Travelers Prop. Cas. Co. of Am. v ICCO Cheese Co., Inc.
2019 NY Slip Op 33224(U)
October 28, 2019
Supreme Court, New York County
Docket Number: 652787/2016
Judge: Andrew Borrok

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 53EFM

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TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA, THE TRAVELERS INDEMNITY COMPANY, THE CHARTER OAK FIRE INSURANCE COMPANY, SELECTIVE WAY INSURANCE CMPANY, CONTINENTAL CASUALTY COMPANY,

Plaintiff,

- v -

ICCO CHEESE COMPANY, INC.,WAL-MART STORES, INC.,

Defendant.

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INDEX NO. 652787/2016

MOTION DATE 10/18/2019

MOTION SEQ. NO. 005 007 008

DECISION + ORDER ON MOTION

HON. ANDREW BORROK:

The following e-filed documents, listed by NYSCEF document number (Motion 005) 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 222, 259, 261, 267, 268, 269, 270, 271, 272, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 365, 368, 372, 373, 374, 380

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 007) 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 224, 260, 264, 273, 274, 275, 276, 277, 278, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 366, 369, 370, 375, 376, 381

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER.

The following e-filed documents, listed by NYSCEF document number (Motion 008) 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 263, 279, 280, 281, 282, 283, 284, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 367, 371, 377, 378, 379, 382

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER.

Travelers Property Casualty Company of America, The Travelers Indemnity Company, and The Charter Oak Fire Insurance Company (collectively, **Travelers**), Continental Casualty Company (**Continental**), and Selective Way Insurance Company (**Selective**) each move for summary

judgment and seek a declaration that they have no duty to defend or indemnify the defendants with respect to any and all Underlying Class Actions. For the reasons set forth on the record (10/18/2019) and as otherwise set forth below, the motions for summary judgment are granted.

THE RELEVANT FACTS AND CIRCUMSTANCES

This is a case about allegedly mislabeled Parmesan cheese. Numerous class action lawsuits have been filed against ICCO-Cheese Company, Inc. (**ICCO**) and Wal-Mart Stores, Inc. (**Wal-Mart**) (collectively, the **Underlying Class Actions**) alleging that ICCO and Wal-Mart intentionally mislabeled a Parmesan cheese product manufactured by ICCO and sold by Wal-Mart under its Great Value brand as containing 100% grated Parmesan cheese when, in reality, it also contained cellulose and lower grade cheeses (Complaint ¶ 1, 12). Wal-Mart was named as a defendant in the Underlying Class Actions and took the position that ICCO had a duty to defend and indemnify Wal-Mart pursuant to the indemnification obligation set forth in the Supplier Agreement (*id.*, ¶ 12; NYSCEF Doc. No. 270, ¶ 14). ICCO filed a notice, tender, and demand for coverage with Travelers seeking coverage under certain policies of insurance described below (Complaint, ¶ 25).

The Insurance Policies

Reference is made to (i) certain Commercial General Liability insurance policies and umbrella/excess Commercial General Liability insurance policies (collectively, the **Travelers Policies**), issued by Travelers to ICCO between 2009 and 2016, (ii) Selective Commercial General Liability Coverage and Commercial Umbrella Coverage insurance policies (collectively,

the **Selective Policies**), issued by Selective to ICCO between 2011 and 2014, and (iii) Continental Excess Third Party Liability policies (collectively, the **Continental Policies**), issued by Continental to ICCO between 2014 and 2016.

Pursuant to the Travelers Policies, Travelers promised 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. ***We will have the right and duty to defend the insured against any "suit" seeking those damages*** even if the allegations of the "suit" are groundless, false or fraudulent. [emphasis added] (NYSCEF Doc. No. 189, § 1 [1] [a]).

The Travelers Policies define an additional insured as:

> Any person or organization . . . with whom you have agreed in a written contract, executed prior to loss, to name as an additional insured, 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 (NYSCEF Doc. No. 189 at 46, Endorsement § B).

The Travelers Policies further provide that:

> If you specifically agree in a written contract or written agreement that the insurance provided to an additional insured under this Coverage Part must apply on a primary basis, or a primary and non-contributory basis, this insurance is primary to other insurance that is available to such additional insured which covers such additional insured as a named insured, and we will not share with that other insurance, provided that:
>
> a. The "bodily injury" or "property damage" for which coverage is sought occurs; and
>
> b. The "personal injury" or "advertising injury" for which coverage is sought arises out of an offense committed subsequent to the signing and execution of that contract or agreement by you (NYSCEF Doc. No. 183 at 54, Endorsement § 1 [a]).

The Travelers Policies define "bodily injury" as "bodily injury, sickness, or disease sustained by a person, including death resulting from any of these at any time" (NYSCEF Doc. No. 189, § V

[3]). Property damage is defined as: "a. Physical injury to tangible property, including all resulting loss of use . . . ; or b. Loss of use of tangible property that is not physically injured" (*id.*, § V [17]).

The Travelers Policies also provide that "[t]his insurance does not apply to Contractual Liability," but "[t]his exclusion does not apply to liability for damages: (2) Assumed in a contract or agreement that is an "insured contract", provided the "bodily injury" or "property damage" occur subsequent to the execution of the contract or agreement" (*id.*, § I [2] [b] [2]). "Insured Contract" is defined as:

> f. That part of any other contract or agreement pertaining to your business . . . under which you assume the tort liability of another party to pay for "bodily injury", "property damage" or "personal injury" to a third party or organization. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement (*id.*, § V [9] [f]).

The Continental Policies are excess, indemnity-only third-party liability policies, which follow-form to the Travelers Policies and therefore incorporate the agreements, limitations, and conditions of the Travelers Policies. The Continental Policies provide coverage in excess of the Travelers Policies, but do not contain a defense obligation.

The Selective Policies contain substantially the same definitions as the Travelers policies set forth above and similarly state that Selective "will have the right and duty to defend the insured against any 'suit' seeking [damages because of 'bodily injury' or 'property damage'], even if the allegations of the suit are groundless, false or fraudulent."

The MDL Consolidation

Pursuant to a Transfer Order, dated June 2, 2016, issued by the United States Panel on Multidistrict Litigation pursuant to 28 USC §1407, the following three dockets involving the Underlying Class Actions were transferred to the Northern District of Illinois as a single Multi District Litigation (**MDL**): (1) *In Re 100% Grated Parmesan Cheese Marketing and Sales Practices Litigation* (MDL No. 2705), (2) *In Re Kraft 100% Grated Parmesan Cheese Marketing and Sales Practices Litigation* (MDL No. 2707), and (3) *In Re Wal-Mart Great Value 100% Grated Parmesan Cheese Marketing and Sales Practices Litigation* (MDL No. 2708). The plaintiffs in the transferred cases filed a Consolidated Class Action Complaint (the **Consolidated MDL Complaint**) against Wal-Mart and ICCO asserting causes of action for, *inter alia*, breach of express warranty, unjust enrichment, breach of the implied warranty of merchantability, and violation of New York General Business Law §§ 349 and 350, among other statutory claims (NYSCEF Doc. No. 171 ¶¶ 32-144). ICCO and Wal-Mart each moved to dismiss the Consolidated MDL Complaint pursuant to Federal Rules of Civil Procedure 12 (b) (1) and (6).

By Decision and Order, dated August 24, 2017, the MDL court granted the motions to dismiss pursuant to FRCP 12 (b) (6) without prejudice, and indicated that if the MDL plaintiffs failed to file amended consolidated complaints by September 14, 2017, the actions would be dismissed with prejudice (NYSCEF Doc. No. 177). On October 19, 2017, the MDL Plaintiffs filed an amended complaint (the **Amended Consolidated Complaint**) (NYSCEF Doc. No. 178). Thereafter, ICCO and Wal-Mart each filed motions to dismiss the Amended Consolidated Complaint (NYSCEF Doc. Nos. 179, 180). Like the original Consolidated MDL Complaint, the Amended Consolidated Complaint alleges that the plaintiffs were misled by the product labels,

which represented that they contained "100% Grated Parmesan Cheese," because in reality the products contained cellulose and other non-cheese ingredients, and (except for the amended complaint filed against Publix) that the products' ingredient lists are misleading because they indicate that cellulose was added to prevent caking when in fact it was also added as a filler (*In re 100% Grated Parmesan Cheese Marketing and Sales Practices Litigation*, 348 F Supp 3d 797, 802 [ND IL 2018]). Significantly, the Amended Consolidated Complaint neither alleges the occurrence of bodily injury nor property damage.

Pursuant to the Memorandum Opinion and Order, dated November 1, 2018, the MDL court noted that the MDL court had previously dismissed the "100% claims" because "no reasonable consumer could be misled by the "100% Grated Parmesan Cheese" labels into thinking that the products were 100% cheese (*id.* at 804, citing *In re 100% Grated Parmesan Cheese Marketing and Sales Practices Litigation*, 275 F Supp 3d 910, 919-27 [ND IL 2017]) and held that the three new allegations (*i.e.*, (1) a consumer survey showing that the "vast majority of purchasers" believed that the products were 100% cheese, (2) two reports from linguistic professors opining that "100% Grated Parmesan Cheese" is susceptible only to the interpretation that the products "consist entirely of grated Parmesan cheese" and (3) a Kraft patent stating that fully cured Parmesan cheese "keeps almost indefinitely") did not warrant a different result (*id.*). The MDL court also dismissed the warranty and unjust enrichment claims because "no reasonable consumer could plausibly understand the label '100% Grated Parmesan Cheese,' on a shelf-stable dairy product whose easily accessible ingredient list identifies non-cheese ingredients, to mean that the product contains only cheese" (*id.*, citing *In re 100% Grated Parmesan Cheese Marketing and Sales Practices Litigation*, 275 F Supp 3d at 925-27).

As to the anticaking claims which sound in fraud, the MDL court held that those claims were sufficiently pled to satisfy Rule 9 (b) but dismissed the anticaking claims under the Alabama Deceptive Trade Practice Act (Ala. Code § 8-19-1 *et seq.*), California Consumers Legal Remedies Act (Cal. Civ. Code § 1750 *et seq.*), California Unfair Competition Law (Cal. Bus. & Profs. Code § 17200 *et seq.*), Florida Deceptive and Unfair Trade Practices Act (Fla. Stat. § 501.201 *et seq.*), New Jersey Consumer Fraud Act (N.J. Stat. § 56:8-1 *et seq.*), New York General Business Law §§ 349, 350, Minnesota Prevention of Consumer Fraud Act (Minn. Stat. § 325F.68 *et seq.*), Minnesota Unlawful Trade Practices Act (Minn. Stat. § 325D.09 *et seq.*), and Minnesota False Statement in Advertising Act (Minn. Stat. § 325F.67) because of the lack of casual connection between the alleged misrepresentations and plaintiffs' alleged injuries, and the claims under Minnesota Deceptive Trade Practices Act because injunctive relief under that statute is the sole remedy and the likelihood of future harm from the alleged misrepresentations had not been plausibly alleged. For the avoidance of doubt, the MDL court held that the anticaking claims under the Connecticut Unfair Trade Practices Act (against Kraft), Illinois Deceptive Practices and Consumer Fraud Act (against Kraft and Albertsons/SuperValu), and Michigan Consumer Protection Act (against Kraft) may proceed (*id.* at 806-09).

With respect to the express warranty claims, the MDL court dismissed the Connecticut, Michigan and New York express warranty claims (against Kraft and SuperValu), but did not dismiss the express warranty claims under Alabama law (against Kraft, SuperValu, and Wal-Mart/ICCO), California law (against Kraft and Wal-Mart/ICCO), Florida law (against Kraft and Wal-Mart/ICCO), Illinois law (against Albertsons only), Minnesota law (against Kraft and Wal-Mart/ICCO), and New Jersey law (against Wal-Mart/ICCO). With respect to the implied

warranty claims, the MDL court dismissed the Alabama and Illinois implied warranty claims against SuperValu. And finally, with respect to the unjust enrichment claims, the MDL court declined to dismiss these claims at the pleading stage, except for the claims against Albertsons under Alabama law (*id.* at 812-815).

The plaintiffs now move for summary judgment in this court, seeking declarations that the movants do not have a duty to defend because the Amended Consolidated Complaint does not plead facts which support a claim for which coverage is available – *i.e.*, arguing that inasmuch as the claims are not for bodily injury or property damage and are essentially for overpayment which is not covered by the insurance policy, there is no duty to defend.

DISCUSSION

Summary judgment will be granted only when the movant presents evidentiary proof in admissible form that there are no triable issues of material fact and that there is either no defense to the cause of action or that the cause of action or defense has no merit (CPLR § 3212 [b]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The proponent of a summary judgment motion carries the initial burden to make a *prima facie* showing of entitlement to judgment as a matter of law (*Alvarez*, 68 NY2d at 324). Failure to make such a showing requires denial of the motion (*id.*, citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Once this showing is made, the burden shifts to the opposing party to produce evidence in admissible form sufficient to establish the existence of a triable issue of fact (*Alvarez*, 68 NY2d at 324).

As a rule, "an insurer's duty to defend its insured arises whenever the allegations in a complaint state a cause of action that gives rise to the reasonable possibility of recovery under the policy" (*Fitzpatrick v American Honda Motor Co.*, 78 NY2d 61, 65 [1991]). Yet courts have observed that even where no covered occurrence is alleged within the "four corners of the complaint," an "insurer must provide a defense if it has knowledge of facts which potentially bring the claim within the policy's indemnity coverage" (*id.*, at 66). An insurer will be required to "provide a defense unless it can 'demonstrate that the allegations of the complaint cast that pleading solely and entirely within the policy exclusions, and, further, that the allegations, *in toto*, are subject to no other interpretation'" (*Allstate Ins. Co. v Mugavero*, 79 NY2d 153, 159 [1992] [citation omitted]). Put another way, the duty to defend is exceedingly broad requiring the insurer to defend a purportedly covered claim which is allegedly frivolous or groundless. However, it is not without limits.

It is undisputed that the Travelers Policies provide third-party liability coverage for bodily injury, property damage, personal injury, advertising injury, or website injury. The critical issue before the court, then, is whether the Underlying Class Action claims negate the possibility of coverage under any of these enumerated categories of coverage. Because as alleged neither the Amended Consolidated Complaint nor the complaints filed in the Underlying Class Actions present any facts which set forth a claim for any of the enumerated covered categories or otherwise have a cause of action or demand related to any of the covered categories, the motion is granted.

As an initial matter, the parties dispute which complaint the court should look to in determining whether any of the claims give rise to a possibility of coverage and therefore a duty to defend.

The plaintiffs argue that the Amended Consolidated Complaint superseded the underlying complaints filed in the Underlying Class Actions and as such is the only operative complaint, and that the underlying individual complaints are therefore neither controlling nor relevant.

Relying on (i) the Transfer Order, entered on June 2, 2016, transferring the Underlying Class Actions to the MDL in the Northern District of Illinois, which indicates that the consolidation directed thereunder was for the limited purpose of "coordinated or consolidated pretrial proceedings" pursuant to 28 USC § 1407, pursuant to which the underlying cases will be transferred back to their original courts for trial and (ii) that the Transfer Order does not state that the Amended Consolidated Complaint was intended to supersede the underlying complaints, and merely states that the plaintiff in each underlying case reserves the right to remand each case back to its original court, the Defendants argue that the underlying complaints have not been superseded by the Amended Consolidated Complaint. The argument is unavailing.

28 USC § 1407 Multidistrict Litigation provides:

> (a) When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the judicial panel on multidistrict litigation authorized by this section upon its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions. Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated: Provided, however, That the panel may separate any claim, cross-claim, counter-claim, or third-party claim and remand any of such claims before the remainder of the action is remanded.

Pursuant to 28 USC § 1407, the Amended Consolidated Complaint controls the case in whatever form survived the motion to dismiss, discovery, and all pretrial proceedings. Once the cases are

remanded back, which can occur any time after the close of discovery (*i.e.*, before summary judgment), the pleadings are conformed to the evidence which governs the record from that point forward in accordance with any rulings made by the MDL court. In other words, wherever the MDL court leaves off, the receiving court on remand begins. The MDL proceedings "supersede" what happens in the receiving court to the extent (and only to the extent) they pick up at a later point in time after amendments of the complaint and including rulings of the MDL court on motions and/or admissions by the parties as part of the MDL proceedings. By way of example, if an expert's testimony was deemed beyond the pleadings in the MDL that ruling remains the law of the case, and to the extent that issue was ruled out of the case, the plaintiff(s) may not tell the receiving court that the complaint allows for a reading to put that issue back in the case.

That said – resolution of this issue is not controlling in this case because neither the allegations, nor the causes of action, nor the claims for relief in the Amended Consolidated Complaint nor in the complaints in the Underlying Class Actions allege facts which support a cognizable legal theory for personal injury or property damage – *i.e.*, a covered claim under the policy which has survived the MDL court rulings.

The Amended Consolidated Complaint

The Amended Consolidated Complaint alleges the following causes of action: (i) Breach of Express Warranty, (ii) Unjust Enrichment, (iii) Breach of Implied Warranty of Merchantability, (iv) New York General Business Law § 349, (v) New York General Business Law § 350, (vi) Minnesota Prevention of Consumer Fraud Act, Minn. Stat. § 325F.68 *et seq*., (vii) Minnesota Unlawful Trade Practices Act, Minn. Stat. § 325D.09, *et seq.*, (viii) Minnesota False Statement in Advertising Act, Minn. Stat. § 325F.67, (ix) Minnesota Deceptive Trade Practices Act, Minn.

Stat. § 325D.44, *et seq.*, (x) Florida Deceptive and Unfair Trade Practices Act, Fla. Stat. Ann. § 501.201, *et seq.*, (xi) New Jersey Consumer Fraud Act, N.J. Stat. § 56:8-1, *et seq.*, (xii) Alabama Deceptive Trade Practices Act, Ala. Code § 8-19-1, *et seq.*, (xiii) California Unfair Competition Law, Cal. Bus. § Prof. Code § 17200, *et seq.*, (xiv) California Consumers Legal Remedies Act, Cal. Civil Code § 1750, *et seq.*

It is indisputable that none of the above-referenced causes of action seek damages relating to either bodily injury or property damage. Nor do any of the facts as set forth in the Amended Consolidated Complaint allege facts which support a claim for either bodily injury or property damage.

The Complaints in the Underlying Class Actions

It is also indisputable that none of the causes of action in the Underlying Class Actions seek damages or have facts relating to either bodily injury or property damage. To wit, the complaints in the Underlying Class Actions assert the following causes of action:

Brown v Wal-Mart Stores, Inc. (1:16-cv-00050 [ND Fla]): (i) Florida Deceptive and Unfair Practices Act, (ii) Unjust Enrichment, (iii) and Violation of the Magnusson-Moss Warranty Act, 15 USC § 2301 *et seq.*;

Bustamante v Wal-Mart Stores, Inc. (2:16-cv-01265 [ND CA]): (i) Breach of Warranty, (ii) Unjust Enrichment, (iii) Unlawful Business Acts and Practices, California Business & Professions Code § 17200 *et seq.*, (iv) Unfair Business Acts and Practices, California Business & Professions Code § 17200 *et seq.*, (v) Fraudulent Business Acts and Practices, California

Business & Professions Code § 17200 *et seq.*, (vi) Misleading and Deceptive Advertising, California Business & Professions Code § 17500 *et seq.*, (vii) Untrue Advertising, California Business & Professions Code § 17500 *et seq.*, (viii) California Consumers Legal Remedies Act., Cal. Civ. Code § 1750 *et seq.*, (ix) California Common Law Regarding Breach of Express Warranty, (x) New Jersey Consumer Fraud Act, N.J.S.A. § 56:8-1 *et seq.*, (x) New Jersey Breach of Express Warranty, (xii) New Jersey Breach of Implied Contract/Violation of Covenant of Good Faith and Fair Dealing, (xiii) New Jersey Truth in Consumer Contract, Warranty and Notice Act, N.J.S.A. § 56:12-14 *et seq.*, (xiv) North Carolina Unfair and Deceptive Trade Practices Act, N.C. Gen. Stat. Sec. 75.1-1, *et seq.*, (xv) North Carolina Common Law Breach of Warranty, and (xvi) North Carolina Breach of Implied Contract/Violation of Covenant of Good Faith and Fair Dealing;

Costoso v Wal-Mart Stores, Inc. (1:16-cv-01162 [ED NY]): (i) New York General Business Law § 349, (ii) New York General Business Law § 350, (iii) State Consumer Protection Statutes, (iv) Breach of Express Warranty, (v) Breach of Implied Warranty of Merchantability, (vi) Breach of Implied Warranty of Fitness for a Particular Purpose, (vii) Common Law Unjust Enrichment, and (viii) Common Law Fraud;

Davies v Wal-Mart Stores, Inc. (3:16-cv-535 [ND Ohio]): (i) Ohio Deceptive Trade Practices Act, (ii) Unjust Enrichment, and (iii) Violation of the Magnusson-Moss Warranty Act, 15 USC § 2301, *et seq.*;

Ducorsky v Wal-Mart Stores, Inc. (16-cv-1571 [SD NY]): (i) New York General Business Law § 349, (ii) Florida Deceptive and Unfair Trade Practices Act, (iii) Breach of Express Warranty, and (iv) Unjust Enrichment;

Franklin v Wal-Mart Stores, Inc. (8:16-cv-00515): (i) Breach of Express Warranty, (ii) Breach of Implied Warranty of Merchantability, (iii) Negligent Misrepresentation, (iv) Fraud, and (v) Unjust Enrichment;

Hara v Target Corporation et al. (__cv__ [D MN]): (i) Minnesota Prevention of Consumer Fraud Act, Minn. Stat. § 325F.68-70, (ii) Minnesota Deceptive Trade Practices Act, Minn. Stat. § 325D.44 *et seq.*, (iii) Minnesota False Statement in Advertising Act, Minn. Stat. § 325F.67, (iv) Unlawful Trade Practices Act, Minn. Stat. § 325D.09-16, (v) Unjust Enrichment, and (vi) Negligent Misrepresentation;

Harwell v Wal-Mart Stores, Inc. (__cv__[ED MO]): (i) Missouri Merchandising Practices Act, (ii) Unjust Enrichment, and (iii) Violation of Magnusson-Moss Warranty Act, 15 USC § 2301 *et seq.*;

Hechmer v Kraft Heinz Food Co. et al. (__cv__ [ND IL]): (i) Breach of Express Warranty, (ii) Breach of Implied Warranty of Merchantability, (iii) Negligent Misrepresentation, (iv) Fraud, (v) unjust enrichment, (vi) Illinois Consumer Fraud and Deceptive Business Practices Act, 815 Ill. Comp. Stat. 505/1 *et seq.*, and (vii) Florida Deceptive and Unfair Trade Practices Act, Fla. Stat. §§ 501.201 *et seq.*;

Jackson v Wal-Mart Stores, Inc. (__cv__[D MN]): (i) Minnesota Unlawful Trade Practices Act, (ii) Unjust Enrichment, and (iii) Violation of Magnusson-Moss Warranty Act, 15 USC § 2301 *et seq.*

Jones v Wal-Mart Stores, Inc. (__cv__[ED PA]): (i) Pennsylvania Unfair Trade Practice and Consumer Protection Law, (ii) Unjust Enrichment, and (iii) Violation of Magnusson-Moss Warranty Act, 15 USC § 2301 *et seq.*;

Manfredi v Wal-Mart Stores, Inc. (__cv__[SD TX]): (i) Texas Deceptive Trade Practices Consumer Protection Act, (ii) Unjust Enrichment, (iii) Violation of Magnusson-Moss Warranty Act, 15 USC § 2301 *et seq.*;

Moschetta v Wal-Mart Stores, Inc. (16-cv-01377-CS [SD NY]): (i) Florida Deceptive and Unfair Trade Practices Act, Ch. 501, Part II, (ii) Illinois Consumer Fruad and Deceptive Business Practices Act, (iii) New York General Business Law § 349, (iv) New York General Business Law § 350, (v) Kansas Consumer Protection Act, Kan. Stat. § 50-626, (vi) Texas Deceptive Trade Practices – Consumer Protection Act, (vii) Georgia Fair Business Practices Act, (viii) Tennessee Consumer Protection Act, T.C.A. § 47-18-104, (ix) Louisiana Deceptive and Unfair Trade Practices Act, (x) Missouri Merchandising Practices Act, (xi) Michigan Consumer Protection Act, (xii) North Carolina Unfair and Deceptive Trade Practices Act, (xiii) Wisoncin Deceptive Trade Practices Act, Wis. Stat. § 100.18, (xiv) Virginia Consumer Protection Act, Va. Code §§ 59.1-196, *et seq.*, (xv) W. Va. Code § 46A-6-104), (xvi) North Carolina Unfair and

Deceptive Trade Practices Act, (xvii) Various Additional State Consumer Protection Statutes, (xviii) Breach of Express Warranty, (xix) Violation of the Magnusson-Moss Warranty Act, 15 USC § 2301, *et seq.*, (xx) Breach of Implied Warranties, and (xxi) Common Law Unjust Enrichment;

Reeves v Wal-Mart Stores, Inc. (3:16-cv-01253-AJB-JLB [SD CA]): (i) California Legal Remedies Act, (ii) California False Advertising Law, (iii) California Unfair Competition Law, (iv) Kansas Consumer Protection Act, (v) Alabama Deceptive Trade Practices Act, (vi) Oklahoma Consumer Protection Act, (vii) Arkansas Common Law Negligent Misrepresentation, (viii) Arkansas Common Law Fraud, (ix) Arkansas Common Law Unjust Enrichment, (x) Declaratory Relief under Arkansas Law, and (xi) Breach of Express Warranty;

Schulze v Wal-Mart Stores, Inc. (3:16-cv-208 [SD IL]): (i) Illinois Consumer Fraud and Deceptive Business Practices Act, (ii) Unjust Enrichment, and (iii) Violation of Magnusson-Moss Warranty Act, 15 USC § 2301 *et seq.*;

Sellers v Kraft Heinz Food Co. (0:16-cv-60624-DPG [SD FL]): (i) Florida Consumer Protection Law, Fla. Stat. § 501.204 (ii) Florida Deceptive and Unfair Trade Practices Act, Fla. Stat. §§ 501.201-501.213 (iii) Negligent Misrepresentation, (iv) Florida Misleading Advertising Law, Fla. Stat. § 817.41 (v) Breach of Express Warranty, Fla. Stat. § 672.313, and (vi) Unjust Enrichment; and

Cruz v Walmart Store, Inc. [sic] (__cv__ [SD Fla]): (i) Florida Deceptive and Unfair Trade Practices Act, Fla. Stat. §§ 501.201 *et seq.*, (ii) Negligent Misrepresentation, (iii) Breach of

Express Warranty, (iv) Violation of the Magnusson-Moss Warranty Act, 15 USC §§ 2301 *et seq.*, (v) Unjust Enrichment, and (xi) Negligence. For the avoidance of doubt, the negligence cause of action is not related to a claim for bodily injury or property damage. To wit, the complaint in *Cruz* alleges:

> 133. That at all times material hereto, the Defendant, had a duty to use reasonable care in the manufacturing, promotion, advertisement, and sale of the above-described Product so as to market without deception and misrepresentation.
>
> 134. That the Defendant breached its duty of reasonable care and negligently manufactured, promoted, advertised, and sold the above-described Product.
>
> 135. ***Accordingly, the Product is valueless*** such that Plaintiff and Class members are entitled to restitution in an amount not less than the purchase price of the product paid by Plaintiff and Class members during the Class Period. [emphasis added]

As with all of the other complaints in the Underlying Class Actions, the claim in *Cruz* is not that the alleged negligence resulted in bodily injury, but rather that the alleged negligence resulted in a "valueless" product for which the plaintiffs are entitled to restitution in an amount not less than the purchase price.

In other words, as discussed more fully below, the death knell tolls for the Defendants' position because none of the facts or causes of action alleged in either the Amended Consolidated Complaint or the complaints filed in the Underlying Class Actions relate to claims for bodily injury or property damage. Rather, all of these claims relate to deceptive labeling and overpayment, which are not covered under the Travelers Policies.

The Factual Allegations in the Complaints

In their opposition, the defendants urge the court to look beyond the Consolidated Amended Complaint to the complaints filed in the following four Underlying Class Actions which they argue give rise to the possibility of coverage: (1) *Brown v Wal-Mart Stores, Inc.* (1:16-cv-00050 [ND FL]) where the complaint alleges that "Plaintiff and members of the Class did not receive a safe and or/effective product when they purchased Wal-Mart's '100% Grated Parmesan Cheese' Products," and that the product was defective because it was "not fit for the ordinary purpose for which it is used", (2) *Ducorosky v Wal-Mart Stores, Inc.* (1:16-cv-01571 [SD NY]) where the complaint alleges that Wal-Mart's Parmesan cheese used cellulose, which is "an additive extracted from wood pulp by using a highly toxic chemical process," and that it also contains "potassium sorbate, a substance made from sorbic acid that has been linked to genetic damage in humans", (3) *Franklin v Wal-Mart Stores, Inc. et al.* (8:16-cv-00515 [MD Fla]) where the complaint alleges that the use of cellulose "changes the nutritional makeup of the product", and (4) *Cruz v Walmart Stores, Inc.* (9:16-cv-80382 [SD Fla]) where the complaint alleged that the product "is valueless," and that it contained ingredients used in products such as "detergents, pet litter, brake pads, and construction materials," which were ingested by the plaintiffs. The argument fails. As discussed above, none of these complaints allege any facts of any bodily injury or property damage to the plaintiffs.

Wal-Mart and ICCO argue that there may nevertheless be a possibility of coverage and therefore a duty to defend based on factual allegations of bodily injuries ***which have not yet been pled but may someday arise.*** Relying on *Harrington Haley LLP v Nutmeg Ins. Co.* (39 F Supp 2d 403 [ND NY 1999]), Wal-Mart and ICCO argue that the causes of action alleged in Amended Consolidated Complaint and the underlying complaints are not determinative, and that the court

must look to whether there are any facts alleged in any of the complaints or known by the plaintiffs to exist which might give rise to a possibility of coverage ***based on some potential future injury*** (*id.*, at 408). Reliance on *Harrington* is misplaced.

There is a significant difference between *Harrington* and the instant action. In *Harrington*, the court found that "***the complaint asserted 'underlying facts' which, if proven, could have given rise to covered liability***" [emphasis added] (*id.*). In this case, however, there are no facts alleged in any of the complaints from which the possibility of coverage might arise. Simply put, no one has alleged so much as a tummy ache or mild indigestion resulting from the eight percent of this product which is not Parmesan cheese, let alone cognizable bodily injury.

Relying on *Medmarc Cas. Ins. Co. v Avent America, Inc.* (612 F3d 607 [7th Cir 2010]), the plaintiffs argue that there is no duty defend because the complaints fail to allege any actual bodily injury or any compensable increased risk of future bodily injury. In *Medmarc*, consumers brought a series of class action lawsuits against Avent America, Inc. (**Avent**) alleging that Avent used Bisphenol-A (**BPA**) in its products without informing consumers of the health risks associated with BPA (*id.*, at 607). Avent tendered the lawsuits to its insurance carriers seeking defense and indemnification for the underlying actions (*id.*, at 612). The carriers denied coverage, and the parties brought declaratory judgment actions to determine whether the insurance carriers had a duty to defend Avent in the underlying suits (*id.*). The district court granted the insurance carriers' motions for summary judgment, and Avent appealed (*id.*, at 613). The 7th Circuit affirmed, holding that there was no duty to defend because "even if the underlying plaintiffs proved every factual allegation in the underlying complaints, the plaintiffs

could not collect for bodily injury because the complaints do not allege any bodily injury occurred" (*id.*, at 614).

The district court further observed that "the complaints do not allege that the underlying plaintiffs now have an increased risk of bodily injury for which they should be compensated," and that "the closest the complaints come to alleging bodily harm is the allegations that [the insured] was aware of a large body of scientific research . . . that BPA exposure can cause physical harm" (*id.*). The district court concluded that such allegations did not give rise to a duty to defend because there were no allegations that the plaintiffs sustained any actual physical harm (*id.*).

Although *Medmarc* is not controlling, the rationale applied here is equally compelling. In other words, here, like in *Medmarc*, none of the complaints allege any physical harm whatsoever. And just as the court in *MedMarc* held that allegations that exposure to an ingredient in the products at issue ***can cause*** physical harm were insufficient to give rise to the possibility of coverage, this court holds that allegations that cellulose ***may cause*** ear and eye irritation and potassium sorbate ***may cause*** genetic damage are insufficient to support a possibility of coverage giving rise to the duty to defend the Underlying Class Actions which are essentially about overpayment and having nothing to do with anything covered under the insurance policies.

Put another way, the problem with the defendants' position is that none of the allegations, in any of the complaints, allege any bodily injury, property damage, or other covered occurrence under the relevant insurance policies. At most, these allegations allege that certain plaintiffs may have

ingested the cheese containing more of an ingredient that they allege to be potentially hazardous than they were expecting, and that they overpaid and did not get the cheese that they bargained for. In no case do any of the underlying complaints as currently pled allege that as a result of ingesting the cheese, any plaintiff was injured or any property damage was sustained.

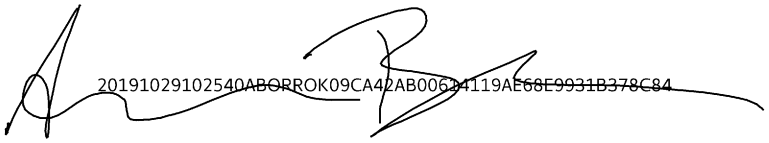
Accordingly, because none of the allegations in the Amended Consolidated Complaint or the underlying complaints allege any personal injury, property damage, or any other covered occurrence under the Travelers Policies, there is no possibility of coverage, and the court therefore holds that there is no duty to defend. The plaintiffs' motions for summary judgment are granted.

Therefore, it is

ORDERED that the plaintiffs' motion for summary judgment pursuant to CPLR § 3212 seeking a declaration that the plaintiffs are not obliged to provide a defense to, and provide coverage for, the defendants ICCO Cheese Company, Inc. and Wal-Mart Stores, Inc. with respect to the Amended Consolidated Complaint filed in the action of *In re 100% Grated Parmesan Cheese Marketing and Sales Practices Litigation*, pending in the United States District Court for the Northern District of Illinois, and the Underlying Class Action claims as herein defined, is granted; and it is further

ADJUDGED and DECLARED that plaintiffs herein are not obliged to provide a defense to, and provide coverage for, the defendants ICCO Cheese Company, Inc. and Wal-Mart Stores, Inc. in the action of *In re 100% Grated Parmesan Cheese Marketing and Sales Practices Litigation*,

pending in the United States District Court for the Northern District of Illinois, and the Underlying Class Action claims as herein defined.



10/28/2019
DATE

ANDREW BORROK, J.S.C.

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
	X	GRANTED		DENIED	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE