

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA

FILED BY WJ D.C.
SEP 19 2019
ANGELA E. NOBLE
CLERK U.S. DIST. CT.
S. D. OF FLA. - MIAMI

**DEL MONTE FRESH PRODUCE)
N.A., INC., a Florida corporation)**

Plaintiff,)

v.)

CASE NO.:

**AMCO INSURANCE COMPANY)
an Ohio corporation; and)
THE MIDWEST'S BEST)
PRODUCE COMPANY,)
a Missouri corporation)**

Defendants.)

COMPLAINT FOR DECLARATORY JUDGMENT

DEL MONTE FRESH PRODUCE N.A., INC. (“Del Monte”) files this Complaint for Declaratory Judgment against defendants **AMCO INSURANCE COMPANY (“AMCO”)** and **THE MIDWEST’S BEST PRODUCE COMPANY D/B/A MIDWEST BEST PRODUCE, INC (“Midwest Best”)** pursuant to Rule 57 of the Federal Rules of Civil Procedure and 28 U.S.C. §§ 1332 and 2201 et seq., seeking a declaration that Del Monte is an additional insured under liability policies of insurance issued to Midwest Best by AMCO, and that AMCO has a direct and immediate obligation to defend and indemnify Del Monte under those policies for all claims against it.

PARTIES

1. Plaintiff Del Monte is a domestic corporation organized and existing under the laws of the state of Florida with its principal place of business in Coral Gables, Florida, and is a corporate citizen of the State of Florida.

2. Defendant AMCO is a corporation organized and existing under the laws of the State of Iowa with its principal place of business in Des Moines, Iowa and is a corporate citizen of the State of Iowa.

3. Defendant Midwest Best is a corporation organized and existing under the laws of the State of Missouri with its principal place of business in St. Louis, Missouri, and is a corporate citizen of the State of Missouri.

JURISDICTION AND VENUE

4. This Court has jurisdiction of this dispute based upon Rule 57 of the Federal Rules of Civil Procedure and 28 U.S.C. § 2201 et. seq. and 28 U.S.C. § 1332. An actual controversy exists as to whether AMCO has a direct and immediate duty to defend and indemnify Del Monte for claims asserted by various consumers against Del Monte for bodily injury allegedly occurring from contaminated vegetables provided by Midwest Best to Del Monte for distribution to those consumers, including claims asserted in two underlying lawsuits and in connection with non-lawsuit claims asserted by 174 claimants (“Underlying Suits

and Claims”). True and accurate copies of the complaints in the two underlying lawsuits are attached as Exhibits A and B.

5. The states of citizenship of Del Monte, AMCO and Midwest Best are completely different and diverse.

6. The amount in controversy exceeds the minimum jurisdiction amount of \$75,000. The policy limits at issue in this case, the claims for compensatory and punitive damages alleged against Del Monte in the Underlying Matters for which it seeks coverage, and the amount of attorney’s fees and expenses that will be incurred by Del Monte for the defense of the underlying lawsuits each exceed \$75,000, exclusive of interest and costs. 28 U.S.C. § 1446; 28 U.S.C. § 1332 (a).

7. Venue is proper in this Court because defendants do business in this judicial district, are subject to the Court’s personal jurisdiction, and a substantial part of the events or omissions giving rise to the claim occurred in this judicial district. 28 U.S.C. § 1391.

FACTUAL ALLEGATIONS

A. Del Monte’s Relationship with Midwest Best

8. Del Monte is one of North America’s leading vertically integrated producers, marketers and sellers of quality fresh and fresh-cut fruits and vegetables.

9. One of Del Monte's products is a prepackaged ready-to-eat vegetable tray sold in various venues, including Kwik Trip stores in Minnesota, Wisconsin and other states. The vegetable trays are typically comprised of broccoli, cauliflower, celery sticks, carrots and dill dip supplied by vendors including Midwest Best.

10. At all times relevant, Del Monte purchased from Midwest Best broccoli crowns, celery and cauliflower ("vegetables"). The vegetables were included within Del Monte vegetable trays it sold to various customers, including but not limited to Kwik Trip convenience stores in Minnesota, Wisconsin and other Midwestern states.

B. Cyclospora Claims Asserted Against Del Monte

11. In early June 2018, Del Monte was informed that state health departments were investigating an increase of Cyclospora infections from patients who had reported purchasing and eating Del Monte vegetable trays sold at Wisconsin or Minnesota Kwik Trip retail locations.

12. In an abundance of caution, Del Monte withdrew all vegetable trays from market retail locations on June 8, 2018, and issued a voluntary recall of all remaining vegetable trays with an expiration date of June 17, 2018.

13. Midwest Best was one of the providers of broccoli crowns, celery and cauliflower contained within the subject vegetable trays.

14. In connection with reports by consumers who alleged contracting *Cyclosporiasis* after eating Del Monte vegetable trays, Del Monte was presented with the claims for alleged damages asserted in the Underlying Matters.

15. The allegations contained in the filed and unfiled complaints are essentially identical: the complainants allege they suffered a food borne illness, specifically *Cyclosporiasis*, as a result of consuming produce within the vegetable tray.

C. Midwest Best and AMCO's Agreement to Indemnify and Insure Del Monte

16. Midwest Best entered into an agreement with Del Monte related to supplying food items entitled "Del Monte Fresh Produce, NA, Inc. Continuing Food Guaranty." A copy of this agreement is attached hereto as Exhibit C. In the Continuing Food Guarantee, Midwest Best agreed "to at all times defend, indemnify, and hold harmless Del Monte, its agents and employees against and from any and all actions, suits, liabilities, prosecutions, penalties, settlements, losses, damages, costs, charges, attorney's fees, and all other expenses relating to or arising from any and all claims (whether founded or unfounded) of every nature or character (including, without limitation, claims for personal injury, death or damage to property):

- (a) based upon or arising out of the condition of the merchandise, any defect or alleged defect in the merchandise, or based upon any allegation that the

merchandise is not fit or safe for consumer use, based upon the nature of the material contained in the merchandise, or based on, arising out of, or any way related to the services and/or merchandise of supplier, or due to any actual negligence or dishonesty of, or any actual act or commission or omission by, supplier, its agents, employees, or contractors.....

17. In addition, Midwest Best agreed “to carry and maintain such insurance as will protect [Midwest] and Del Monte from claims ... for personal injury, death or property damage which may be made by agents or employees of suppliers and/or any third party arising out of or in connection with supplier services and/or products.” *See Exhibit C.*

18. Midwest Best contractually agreed to “cause its insurance policies...to name Del Monte Fresh Produce, NA, Inc. as additional insured” on general liability policies with limits of at least \$1 million per occurrence and not less than \$2 million aggregate.

19. As required by the Continuing Food Guaranty, Midwest Best obtained liability insurance policies from AMCO. AMCO issued a commercial general liability policy of primary insurance to Midwest Best bearing policy number ACPGLAO3008550160 with an operative policy period from November 20, 2017-November 20, 2018 (the “Primary Policy”). A copy of the policy is attached as Exhibit D. The general liability policy provides \$1 million per occurrence and \$2 million in aggregate limits.

20. AMCO also issued a commercial umbrella policy of insurance bearing policy number ACPCAA3008550160 for the November 20, 2017 to November 20, 2018 policy period with limits of \$3 million per occurrence and \$3 million aggregate limits. *See* Exhibit E.

21. The policies of insurance were delivered to Midwest Best in the state of Missouri.

22. Under the underlying Primary Policy, AMCO agreed to “pay those sums that the insured becomes legally obligated to pay as damages because of ‘bodily injury’ or ‘property damage’ to which this insurance applies.” AMCO agreed that it “will have the right and duty to defend the insured against any ‘suit’ seeking those damages.” *See* Exhibit D.

23. The Primary Policy defines “bodily injury” as “bodily injury, sickness or disease sustained by a person including death resulting from any of these at any time period.” The policy defines “suit” as “a civil proceeding in which damages because of ‘bodily injury’, ‘property damage’ or ‘personal and advertising injury’ to which this insurance applies are alleged. The policy definition of “suit” also “includes...(b) any other alternative dispute resolution proceeding in which such damages are claimed and to which the insured submits with our consent.”

24. Endorsement CG72121216 to the Primary Policy confers “automatic” additional insured status “when required in an agreement.” This endorsement

modifies Section II – WHO IS AN INSURED to “include ... organization(s) described in Paragraphs a. – i. below with whom you have agreed in writing in a contract or agreement that such person or organization be added as additional insured on your policy.” Subsection i. includes “vendors but only with respect to bodily injury or property damage arising out of your products which are distributed or sold in the regular course of the vendor’s business...”

25. Because Midwest Best contractually agreed to name Del Monte as an additional insured under the AMCO policy, and Del Monte has claims against it for bodily injury arising out of Midwest Best’s products distributed by Del Monte in the regular course of Del Monte’s business, Del Monte is an insured under the AMCO policy.

26. AMCO has acknowledged that Del Monte is an additional insured under the policy for the claims against it described herein.

27. Under the terms of the AMCO Primary Policy, AMCO is primary over any other collectable insurance, subject to exceptions not applicable to this claim. The AMCO Primary Policy provides that “[i]f this insurance is primary, our obligations are not affected unless any of the other insurance is also primary.”

28. Because Del Monte is an additional insured on the AMCO policy, the AMCO policy is primary and any other policy of insurance affording coverage to Del Monte is excess only.

29. Because Midwest Best has contractually agreed to indemnify Del Monte for these claims, and the AMCO policies provide indemnity to Midwest Best and AMCO for these claims, applicable law requires AMCO to fully defend and indemnify Del Monte notwithstanding the existence of any other insurance available to Del Monte.

30. Because Midwest Best has contractually agreed to indemnify Del Monte for these claims, and the AMCO policies provide indemnity to Midwest Best and AMCO for these claims, once the AMCO Primary Policy is exhausted applicable law requires AMCO to fully defend and indemnify Del Monte under its Excess Policy notwithstanding the existence any other insurance available to Del Monte.

D. Nationwide Refuses to Provide Del Monte with a Complete Defense or Indemnification

31. On June 20, 2018, Del Monte, through counsel, placed Midwest Best on written notice of the initial action in the Minnesota case served on June 13, 2018, and the Wisconsin complaint filed on June 15, 2018, which at that time had not yet been served. In its notification, Del Monte tendered these current claims and all potential claims, demands or suits or future or related claims, that may arise from products that Midwest Best supplied to Del Monte for a defense and indemnification under the Continuing Food Guarantee and under the AMCO

Policy. Del Monte reasserted those tenders at least on July 10, 2018 and September 7, 2018.

32. Upon information and belief, Midwest Best notified AMCO of Del Monte's tender in or after June 2018 and provided it with a copy of the Underlying Matters as a defendant in the pending actions.

33. Del Monte also placed AMCO on formal notice of the underlying actions and tendered the matters for a defense and indemnity as an additional insured under the AMCO policy.

34. On December 21, 2018, AMCO issued a reservation of rights letter to Del Monte in which it acknowledged that Del Monte was an additional insured under the AMCO policy and that AMCO's policy applied to these claims. However, despite the fact that the allegations of the complaints triggered a duty to defend and AMCO has primary coverage, AMCO only offered to "participate in reimbursing counsel selected for defense by Del Monte based on its proportionate share of the defense cost that may be incurred by counsel selected by Del Monte or its carriers, subject to a full reservation of rights under the applicable policies and law."

35. The only coverage issues reserved by AMCO were the assertion of five exclusions in the policy identified as: "repackaging", "express warranty claims", "inspection", "physical change to a product", and "relabeling" exclusions.

The reservation of rights letter did not explain how each of the exclusions precluded coverage for the allegations or otherwise limited AMCO's duty to defend to only "a proportionate share of the defense cost" as asserted in the reservation of rights letter.

36. AMCO has informed Del Monte, without explanation, that it is only obligated to reimburse Del Monte for 20% of the costs incurred in the defense of the underlying suits.

37. AMCO has refused to reimburse any defense costs incurred prior to October 2018, the date on which it claims it first received notice of the Underlying Lawsuits.

38. AMCO has refused to reimburse Del Monte for the settlements reached by Del Monte.

39. Del Monte advised AMCO of its intent to attempt to resolve the Underlying Lawsuits and other pending claims in a global mediation before a retired Federal District Court Judge in Minnesota and requested AMCO's participation therein. AMCO has refused to participate fully in the mediation and has refused to consent to the resolution of any claim not currently in suit. AMCO has also informed Del Monte that it will not indemnify Del Monte for any claim settled without AMCO's consent.

40. Despite Del Monte's request, AMCO has refused without justification to amend or withdraw its reservation to honor its obligations to Del Monte under the policies.

41. Due to the unreasonable and inappropriate restrictions placed on coverage by AMCO in its reservation of rights letter and subsequent communications, and as permitted by applicable law, Del Monte has rejected AMCO's tender of a partial defense under reservation of rights and brings this declaratory judgment action seeking a declaration of AMCO's duties and obligations under the Policies.

COUNT I – DECLARATORY JUDGMENT

42. Del Monte adopts and incorporates the prior paragraphs as if fully stated and set forth herein.

43. Del Monte is an additional insured under the subject AMCO policies based on claims alleging bodily injury occurring within the AMCO policy period as a result of products supplied by Midwest Best to Del Monte for distribution.

44. The underlying state court actions are "suits" under the policies for which AMCO is obligated to defend and indemnify Del Monte in full.

45. The unfiled claims against Del Monte constitute suits for which a defense and indemnity is owed because Del Monte had requested AMCO's

permission to enter into alternative dispute resolution proceedings but AMCO has impermissibly withheld without justification.

46. Del Monte has met all conditions precedent for coverage under the policies.

47. The exclusions asserted by AMCO in its reservation of rights letter do not preclude a defense to or indemnification for any of the claims against it in the underlying state court actions or in the other claims asserted against Del Monte for which suit has not been filed.

48. The AMCO policies are primary over any other insurance available to Del Monte. AMCO is obligated to defend and indemnify Del Monte for all claims against it arising from products supplied by Midwest Best, subject only to the limits of available insurance under the Primary and Excess Policies.

49. AMCO has waived or has otherwise estopped from asserting any coverage defenses including, but not limited to, forfeiture clauses and exclusions under the Policies because of its failure to timely or properly reserve its rights under the Policies or in the alternative, because its purported reservation constitutes a denial of the claim without justification.

CLAIM FOR RELIEF

Del Monte respectfully requests a declaration from this Court that:

A. A bona fide justiciable controversy exists between the parties that must be resolved;

B. Del Monte is an additional insured under the Policies issued to Midwest Best;

C. The AMCO Policies are primary over any other policy of liability insurance providing coverage to Del Monte for the subject claims;

D. AMCO is obligated to immediately provide a full and complete defense to Del Monte and reimburse it for all defense costs incurred in defense of the Underlying Lawsuit;

E. AMCO is obligated to indemnify Del Monte for all losses claimed against it, which includes an obligation to reimburse Del Monte for all settlements of filed and unfiled claims reached by Del Monte, up to the policy limits;

E. For such other and further relief to which Del Monte is entitled.

/s/ D. Ross McCloy, Jr.

D. Ross McCloy, Jr.

Florida Bar No. 0262943

Attorney for Plaintiff

OF COUNEL:

HAND ARENDALL HARRISON SALE, LLC

P.O. Drawer 1579
Panama City, Florida 32402
Telephone: (850) 769-3434
Fax: (850) 769-6121
rmccloy@handfirm.com
rjackson@handfirm.com

Joseph L. Cowan, II
Pro Hac Vice Admission Pending
Attorney for Plaintiff

OF COUNEL:

HAND ARENDALL HARRISON SALE, LLC

1801 5TH Avenue North, Suite 400
Birmingham, Alabama 35203
Telephone: (205) 324-4400
Fax: (205) 322-1163
jcowan@handfirm.com

SERVE DEFENDANT VIA CERTIFIED MAIL

AMCO Insurance Company
c/s Florida Chief Financial Officer as RA
Service of Process Section
PO Box 6200
Tallahassee, FL 32314-6200

SERVE DEFENDANT VIA CERTIFIED MAIL

The Midwest's Best Produce Company
Dan Pupillo
President-CEO
4101 Geraldine Ave
St. Louis, MO 63115-1210