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United States District Court, N.D. Illinois, Eastern Division.

BUILDERS CONCRETE SERVICES, LLC, Plaintiff,
v.
WESTFIELD NATIONAL **INSURANCE** COMPANY, Defendant.

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Signed 09/14/**2020**

Attorneys and Law Firms

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Memorandum Opinion and Order

Gary Feinerman, United States District Judge

***1** **Builders** Concrete Services, LLC seeks a declaratory judgment that its general liability insurer, Westfield National **Insurance** Company, must permit it to defend against claims in an ongoing state court lawsuit using independent counsel at Westfield's expense. Doc. 1. Westfield counterclaims for a declaratory judgment that it may conduct the defense using its chosen counsel. Doc. 10 at 20-31. The parties cross-move for summary judgment. Docs. 16, 19. Westfield's motion is granted and **Builders's** is denied.

Background

The facts are almost entirely undisputed. Because the parties cross-move for summary judgment, the court ordinarily would view the disputed facts in the light most favorable to Westfield when considering **Builders's** motion and in the light most favorable to **Builders** when considering Westfield's motion. *See First State Bank of Monticello v. Ohio Cas. Ins. Co.*, 555 F.3d 564, 567 (7th Cir. 2009) ("[B]ecause the district court had cross-motions for summary judgment before it, we construe all facts and inferences therefrom in favor of the party against whom the motion under consideration is made.") (internal quotation marks omitted). But because the court will grant Westfield's motion and deny **Builders's**, the facts are set forth as favorably to **Builders** as the record and Local Rule 56.1 permit. *See Garofalo v. Vill. of Hazel Crest*, 754 F.3d 428, 430 (7th Cir. 2014). At this juncture, the court must assume the truth of those facts, but does not vouch for them. *See Gates v. Bd. of Educ. of Chi.*, 916 F.3d 631, 633 (7th Cir. 2019).

The underlying state court suit is ***Builders*** *Concrete Services, LLC v. Focus Construction, Inc.*, 2019 L 008268 (Cir. Ct. Cook Cnty., Ill.). Doc. 33 at ¶ 21; *see* Docs. 18-2, 18-3. Focus Construction, a general contractor, hired **Builders** as a subcontractor to perform concrete work on a new apartment building in Evanston, Illinois. Doc. 33 at ¶ 19. That work included pouring concrete for structural columns. *Id.* at ¶¶ 20, 23. In April 2019, one of those columns buckled and failed. *Id.* at ¶ 23. Focus withheld its final payment to **Builders**, and **Builders** sued Focus for breach of contract. Doc. 18-2. Focus counterclaimed for breach of contract and negligence, alleging that **Builders's** faulty work caused the column to fail. Doc. 18-3.

Focus's counterclaims allege that the column's failure damaged not only **Builders's** own work product—the column and other concrete structures—but also parts of the building that **Builders** did not work on. Doc. 33 at ¶¶ 25-27; *see* Doc. 18-3 at 19 (alleging that, as a result of the column's failure, "floors [were] displaced and became out of level; windows, windowsills and frames were damaged; and miscellaneous electrical, mechanical, and plumbing elements were damaged"). **Builders** states, without contradiction from Westfield, that its work did not encompass those other parts of the building. Doc. 17 at 9. Many of the losses for which Focus seeks relief stem from those effects of the column's failure. Doc. 18-3 at 21-22, 26, 27.

***2** The distinction between the damage to **Builders's** own work and the damage to other parts of the building likely will impact the degree to which Westfield must indemnify **Builders** should Focus prevail on its counterclaims. At the time the column failed, **Builders** carried a commercial general liability policy issued by Westfield. Doc. 33 at ¶ 13; Doc. 18-1. As the parties agree, Illinois law governs the policy. Doc. 17 at 5; Doc. 20 at 2. And the default rule in Illinois is that a commercial general liability policy does not cover damage to the **insured's** own work—meaning that Westfield likely must indemnify **Builders** for damage only to other parts of the building and not to the column and **Builders's** other concrete work. *See Westfield Ins. Co. v. Nat'l Decorating Serv., Inc.*, 863 F.3d 690, 697 (7th Cir. 2017) ("Under Illinois law, [commercial general liability] policies are not intended to serve as performance bonds, and therefore, economic losses sustained as a result of defects in or damage to the **insured's** own work or product are not covered.") (internal quotation marks omitted); *Travelers Ins. Co. v. Eljer Mfg., Inc.*, 197 Ill.2d 278, 258 Ill.Dec. 792, 757 N.E.2d 481, 503 (2001) (holding that general liability policies "are intended to protect the **insured** from liability for injury or damage to the persons or property of others; they are not intended to pay the costs associated with repairing or replacing the **insured's** defective work and products, which are purely economic losses") (quoting *Qualls v. Country Mut. Ins. Co.*, 123 Ill.App.3d 831, 78 Ill.Dec. 934, 462 N.E.2d 1288, 1291 (1984)).

Exclusions (j), (*l*), and (m) of the Westfield policy, which the parties call "business **risk** exclusions," reinforce the distinction drawn by Illinois law between **Builders's** work and other parts of the building. Doc. 18-1 at 20; *see* Doc. 17 at 7; Doc. 20 at 8. Exclusion (j) excludes from coverage "property damage" to "that particular part of real property on which you [**Builders**] ... are performing operations" and to "that particular part of any property that must be restored, repaired, or replaced because 'your [**Builders's**] work' was incorrectly performed on it." Doc. 18-1 at 20. (The policy defines "your [**Builders's**] work" to include "work or operations performed by you [**Builders**] or on your behalf" and "materials, parts or equipment furnished in connection with such work." *Id.* at 31.) Exclusion (*l*) excludes "property damage" to "your work" that falls within a separately defined "products-completed operations hazard." *Id.* at 20. And exclusion (m) excludes "property damage" to "impaired property" and "property that has not been physically injured" if the damage resulted from **Builders's** work or its failure to abide by the terms of a contract. *Ibid.*

The exact scope of the business **risk** exclusions does not matter for purposes of the present suit, which is not a coverage dispute. The important point here, on which both parties agree, is that the business **risk** exclusions leave damage to **Builders's** own work less likely than damage to other parts of the building to be covered by the Westfield policy. Doc. 17 at 7-8; Doc. 20 at 8. That understanding aligns with background principles of Illinois law set forth above. *See Allied Prop. & Cas. Ins. Co. v. Metro N. Condo. Ass'n*, 850 F.3d 844, 847 (7th Cir. 2017) ("Illinois courts have concluded that [commercial general liability] policies like Allied's do not cover the cost of repairing the **insured's** defectively completed work.") (citing *Pekin v. Richard Marker Assocs., Inc.*, 289 Ill.App.3d 819, 224 Ill.Dec. 801, 682 N.E.2d 362, 365 (1997)); *Ohio Cas. Ins. Co. v. Bazzi Constr. Co.*, 815 F.2d 1146, 1148 (7th Cir. 1987) (collecting cases).

Builders timely tendered Focus's counterclaims to Westfield and asked for "full defense and indemnity pursuant to the terms of the Policy." Doc. 18-4 at 2. Westfield agreed to defend **Builders**, subject to a general reservation of rights: "[Westfield] reserves the right to deny any further duty to defend or indemnify **Builders** to the extent that the policy exclusions negate any potential or actual coverage." Doc. 18-5 at 15. Westfield also engaged an attorney to represent **Builders** in its defense of the counterclaims. *Id.* at 2.

Days later, **Builders** responded that it would not accept Westfield's assigned counsel but instead would "exercise its right to independent counsel of its own choosing." Doc. 18-6 at 3. **Builders** maintained that because the policy's business **risk** exclusions could "affect coverage based on Westfield's reservation of rights," Westfield had a conflict of interest that entitled **Builders** to use its own counsel. Doc. 18-6 at 4-5. Westfield disagreed, replying: "If **Builders** refuses Westfield's offer of defense counsel, Westfield reserves ... the right to seek a declaratory judgment with respect to its right and obligations under the policy." Doc. 18-7 at 2. Less than two weeks later, **Builders** filed this suit. Doc. 1.

Discussion

***3** The Westfield policy provides that Westfield "will have the right and duty to defend the **insured** against any 'suit' " seeking damages "to which this **insurance** applies." Doc. 18-1 at 16. Illinois law construes such provisions broadly: "An **insurer's** duty to defend its **insured** is much broader than its duty to indemnify its

insured. An insurer may not justifiably refuse to defend an action against its **insured** unless it is clear from the face of the underlying complaint that the allegations set forth in that complaint fail to state facts that bring the case *within or potentially within* the **insured's** policy coverage." *Gen. Agents Ins. Co. of Am., Inc. v. Midwest Sporting Goods Co.*, 215 Ill.2d 146, 293 Ill.Dec. 594, 828 N.E.2d 1092, 1098 (2005) (emphasis added) (citation omitted). Westfield concedes that it has the duty to defend **Builders** against Focus's counterclaims. Doc. 20 at 7.

A corollary to the broad duty to defend under Illinois law is the general rule that the insurer makes all strategic decisions concerning the defense, including choice of counsel. *See Nat'l Cas. Co. v. Forge Indus. Staffing Inc.*, 567 F.3d 871, 874 (7th Cir. 2009) ("Along with an **insurer's** obligation to defend its **insured** comes its right to control and direct the defense.") (citing *Am. Family Mut. Ins. Co. v. W.H. McNaughton **Builders**, Inc.*, 363 Ill.App.3d 505, 300 Ill.Dec. 234, 843 N.E.2d 492, 498 (2006)); 14 Couch on **Insurance** 3d. § 200:1 ("Generally, liability **insurance** policies allow the insurer exclusive control over litigation against the **insured**."). The Westfield policy expressly incorporates this general rule: "We may, at our discretion, investigate any 'occurrence' and settle any claim or 'suit' that may result." Doc. 18-1 at 16.

An exception to the general rule holds that the **insured** may assume control of the defense, and obtain independent counsel at the **insurer's** expense, if the **insured's** interests conflict with the **insurer's** interests. *See Forge Indus. Staffing*, 567 F.3d at 874 ("If there is an actual conflict of interest between the insurer and **insured**, the **insured** has the right to obtain independent counsel at the **insurer's** expense.") (citing *McNaughton **Builders***, 300 Ill.Dec. 234, 843 N.E.3d at 498). This case turns on whether such a conflict exists between **Builders** and Westfield. **Builders** argues that, if Westfield controls the defense, Westfield's chosen counsel could emphasize the damage to **Builders's** own (uninsured) work product and downplay the damage to the other (**insured**) parts of the building—resulting in **Builders's** bearing a greater share than it should for any judgment Focus obtains on its counterclaims. Doc. 17 at 11. Or, **Builders** adds, Westfield's counsel could concede facts that minimize the impact of the so-called "products-completed operations hazard"—essentially an exception to the business **risk** exclusions—again diminishing Westfield's responsibility for any judgment. *Id.* at 12; *see also* Doc. 31 at 8-9. Westfield responds that these alleged conflicts are illusory and, in any event, insufficient to give **Builders** the right to retain independent counsel. Doc. 20 at 4, 10.

The Seventh Circuit in *Forge Industrial Staffing* articulated the principles that govern resolution of this dispute. In that case, a staffing agency faced employment discrimination claims from former employees, and the agency's liability insurer assumed the defense and chose defense counsel. 567 F.3d at 873. The agency argued that a conflict existed because the insurer had an incentive to shift any plaintiffs' judgment more toward punitive damages or damages for willful conduct, which the **insurance** policy would not cover, than toward ordinary compensatory damages, which the policy would cover. *Id.* at 874. In rejecting that argument, the Seventh Circuit held that "[a]n actual, not merely potential, conflict is required to trigger the **insured's** right to conflict counsel" under Illinois law. *Ibid.* (citing *Murphy v. Urso*, 88 Ill.2d 444, 58 Ill.Dec. 828, 430 N.E.2d 1079, 1083-84 (Ill. 1981)). And the Seventh Circuit explained that an "actual conflict" exists only "when the underlying complaint contains *two mutually exclusive theories* of liability, one which the policy covers and one which the policy excludes." *Id.* at 875 (emphasis added) (citing *Maneikis v. St. Paul Ins. Co. of Ill.*, 655 F.2d 818, 825 (7th Cir. 1981)).

***4** "Mutually exclusive theories" is a demanding standard, requiring the **insured** to show how the insurer, by making strategic choices in conducting the defense, could avoid *any* responsibility to pay the underlying judgment by shifting *all* losses to uncovered categories. An **insured** failing to meet that standard is not entitled to independent counsel: "Simply put, if no fact issues appear on the face of the underlying complaint that can be *conclusively resolved* in such a way that **insurance** coverage is *necessarily precluded* under the policy, then appointment of independent counsel is not warranted." *Id.* at 878 (emphasis added) (citing *Shelter Mut. Ins. Co. v. Bailey*, 160 Ill.App.3d 146, 112 Ill.Dec. 76, 513 N.E.2d 490, 496-97 (1987)).

The Illinois cases cited in *Forge Industrial Staffing* illustrate how this standard is applied. In *McNaughton **Builders***, a home **builder** was sued for damage that might have occurred before its **insurance** policy's effective date. 300 Ill.Dec. 234, 843 N.E.2d at 495-96. Depending on the exact date of the damage, then, the insurer might have had no responsibility to indemnify the **builder** for any part of an adverse judgment. *Id.*, 300 Ill.Dec. 234, 843 N.E.2d at 499. Because this circumstance could have allowed the insurer "to shift facts in a way that [took] the case outside the scope of policy coverage," the **builder** was entitled to independent counsel. *Id.* at 498, 843 N.E.2d at 499. Conversely, in *Bailey*, the **insured** was a defendant in a personal injury suit that alleged only one theory of recovery, negligence, even though the plaintiff

might have characterized the **insured's** conduct as an (uncovered) intentional tort. 112 Ill.Dec. 76, 513 N.E.2d at 492-93. The **insured** argued that he was entitled to independent counsel because his policy did not cover intentional acts. *Id.*, 112 Ill.Dec. 76, 513 N.E.2d at 494. The court rejected the argument, explaining that the existence of a conflict must be evaluated against the face of the complaint, not hypothetical amendments. *Ibid.* Because the **insured** was not being "sued under multiple theories of recovery, with some of the theories being covered by the policy and others not," there was no conflict and the **insured** was not entitled to independent counsel. *Id.* at 494, 496, 513 N.E.2d at 494.

The lesson of *Forge Industrial Staffing* is this: Unless the insurer, through its chosen counsel, can manipulate or otherwise affect the course of the underlying suit in a way that would "completely and irreparably" eliminate coverage for a judgment, the **insured** is not entitled to independent counsel. *Forge Indus. Staffing*, 567 F.3d at 879. Put another way, if different results in the underlying litigation affect only the relative responsibility of the insurer and the **insured** for the judgment without eliminating coverage completely and irreparably, the insurer retains the right to control the defense. *See Maneikis*, 655 F.2d at 825 (holding that the **insured** has no right to independent counsel where the conflict is "less than complete").

In its briefing, **Builders** gestures toward an argument that *Forge Industrial Staffing* mistook Illinois law on this point, suggesting that some Illinois cases reject the "mutually exclusive liability theory." Doc. 31 at 4; *see also id.* at 6 (citing *Nandorf, Inc. v. CNA Ins. Cos.*, 134 Ill.App.3d 134, 88 Ill.Dec. 968, 479 N.E.2d 988 (1985)). And at the motion hearing, Doc. 43, counsel made the point explicit, asserting that "perhaps the Seventh Circuit overstated the collective holdings of all of those [Appellate Court of Illinois] cases." But even if the Appellate Court of Illinois has sometimes applied a looser, more **insured**-friendly standard, this court must follow *Forge Industrial Staffing*, a precedent of the Seventh Circuit, unless the Supreme Court of Illinois subsequently issued a contrary decision. *See H.A.L. NY Holdings, LLC v. Guinan*, 958 F.3d 627, 634 (7th Cir. **2020**) (holding that the "precedential force" of Seventh Circuit decisions "is not impaired by a handful of Illinois Appellate Court opinions arguably stating the law differently"); *Reiser v. Residential Funding Corp.*, 380 F.3d 1027, 1029 (7th Cir. 2004) (holding that the district court must adhere to the Seventh Circuit's interpretation of state law unless and until a "decision by a state's supreme court terminates the [Seventh Circuit decision's] authoritative force"). No such contrary decision has been issued.

***5** Westfield clearly prevails under the *Forge Industrial Staffing* standard. The parties agree that at least some of the damages alleged in Focus's counterclaims would fall within the Westfield policy's coverage. Westfield correctly observes that the counterclaims allege "damage to other parts of the project," separate from **Builders's** own work, "such as a steel beam which was allegedly damaged as a result of the defective concrete." Doc. 20 at 10. **Builders** likewise acknowledges that Westfield's chosen counsel could seek only to diminish Westfield's responsibility to indemnify **Builders** for a judgment on Focus's counterclaims, not to eliminate it entirely. Doc. 17 at 11 ("Westfield's interests are furthered by maximizing the application of the exclusions to push more potential damages outside of coverage."); Doc. 31 at 7 (arguing that Westfield could attempt to exclude "a large portion" or "a majority" of damages "as an uncovered business **risk**").

The parties' agreement on these points is correct. Focus's counterclaims allege damages to other parts of the building. Doc. 33 at ¶ 26. And, as noted, plentiful authority supports Westfield's duty to indemnify such damages. *See, e.g.*, *Nat'l Decorating Serv.*, 863 F.3d at 697; *Eljer Mfg.*, 258 Ill.Dec. 792, 757 N.E.2d at 503. It therefore does not surprise that, in its reply brief, **Builders** finds it necessary to contend that Illinois law does not, in fact, impose the "mutually exclusive theories" standard to determine when an **insured** is entitled to independent counsel. Doc. 37 at 4. But that standard is the correct one under *Forge Industrial Staffing*, and because **Builders** fails to meet it, Westfield may continue to control the defense using its chosen counsel.

Builders argues that *R.C. Wegman Construction Co. v. Admiral* ***Insurance*** *Co.*, 629 F.3d 724 (7th Cir. 2011), favors the contrary result. According to **Builders**, *R.C. Wegman* held that there was a conflict of interest merely because a large portion of the damages in the underlying suit might be uncovered. Doc. 31 at 6-7; Doc. 37 at 7. **Builders** misreads *R.C. Wegman*. That case dealt with an entirely different basis for a conflict: the known likelihood of a jury verdict significantly above the policy limit, creating a situation where the insurer was "[g]ambling with [the] **insured's** money." 629 F.3d at 729. **Builders** does not suggest that covered damages arising from Focus's counterclaims could exceed the Westfield policy's limit. Moreover, the **insured** in *R.C. Wegman* was suing its insurer for breach of fiduciary duty *after* the jury had rendered a verdict, so the conflict of interest had become clear in retrospect. *Id.* at 725, 729. Here, by contrast, **Builders**—like the **insured** in *Forge*

Industrial Staffing—asks the court to predict, based only on a pleading, that a conflict will arise. *Forge Industrial Staffing* is the case on point here, and it dictates a ruling in Westfield's favor.

Conclusion

Westfield's summary judgment motion is granted, and **Builders's** summary judgment motion is denied. The court declares that Westfield may proceed with the defense of **Builders** using Westfield's chosen counsel.

All Citations

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