ENTERED 12-6-11

IN THE CIRCUIT COURT OF BOONE COUNTY, WEST VIRGINIA

JERRY ADKINS, ET AL, Plaintiffs v. MASSEY ENERGY COMPANY, ET AL., Defendants	Consol. Civil Action No. 09-C-59 Judge William S. Thompson
MASSEY ENERGY COMPANY, ET AL., Third-Party Plaintiffs v. AIG CASUALTY COMPANY f/k/a BIRMINGHAM FIRE INSURANCE COMPANY, ET AL., Third-Party Defendants	

ORDER

On January 13, 2011, this Court heard argument on Certain London Market Insurance Companies and Certain Underwriters at Lloyd's London's (collectively, "London") Motion for Summary Judgment. All interested parties had the opportunity to submit their positions to the Court in written pleadings and through arguments of counsel. The Court has considered the Motion for Summary Judgment, the response and the complete record in this matter, and hereby **DENIES THE MOTION FOR SUMMARY JUDGMENT.**

1. On May 21, 2009, Third-Party Plaintiffs Massey Energy Company ("Massey Energy"), A.T. Massey Coal Company, Inc. ("A.T. Massey"), Omar Mining Company ("Omar

Mining"), Independence Coal Company, Inc. ("Independence Coal"), and Elk Run Coal Company, Inc. individually and d/b/a Black Castle Mining Company ("Elk Run") (collectively "Massey") initiated this third-party insurance coverage action (this "Action") against the insurance companies that sold Massey primary, umbrella, and excess liability insurance policies covering the period from at least 1974 to 2001, including London. London sold Massey Policy No. 92-0033 for the policy period March 1, 1992 to November 1, 1993 ("London Policy").

2. In this Action, Massey seeks a declaration of coverage for defense and indemnity for the claims that the underlying plaintiffs have filed against Massey in this Court alleging that Massey's coal mining operations caused the underlying plaintiffs to suffer bodily injury and damaged their property (the "Underlying Claims"). Massey also seeks damages for breach of contract, bad faith, and violation of the West Virginia Unfair Trade Practices Act.

3. London has moved for summary judgment that it has no duty to defend or indemnify Massey in the Underlying Claims. London contends that the Seepage, Pollution and Contamination exclusion ("pollution exclusion") in the London Policy unambiguously excludes coverage for the Underlying Claims.

4. The legal standards applicable to London's Motion are not in dispute. If the allegations of a lawsuit establish a mere potential for coverage, then an insurer with a duty to defend must defend and/or pay defense costs for the entire lawsuit. *See, e.g., Aetna Cas. & Sur. Co. v. Pitrolo*, 342 S.E.2d 156, 160 (W. Va. 1986). The determination of the insurer's duty to indemnify, i.e., pay the underlying claim, generally requires a fuller investigation of the facts and circumstances of that claim. *See, e.g., Perdue Farms, Inc. v. Travelers Cas. & Sur. Co. of Am.*, 448 F.3d 252, 258 (4th Cir. 2006) (duty to indemnify is based on insurer's obligation to pay a judgment or settlement for which a policyholder is liable and which is covered under the policy).

5. As set forth below, the Court **FINDS** that London has not sustained its burden under West Virginia Rule of Civil Procedure 56(c) of demonstrating that "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of

law" with respect to both London's duty to defend and London's duty to indemnify. *See also Mallet v. Pickens*, 522 S.E.2d 436, 438 (W. Va. 1999).

6. The London Policy provides coverage to Massey against claims that are brought by third-parties alleging that Massey's coal mining operations caused "bodily injury" or "property damage." The London Policy obligates London to defend, or pay the costs of defending, "any suit" against Massey seeking damages on account of bodily injury or property damage that is alleged to have taken place, in whole or in part, during the London Policy period. (Powell Aff., Ex. 1 at A-72.) The Policy defines "occurrence" as "an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured." (*Id.* at A-32.)

7. The pollution exclusion in the London Policy is grouped together with a number of other exclusions in an endorsement entitled "Third Party Oil Exclusions 'Occurrence' 1.12.88." (Powell Aff., Ex. 1 at A-76.) The pollution exclusion states:

> Notwithstanding anything to the contrary contained in this policy, it is hereby understood and agreed that this policy is subject to the following exclusions and that this policy shall not apply to:
>
> ***
>
> 7. SEEPAGE, POLLUTION AND CONTAMINATION
>
> Liability for any bodily injury and/or personal injury to or illness or death of any person or loss of, damage to, or loss of use of property directly or indirectly caused by or arising out of seepage into or onto and/or pollution and/or contamination of air, land, water, and/or any other property and/or any person irrespective of the cause of the seepage and/or pollution and/or contamination, and whenever occurring.

8. London contends that the language of the pollution exclusion is "plain and unambiguous," and further argues that the Underlying Claims "allege property damage and bodily injury arising from coal slurry, impoundments and other toxic coal production byproducts emitted during coal mining and processing operations." (London Mem. at 2.) London contends

that "[t]hese allegations fall squarely within the exclusion," and therefore, "there is no possibility of coverage under the Policy." (*Id.*)

9. Massey contends that London's pollution exclusion is ambiguous in the context of Massey's coal mining operations. In that regard, the parties have cited a number of cases from various jurisdictions around the country. The cases cited by London generally hold that a particular pollution exclusion is unambiguous, and apply that exclusion without regard to the factual context of the insured's operations or the underlying claim. The cases cited by Massey generally hold that the pollution exclusion is ambiguous when the insurer attempts to apply the exclusion in the context of the business operations for which the insured has purchased insurance coverage.

10. Under West Virginia law, policy exclusions are not applied in the abstract without reference to their factual context. Instead, West Virginia law requires that exclusions be closely analyzed within the specific factual context of the entire insurance policy, the operations that the policy was purchased to insure, and the claim at issue. *See, e.g., Ayersman v. W. Va. Div. of Envtl. Prot.*, 542 S.E.2d 58, 60 n.2 (W. Va. 2000) (Supreme Court of Appeals of West Virginia is "skeptical of any policy language that purports to exclude a primary function of the insured"); *Silk v. Flat Top Constr., Inc.*, 453 S.E.2d 356, 359 (W. Va. 1994) (insurer must prove the facts necessary to show the operation of an exclusion); *Neely*, 2008 U.S. Dist. LEXIS 16615, at *15-16.

11. London contends that its pollution exclusion is clear and unambiguous. However, West Virginia law is consistent with the line of cases that have found pollution exclusions to be ambiguous when viewed within the factual context of the operations that the policy intended to cover. *See Ayersman*, 542 S.E.2d at 60 n.2; *Silk*, 453 S.E.2d at 359. In this regard, courts have found so-called "pollution exclusions" to be ambiguous when an insurer argues that the policyholder's core product is a "pollutant." *See, e.g., Barrett v. Nat'l Union Fire Ins. Co. of Pittsburgh,* 696 S.E.2d 326, 330 (Ga. Ct. App. 2010) (court refused to bar coverage for damage caused by natural gas as a "pollutant," holding that it would violate public policy to allow insurer

to sell a policy to a company "whose main product is natural gas, which policy contains an exclusion for damages resulting from such natural gas"); *Hartford Acc. & Indem. Co. v. Doe Run Res. Corp.*, No. 4:08-CV-1687 CAS, 2010 WL 1687623, at *7 (E.D. Mo. Apr. 26, 2010) (court declined to find that lead was a "pollutant" because the insured was in the business of lead mining and production, recognizing that application of pollution exclusion to "all aspects of [the insured's] lead-related operation . . . could potentially negate virtually all coverage"); *Roinestad v. Kirkpatrick*, No. 09CA2179, 2010 WL 4008895, at *5-6 (Colo. App. Oct. 14, 2010) (pollution exclusion did not apply because definition of "pollutant" did not unambiguously apply to cooking oil and grease, which were natural by-products of policyholder's core restaurant operations); *State Auto. Mut. Ins. Co. v. Flexdar, Inc.*, 937 N.E.2d 1203, 1212 (Ind. Ct. App. 2010) (holding that exclusion's nearly limitless language rendered it ambiguous and that a policy must be specific if it wishes to eliminate claims relating to a particular alleged contaminant).

12. These cases and others, which find that pollution exclusions are ambiguous in the context of an insured's product or core operations, are also consistent with the principle of West Virginia law requiring that "'[exclusionary] policy language . . . be strictly construed against the insurer in order that the purpose of providing indemnity not be defeated.'" *Erie Ins. Prop. & Cas. Co. v. Stage Show Pizza, JTS, Inc.*, 553 S.E. 2d 257, 261 (W. Va. 2001) (quoting *Nat'l Mut. Ins. Co. v. McMahon & Sons, Inc.*, 356 S.E.2d 488, 490 (W. Va. 1987)); *Riffe v. Home Finders Assocs., Inc.*, 517 S.E.2d 313, 319 (W. Va. 1999); *Murray v. State Farm Fire & Cas. Co.*, 509 S.E.2d 1, 8 (W. Va. 1998). As such, exclusionary language must be considered in light of the nature of, and specific risks presented by, the insured's normal business operations, and the exclusion should apply to the insured's business only when that represents the only reasonable reading of the exclusion.

13. Accordingly, the Court **FINDS** that a reasonable interpretation is that, in the context of Massey's business operations, which are not in dispute, the coal and other minerals extracted and washed during coal mining operations do not qualify as "seepage, pollution, or contamination" under London's pollution exclusion. If portions of the extracted coal, rock,

minerals and water are returned to the underground mine voids or above-ground impoundments, it is reasonable for Massey not to consider these materials to be thereby transformed into pollutants, because this material is a natural part of the environment where Massey routinely conducts its business.

14. Finally, Massey contends that various representations made to state insurance regulators by the insurance industry reflect that the intent of the pollution exclusion was to apply only to governmentally-mandated environmental cleanups, and not to bodily injury or property damage claims brought by private parties. Massey contends that even if London did not directly make the representations itself, London nevertheless was the beneficiary of those representations because they allowed London to use its pollution exclusion in the market. Massey contends that because London would not have been able to include these exclusions absent the prior industry representations, the prior representations are relevant extrinsic evidence of the insurance industry's intent behind these exclusions.

15. West Virginia courts permit the introduction of extrinsic evidence to discern the insurers' intent in a situation such as this, when ambiguous policy language must be construed. *See, e.g., Joy Techs., Inc. v. Liberty Mut. Ins. Co.*, 421 S.E.2d 493 (W. Va. 1992); *see also* Syllabus Pt. 2, *Berkeley Cnty. Pub. Serv. Dist. v. Vitro Corp. of Am.*, 162 S.E.2d 189, 191 (W. Va. 1968) ("Extrinsic evidence may be used to aid in the construction of a contract if the matter in controversy is not clearly expressed in the contract, and in such case the intention of the parties is always important and the court may consider parol evidence in connection therewith with regard to conditions and objections relative to the matters involved.").

16. Accordingly, the Court **FINDS** that the insurance industry representations to state regulators concerning pollution exclusions similar to the pollution exclusion in the London Policy are consistent with an interpretation that London's pollution exclusion was intended to apply to governmentally-mandated environmental cleanups, and not to bodily injury or property damage claims brought by private parties.

17. In reference to specific events in West Virginia, the West Virginia Insurance Commissioner has advised that, although the Commission permits "absolute pollution exclusions," any such exclusion "must be worded and interpreted consistently with an administrative order that our agency issued on August 19, 1970 (Admin. Hrg. No. 70-4)," and further that "reductions in the extent of coverage that a policy provides must be accompanied by an appropriate reduction in premium rates." (*See* Powell Aff., Ex. 7 (Feb. 24, 2000 letter of West Virginia Insurance Commissioner and attached administrative order).) The referenced administrative order concerned the insurance industry's request for approval of a "pollution and contamination" exclusion. The order states that "there is no justification for the complete exclusion of coverage for pollution by oil and other petroleum substances [and other substances] on a public policy basis," and that "the respective insurers propose to charge the same rates for less coverage." (*Id.*, Administrative Order at ¶ 3.)

18. Massey paid the premium for the London Policy, and London does not dispute that it provided excess insurance to Massey for years prior to the 1992-93 Policy period. There is no evidence, however, that London reduced or discounted the premium for the 1992-93 Policy at all to reflect a reduction in coverage due to a pollution exclusion. Accordingly, the Court **FINDS** that, under West Virginia Administrative Order 70-4, the pollution exclusion cannot apply in this case to preclude coverage for the Underlying Claims.

19. The Underlying Claims allege, *inter alia*, bodily injury and property damage caused by destabilization of various rock strata which resulted in damage to the plaintiffs' well water. (*See, e.g.*, Powell Aff., Ex. 2, *Bishop* Second Amended Complaint ¶¶ 31-40.) But for the pollution exclusion in the London Policy, the Underlying Claims would present the potential that Massey could become liable for bodily injury or property damage that is clearly covered under the London Policy. This potential gives rise to a duty to defend under the London Policy. Therefore, in order to avoid its duty to defend Massey against the Underlying Claims, London has the burden of showing as a matter of law that, based on its pollution exclusion, there is no potential that Massey could incur any liability covered under the London Policy. W. Va. R. Civ.

P. 56(c). The Court **FINDS** that London has not satisfied its burden of showing that the pollution exclusion bars coverage for all of the Underlying Claims as a matter of law. Therefore, the Court **FINDS** that the Underlying Claims allege claims that are potentially covered under the London Policy. Based on the foregoing findings, the Court **FINDS** that London is required to defend Massey or pay Massey's defense costs in the Underlying Claims. *Pitrolo*, 342 S.E.2d at 160.

Therefore, the court **ORDERS** that London's Motion for Summary Judgment is hereby **DENIED**. Nothing in this order is to be construed as a finding that requires London to indemnify Massey.

The Clerk is **DIRECTED** to send a copy of this Order to all parties of record.

ENTERED this 6th day of December, 2011.

William S. Thompson, Circuit Judge