colony contributed its policy limits to the settlement, and Colony and Omega dismissed their claims against each other in this case. The *Taylor* settlement did not reach the EIC excess coverage, and EIC remains a Plaintiff/Counter-Defendant in this action. Thereafter, Walls, Gabel, Davis and McGill filed lawsuits against Omega alleging the same material facts as Taylor (i.e., that the explosion was caused by the ignition of flammable gases within Omega storage tank.) Other than Walls, these individuals sustained only minor physical injuries, but alleged post-traumatic stress disorder as a result of the explosion.

On July 13, 2016 and August 25, 2016, Omega filed Motions for Partial Summary Judgment alleging that the Pollution Exclusion did not apply and that the Primary Non-

Contributory clause was ambiguous and thus inapplicable to Omega in connection with this incident.

On February 13, 2017, EIC filed a Motion for Summary Judgment arguing that Omega is not an insured under the Colony policy and therefore, likewise is not an insured under the excess policy issued by EIC. EIC further argues that Omega is not entitled to indemnity because there were no factual allegations of negligence against Accu-Fab in the underlying cases. Finally, EIC argues that its pollution exclusion bars Omega's claims.

On March 22, 2017, this Court issued an Order denying the parties Motions finding that there were disputed issues of facts before it regarding Accu-Fab's actions or negligence and how it would effect Omega's liability and therefore, the Court could not determine whether Omega qualified as an additional insured. EIC filed a Renewed/Amended Motion for Summary Judgment alleging that additional discovery has been conducted warranting application of the Pollution Exclusion and that the Mississippi Supreme Court has issued a ruling that confirms that no coverage is triggered under EIC's policy to entitled Omega to indemnity. Omega disagrees and argues that the Supreme Court's decision is silent on whether EIC's coverage is triggered and that the Pollution Exclusion is not applicable.

III. SUMMARY JUDGMENT STANDARD

Rule 56(c) of the *Mississippi Rules of Civil Procedure* provides that summary judgment should be rendered "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." On a motion for summary judgment, "[t]he evidence is viewed in the light most favorable to the party opposing the motion."

Abrams v. Republic Fin. LLC, 146 So.3d 1030, 1031 (Miss. Ct. App. 2014) (quoting *Davis v. Hoss*, 869 So.2d 397, 401 (Miss. 2004). *M.R.C.P.* 56(c).

Rule 56(e) provides that "[w]hen a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him." *M.R.C.P.* 56(e). A trial court may grant summary judgment on a contractual issue only if no genuine issue of material fact arises, and no ambiguity exists in the contracts. "To survive summary judgment, it is not enough that disputed facts exist – such facts must also be material." *Bradley v. Kelley Bros. Contractors, Inc.*, 117 So.3d 331, 338 (Miss. Ct. App. 2013) (citing *Citifinancial Retail Servs. v. Hooks*, 922 So.2d 775, 779 (Miss. 2006)). Further, "[a] 'material fact' is 'one that matters in an outcome determinative sense[.]'" *Id.*

IV. RECOMMENDATION

The material facts, as set above, are undisputed. The parties have not articulated any material fact dispute. Instead the parties argue that the applicable law applied to the facts will require a judgment as a matter of law for one of the parties. EIC argues that it is entitled to a declaratory judgment because Omega is not an additional insured under its policy and accordingly, it is not liable to provide coverage for the underlying damage claims. If it is determined that EIC is an additional insured, Omega insists that it is still entitled to a declaratory judgement because its policy cannot be accessed because the primary policy was not exhausted because it was voluntarily paid, citing *Colony Ins. Co. v. First Specialty Ins. Co.*, 262 So.3d 1128, (Miss. 2019). Lastly, EIC argues that its Pollution Exclusion is a bar to Omega's recovery claims. Of course,

Omega disagrees and argues that it is entitled to a declaratory judgment because it is an additional insured under EIC's excess insurance policy and the primary policy's limits have been exhausted. Finally Omega argues that EIC's Pollution Exclusion is not a bar to recovery. Each of these arguments will be addressed below.

a. Whether Omega qualifies as an additional insured?

Omega contracted with Accu-Fab to perform steel fabrication and pipefitting work at its Omega facility in Moss Point, Mississippi. In order to provide insurance for the project, Accu-Fab purchased two (2) insurance policies – a one million dollars ($1,000,000) primary policy from Colony and a five million dollars ($5,000,000) excess policy from EIC. Colony's insurance policy did not list Omega as an insured; rather Accu-Fab was the named insured. However, the Colony policy contained an "Additional Insured" endorsement which covered:

> "all persons or organizations as required by written contract with Accu-Fab. This endorsement applied to an injury "caused, in whole or in part by" Accu-Fab's acts or omissions" or "the acts or omission of those acting on Accu-Fab's behalf."

Of course, there were certain limitations and exclusions.

Accu-Fab and Omega entered into a Master Service Contract ("Contract"), which required Accu-Fab to provide additional coverage to Omega, which Accu-Fab did when it purchased the Colony and EIC's policies. Had not Omega hired Accu-Fab to perform the fabrication and pipefitting work, there would have been no reason for Accu-Fab to purchase the insurance policies. In the undersigned's opinion, the Additional Insured endorsement (quoted above), includes Omega. Omega is an "organization" which had a "written contract" with Accu-Fab. In that the EIC policy is a following-form excess policy, it is my recommendation that Omega is an additional insured under EIC's insurance policy.

b. Has EIC excess policy been triggered by Colony's voluntary payment of its primary policy?

It is undisputed that Colony paid its $1,000,000 policy limits. The Mississippi Supreme Court held that Colony's payment (while continuing taking a position that Omega was not an insured under its policy and that it's Pollution Exclusion applied) was a voluntary payment. *Colony Ins. Co. v. First Specialty Ins. Co.*, 262 So.3d 1128, (Miss. 2019). EIC argues that based on the *Colony* decision, the primary policy's limit has not been exhausted because the payment was voluntary. As expected, Omega disagrees and argues that, whether voluntary or not, the primary policy was exhausted when Colony paid its policy limits at which time the excess policy was triggered. Omega further argues that even if the primary policy has been exhausted, the excess policy was not triggered because there was no payment of a "covered claim."

The *Colony Ins. Co. v. First Specialty Ins. Co.* opinion left no doubt about the $1,000,000 payment – it was voluntary. But the question that must be answered is whether an excess insurance policy is triggered when the insurance company with primary coverage voluntarily pays all its primary coverage and exhaust its policy limits? Unfortunately, the *Colony* opinion did not decide this question. But we have other Supreme Court opinions, as well as the policies, to help us decide this issue. In *National Union Fire Ins. Co. v. Miss. Ins. Guaranty Ass'n*, 990 So.2d 174 (Miss. 2008), the Mississippi Supreme Court looked at a situation when excess coverage come into play. The Court stated

> A primary policy "covers any loss over a small deductible, has a relatively small maximum coverage, and requires relatively high premiums, since almost any covered loss will require the insurer to make some payment." Lee R. Russ & Thomas F. Segalla, 1 Couch on Insurance § 6:35 (3d ed.2007). "The next level of insurance, pure 'excess insurance, commonly kicks in at the maximum coverage under the primary policy, has a high maximum policy limit, and is purchased with relatively small premiums, since most covered losses will not reach the level at which the policy kicks in...." *Id.*

> True excess policies "limit their risks to losses which exceed some specified floor" and "explicitly contemplate that the insured will carry primary insurance coverage (a self-insure) for amounts below the ... floor." Lee R. Russ & Thomas F. Segalla, 7A Couch on Insurance § 103:13 (3d ed.2007). "[C]overage under the primary policy is a prerequisite to coverage under the excess policy, with the coverage of the excess policy explicitly tied or 'piggybacked' to the articulation of coverage in the primary policy." *Id. See also* Douglas R. Richmond, Rights and Responsibilities of Excess Insurers, 78 Denv. U.L.Rev. 29-30 (2000).

It is true that the issue of voluntary versus compulsory was not addressed in *National Union Fire*, but the court said "coverage under the primary policy is a prerequisite to coverage under the excess policy." Coverage is determined by the policy. Section A – Insuring Agreement contained in EIC's policy reads as follow:

> 1. The Company hereby agrees to pay on behalf of the Insured that portion of Ultimate Net Loss in excess of the limits of Underlying Insurance as shown in Item 4. of the Declaration, but only up to an amount not exceeding the Company's Limit of Lability as shown in item 3. of the Declarations Except for the Terms, Definition, Conditions and Exclusions of this policy, the coverage provided by this policy shall follow the insuring Agreements, Definitions, Conditions and Exclusions of the Controlling Underlying Insurance Policy as shown in Item 4 of the Declaration.

The above provision states that excess coverage comes into play on behalf of the insured when the ultimate net loss is in excess of the limits of the underlying insurance, which is $1,000,000 here. This language is clear and unambiguous – the excess policy comes into play "in excess of the limits of the Underlying Insurance." The policy (which was drafted by EIC) makes no provision that the payment must be compulsory for this provision to come into play. And to the extent this makes this provision ambiguous - the ambiguity must be read against the drafter of the policy - EIC. *Lewis v. Allstate*, 730 So.2d 65, 68 (Miss. 1998). Therefore, it is my recommendation that

Colony's voluntary payment of its $1,000,000 primary policy, exhausted its policy limit, and EIC excess policy is triggered.

EIC contends this finding shouldn't end the inquiry because there must also be a finding that the $1,000,000 payment was for a covered claim. There can be no dispute that the underlying lawsuits were based on injuries occurring during the steel fabrication and pipefitting work by Accu-Fab workers at the Omega plant. It is also undisputed that the insurance policies at issue were commercial liability policies to cover situations like the one at issue here. It is true that Accu-Fab was not a named party in the underlying lawsuits and EIC maintains this fact is fatal to Omega's argument that this incident was a covered claim. However, whether Accu-Fab was sued or not does not take away from an insured's obligation to defend and pay for covered claims. The Mississippi Supreme Court stated in *Mueller v. American Guarantee*, 707 So. 2d 1062, 1068 (Miss. 1996) that an insurer has a contractual obligation to furnish a legal defense for claims covered under its insurance policy and to pay all sums that they became legally obligated to pay for such claims. This declaratory judgment action was filed to determine if the claims were covered or not. According to my reading of the policies and understanding the claims made from the July 28, 2014 explosion, it is my recommendation that the injuries resulting from this tragic event are covered claims, subject to the conditions and exclusion set out therein.

c. Whether the Pollution Exclusion applies.

In order to determine whether the pollution exclusion applies we must look at the terms of the policy. Under Mississippi law, insurance policies are contracts, and as such, they are to be enforced according to their provisions. When parties to a contract make mutual promises (barring some defense or condition which excuses performance), they are entitled to the benefit of their bargain. *Noxubee County,* 883 So.2d at 1166 (citations omitted). *See also Simmons v. Bank of*

Mississippi, 593 So.2d 40, 42–43 (Miss.1992)(quoting *Cherry v. Anthony, Gibbs, Sage,* 501 So.2d 416, 419 (Miss.1987)) ("[a] court must effect a determination of the meaning of the language used, not the ascertainment of some possible but unexpressed intent of the parties."). "[I]n interpreting an insurance policy, this Court should look at the policy as a whole, consider all relevant portions together and, whenever possible, give operative effect to every provision in order to reach a reasonable overall result." *J & W Foods Corp. v. State Farm Mut. Auto. Ins. Co.,* 723 So.2d 550, 552 (Miss.1998) (citing *Cont'l Cas. Co. v. Hester,* 360 So.2d 695, 697 (Miss.1978)). Additionally, our courts have held that if a contract is clear and unambiguous, then it must be interpreted as written.... If a contract contains ambiguous or unclear language, then ambiguities must be resolved in favor of the non-drafting party. Ambiguities exist when a policy can be logically interpreted in two or more ways, where one logical interpretation provides for coverage. However, ambiguities do not exist simply because two parties disagree over the interpretation of a policy. Exclusions and limitations on coverage are also construed in favor of the insured. Language in exclusionary clauses must be "clear and unmistakable," as those clauses are strictly interpreted. *United States Fid. & Guar. Co. v. Martin,* 998 So.2d 956, 963 (Miss.2008) (internal citations omitted). *See also Frazier v. N. Miss. Shopping Ctr., Inc.,* 458 So.2d 1051, 1054 (Miss.1984) ("[a] construction leading to an absurd, harsh or unreasonable result in a contract should be avoided unless the terms are express and free of doubt."). With the understanding of contract construction, we now look at EIC's pollution exclusion.

EIC's Pollution Exclusion reads as follow:

SECTION D – EXCLUSIONS

> **It is agreed that the aggregate limits shown in Item 4. Schedule of Underlying Insurance, shall neither be reduced or exhausted by reason of any paid losses caused by, or arising out of the Exclusions listed below:**

> This policy shall not apply:
>
> 1. To "Ultimate Net Loss":
>
> a. arising out of or contributed to in any way by the actual, alleged or threatened discharge, dispersal, release, migration, escape, or seepage of pollutants; or...
>
> As used in this exclusion, pollutants means any solid, liquid, gaseous, or thermal irritant or contaminant including smoke, vapor, soot, fumes, acids, alkalis, chemicals, and waste. Waste includes material, to be recycled, reconditioned, reclaimed or disposed of.

There does not appear to be a dispute as to what "stickwater" is. The expert reports and discovery responses define "stickwater" as a liquid composed of water, fish oil and fish solids. EIC argues that "stickwater" meets the definition of "pollutants" found in its policy. EIC further argues that it was the "release, migration, escape and seepage" of the remnants of stickwater which resulted in the explosion which killed and injured Accu-Fab's workers. Omega argues that the injuries were caused by an explosion and the Pollution Exclusion does not come into play.

The undersigned has read numerous law journal articles and commentaries on the Pollution Exclusion, as well as decisions from several courts. Additionally, EIC provided the recent Fifth Circuit case of *Eastern Concrete Materials v. Ace American Insurance*, 948 F. 3d 289 (5th Cir. 2020). In *Eastern Concrete*, the Fifth Circuit found that "rock fines" (the smallest participles of crushed stone) was a "contaminant" as defined in the pollution exclusion in the insurance policy Eastern Concrete purchased. The court upheld a lower court ruling that the pollution exclusion applied and there was no coverage for the physical damage to the stream and stream bed by "rock fines" changing the contours of the stream. This case is instructive because it turned to the clear language in the insurance policy in making its decision. Thus, a thorough review of EIC's policy is necessary. The pollution exclusion (quoted above) states the policy shall not apply to ultimate

net loss arising out of or contributed to in any way by the actual, alleged or threatened discharge, dispersal, release, migration, escape, or seepage of pollutant. Thus, if "stickwater" is a "pollutant" which discharged, dispersed, released, migrated, escaped or seeped out of Tank #10 and "contributed in any way" to the ultimate net loss, the pollution exclusion applies.

I studied the expert opinions of Thomas Stuart Webster (stickwater is a gas-emitting liquid composed of water, fish oil and fish solids), Dr. Clifford Lang (stickwater emits the following flammable gases – methane, hydrogen, hydrogen sulfide and ammonia), Dr. Michael DeHarde (explosion was caused by the inadvertent ignition of flammable stickwater gasses), Christopher Bonanti (stickwater contents were flammable and required atmospheric testing to ensure that no flammable gases were present), Barry Formisano (the presence of flammable or combustible fumes or gases in Tank #10 was a foreseeable risk) and each expert agrees that the stickwater in Tank #10 emitted "gases." The subject pollution exclusion includes "gases" in the definition of "pollutants" ("pollutants means any solid, liquid, gaseous, or thermal irritant or contaminant"). Thus, the clear policy provision in EIC's policy exclude from coverage "pollutants" that are discharged, dispersed, released, migrated, escaped, or seeped and caused or contributed to the ultimate loss. The ultimate loss here are the death and injuries to Accu-Fab's workers who filed lawsuits against Omega. Their death and injuries were, at least, contributed to by the migration of pollutants. Based on the clear policy language, it is my recommendation that "stickwater" is pollutant which caused or contributed to the "Ultimate Loss." Accordingly, it is my recommendation that the pollution exclusion applies and is a bar to Omega's claims for coverage.

V. CONCLUSION

Based on the above, I recommend the court grant EIC's motion for summary judgment and declare that the pollution exclusion in EIC's excess policy is applicable and bars Omega's claims

for damages. Pursuant to *Miss. Rules of Civil Procedure* 53(g)(2) any party objecting to this report and recommendation may serve written objections upon the other party within ten (10) after service

This the 6th day of March, 2020.

Robert L. Gibbs

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSISSIPPI

EVANSTON INSURANCE COMPANY **PLAINTIFF**

VERSUS **CAUSE NO. 2015-00, 082(2)**

OMEGA PROTEIN, INC. **DEFENDANT**

FILED
AUG 18 2020
RANDY CARNEY, CLERK
BY_____D.C.

ORDER ADOPTING REPORT AND RECOMMENDATIONS OF SPECIAL MASTER

THIS CAUSE came before the Court on the parties' Motions for Action on their respective objections to the Report and Recommendations of the Special Master, and the Court, having heard the arguments of counsel, having read and considered the briefs and authorities submitted and having been further fully advised in the premises, finds that the Report and Recommendations of the Special Master shall be accepted in their entirety.

On July 24, 2019, to better assist the Court in determining certain issues in this case, the Honorable Robert L. Gibbs was appointed as Special Master to prepare a report and recommendations pursuant to Miss. R. Civ. P. 53(c)-(g). Specifically, Mr. Gibbs was charged with preparing a report related to (1) whether Omega qualifies as an additional insured, (2) whether EIC's excess policy was triggered by Colony's voluntary payment of its primary policy, and (3) whether the pollution exclusion applies. Mr. Gibbs determined that Omega does qualify as an additional insured, that EIC's excess policy was triggered and that the pollution exclusion applies. The parties filed their responses and objections pursuant to Miss. R. Civ. P. 53(g)(2).

The Court does not find Mr. Gibbs' report to be manifestly wrong.[1] **IT IS THEREFORE, ORDERED** that the parties' objections are hereby overruled and the Special Master's Report and Recommendations shall be accepted by the Court in their entirety.

SO ORDERED this the 18th day of August, 2020.

CIRCUIT COURT JUDGE

[1] Miss. R. Civ. P. 53(g)(2).

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSISSIPPI

EVANSTON INSURANCE COMPANY — INTERVENOR

VERSUS — CAUSE NO.: 2015-00,082(2)

OMEGA PROTEIN, INC. — DEFENDANT

FILED
AUG 26 2020
RANDY CARNEY, CLERK
BY _____ D.C.

FINAL JUDGMENT

In accordance with the Order Adopting the Report and Recommendations of the Special Master [Order - Doc. 223] [Report and Recommendation - Doc. 212], Evanston Insurance Company's Renewed/Amended Motion for Summary Judgment [Doc. 155] is hereby granted and final judgment entered in favor of Evanston Insurance Company and against Omega Protein, Inc. with each party to bear their own costs.

SO ORDERED AND ADJUDGED this the 26th day of Aug., 2020.

CIRCUIT COURT JUDGE

AGREED TO FORM ONLY:

Mark Morrison, Esq.
Attorney for Plaintiff Intervenor
Evanston Insurance Company

Fredrick B. Feeney, II, Esq.
Attorney for Defendant
Omega Protein, Inc.