

1 of 7 DOCUMENTS

**INLAND WATERS POLLUTION CONTROL, INC., Plaintiff-Appellant, v.
NATIONAL UNION FIRE INSURANCE COMPANY, Defendant-Appellee.**

No. 92-1450

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

997 F.2d 172; 1993 U.S. App. LEXIS 15118

March 26, 1993, Argued

June 24, 1993, Decided

June 24, 1993, Filed

SUBSEQUENT HISTORY: As Corrected June 25, 1993.

PRIOR HISTORY: [**1] On Appeal from the United States District Court for the Eastern District of Michigan. 89-70584. Paul V. Gadola, District Judge.

DISPOSITION: REVERSED AND REMANDED

COUNSEL: For INLAND WATERS POLLUTION CONTROL, a Michigan Corporation, Plaintiff - Appellant: Mark S. Demorest, ARGUED, BRIEFED, 313-680-8866, Hainer & Demorest, 100 W. Big Beaver Road, Suite 665, Troy, MI 48084-5283.

For NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA, Defendant - Appellee: Sheldon G. Karasik, ARGUED, BRIEFED, 212-344-7788, Edward Hayum, 212-344-7788, Sheft & Sweeney, 11 Broadway, New York, NY 10004. Frances A. Rosinski, 313-396-4200, Timmis & Inman, 300 Talon Centre, Detroit, MI 48207.

JUDGES: Before: KENNEDY and MILBURN, Circuit Judges; and KRUPANSKY, Senior Circuit Judge.

OPINION BY: MILBURN

OPINION:

[*173] MILBURN, Circuit Judge. Plaintiff Inland Waters Pollution Control, Inc. ("Inland Waters"), appeals the district court's grant of summary judgment for

defendant, National Union Fire Insurance Company of Pittsburgh, Pennsylvania ("National Union"), in this diversity action on various insurance contracts. The principal issue on appeal is whether the district court erred in applying the "loss in progress" doctrine so as to find National Union not liable on the insurance policies it issued to Inland Waters. For the reasons that follow, we reverse and remand.

I.

The salient facts in this case are fully set out in our prior per curiam opinion, *Inland Waters Pollution Control, Inc., v. National Union Fire Insurance Co.*, 1991 U.S. App. LEXIS 21274, No. 90-2306 (6th Cir. Aug. 30, 1991)(**Inland Waters I**), which we attach as Appendix 1 to this opinion. Briefly summarized, the undisputed facts are that Inland Waters was employed by Stricker Paint Products, Inc. ("Stricker"), to remove and dispose of several hundred drums containing [**2] waste paint materials. In January and February of 1981, Inland Waters began crushing the drums on Stricker's property, discovering in the process that some of the drums contained liquids which, when released, soaked into the soil. Over six years later, hydrogeological investigations of the Stricker property disclosed a significant amount of solvent contamination both in the soil and in the groundwater.

Stricker sued Inland Waters in 1987 for mishandling the removal project, and Inland Waters called upon its insurance company, [*174] National Union, to defend it and indemnify it under certain insurance policies issued by National Union. Some of the policies in question were

successive occurrence-based liability policies first issued by National Union on August 1, 1981, in which National Union undertook to indemnify Inland Waters for damages Inland Waters might be required to pay for damaging the property of another during the policy period. Beginning August 1, 1986, National Union also issued several successive one-year liability policies that indemnified Inland Waters against damages it might be required to pay on claims first made during the policy period. The particular claims-made policy [**3] issued for the period of August 1, 1987, to August 1, 1988, contained a clause further limiting coverage to property damage that occurred after August 1, 1985. National Union denied coverage under all its policies and refused to defend Inland Waters against Stricker's lawsuit. That action was eventually settled for \$ 105,000 by Inland Waters, which then instituted the present action against National Union for breach of contract.

On October 20, 1990, the district court granted summary judgment in favor of National Union, finding that the damage to Stricker's property occurred prior to the effective date of any of the insurance policies in question. Inland Waters appealed, and we issued a per curiam opinion on October 30, 1991, in which we affirmed the district court's grant of summary judgment in part, reversed in part, and remanded the case for further proceedings. Specifically, we held that the Supreme Court of Michigan, if called upon to decide the question, would adopt the "injury in fact" trigger theory as determinative of the coverage issue in this case. Under this theory, coverage is triggered when actual property damage first occurs. Because it was clear to us that the damage [**4] to Stricker's soil first occurred in January or February of 1981 when Inland Waters crushed the liquid-filled drums, we agreed with the district court that the damage to the soil occurred before any of the coverage periods specified in the policies issued by National Union. We therefore affirmed the district court's grant of summary judgment insofar as it held that National Union had no duty to defend Inland Waters for damage it may have caused to Stricker's soil in early 1981.

As to the alleged damage to the groundwater, however, we stated:

The district court erred by granting summary judgment because there is a genuine issue of material fact regarding when the groundwater first became

contaminated. Although Inland Waters allowed the liquid waste to escape into the soil in January or February of 1981, it cannot be determined from the present record the length of time required for the contaminants to filter through the soil and reach the groundwater. If evidence establishes that the groundwater was first contaminated after August 1981, there could be coverage under the occurrence policy, and National Union could be liable for breach of the duty to defend.

Inland Waters I, slip [**5] op. at 26.

Concerning the claims-made policies, we also held that,

although Inland Waters allowed the liquid waste to escape into the soil in January or February 1981, it cannot be determined from the present record the length of time required for the contaminants to filter through the soil and reach the groundwater. If evidence establishes that the groundwater was first contaminated after August 1, 1985 [the retroactive date], there could be coverage under the claims-made policy, and National Union could be liable for a breach of its duty to defend.

Id., slip op. at 30. We then directed the district court "to resolve the question of fact regarding when the groundwater first became contaminated," **id.**, thus making it clear that it was the date when the contaminants first reached the groundwater that would determine the question of coverage. The date of the spill could not, therefore, be conclusive of the coverage issue respecting the groundwater claim.

On remand, however, the district court did not resolve the factual question concerning the date on which the groundwater was first contaminated, but again granted summary judgment to National Union on the ground that the "loss [**6] in progress" doctrine foreclosed [*175] coverage in this case. n1 The district court described the doctrine as stating that where damage has begun to occur, no part of the loss may be insured against. It applied the doctrine as follows:

n1 According to the district court, National Union had raised the "loss in progress" doctrine in its first motion for summary judgment, and it renewed that argument after remand. **Inland Waters Pollution Control, Inc. v. National**

Union Fire Ins. Co., 783 F. Supp. 325, 327 (E.D. Mich. 1992).

Because of the weight of authority outside of this jurisdiction, and because of the indications within the State of Michigan that the "known risk" and "loss in progress" doctrines would be acceptable, this court believes that the Michigan Supreme Court, if presented with this question, would adopt the "known risk" and the "loss in progress" doctrines into Michigan law. Because this court so believes, this court adopts the "known risk" and the "loss in progress" doctrines.

Under [**7] the "known risk" doctrine the relevant question is whether plaintiff reasonably should have known that the water contamination would have ultimately resulted from the Stricker spill. **See Central Quality**, slip op. at 31 n. 13. Defendant affirmatively states that plaintiff should have known. Plaintiff just as forcefully states that it should not have known. Plaintiff's expert, through an affidavit, indicates that many factors must weigh in to this knowledge, and that, even with the evidence available to him, he could not know with any certainty of the future risks to the water table. This creates a genuine issue of material fact for a jury. **Anderson**, 477 U.S. at 249-50, 106 S. Ct. at 2510-11. Therefore, defendant is denied summary judgment under the "known risk" doctrine.

However, under the "loss in progress" doctrine, there is no factual dispute. Plaintiff spilled the contaminants on the ground. Despite its efforts at mitigating the damage, the water table became contaminated as a result of the spill. The damage may have taken years to manifest itself, but it is a direct result of the spill caused by plaintiff. Because this spill took place prior [**8] to the effective date of the insurance contract, defendant is not liable to plaintiff for insuring against any injury flowing from that occurrence. There is no genuine issue of material fact present. **Id.**, **Catrett**, 477 U.S. at 322-23, 106 S. Ct. at 2552-53; **Matsushita**, 475 U.S. at 586-87, 106 S. Ct. at 1355-56. Therefore, defendant must succeed on its motion for summary judgment under the "loss in progress" doctrine.

Inland Waters Pollution Control, Inc., v. National Union Fire Ins. Co., 783 F. Supp. 325, 329 (E.D. Mich. 1992).

II.

Under Federal Rule of Civil Procedure 56, summary judgment may be granted only where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. We review a district court's grant of summary judgment de novo. **Pinney Dock & Transp. Co. v. Penn Cent. Corp.**, 838 F.2d 1445, 1472 (6th Cir.), **cert. denied**, 488 U.S. 880, 102 L. Ed. 2d 166, 109 S. Ct. 196 (1988). In a diversity case such as this, Michigan law governs substantive matters, **FL Aerospace v. Aetna Casualty & Sur. Co.**, 897 F.2d 214, 217 [**9] (6th Cir.), **cert. denied**, 498 U.S. 911, 112 L. Ed. 2d 238, 111 S. Ct. 284 (1990), and we review the district court's determination of state law de novo. **Salve Regina College v. Russell**, 499 U.S. 225, 111 S. Ct. 1217, 1221, 113 L. Ed. 2d 190 (1991).

A.

In this appeal, Inland Waters argues that the district court erred in applying the "loss in progress" doctrine in that the district court treated the doctrine as barring coverage if the "occurrence" -- in this case, the spill -- happened prior to the inception date of any insurance policy. Inland Waters contends that this formulation of the doctrine omits a crucial element of the doctrine, i.e., the element of foreknowledge or expectation of the loss by the insured. Thus, Inland [**176] Waters argues that summary judgment was inappropriate because an issue of material fact regarding its foreknowledge or expectation of the damage to the groundwater was left unresolved.

The cases cited by the district court in support of its formulation of the "loss in progress" doctrine do not hold that an insured's foreknowledge of loss is immaterial to the operation of the doctrine. Instead, each case is better read to require the element of foreknowledge or [**10] its substantial equivalent, an obvious and immediate threat of loss. The district court's definition of the "loss in progress" doctrine is taken from a footnote in **Great Southwest Fire Ins. Co., v. Watt Indus. Inc.**, 229 Cal. App. 3d 594, 280 Cal. Rptr. 249, 253 n.5 (Cal. App. 1991), **review denied and ordered not to be officially published** (July 22, 1991). n2 The footnote, which is dictum, states in part:

n2 California Rules of Court, Rule 976 (c)(2), allows the California Supreme Court to order opinions not to be published. Rule 977 provides that unpublished opinions may not be cited or

relied on except for very limited purposes such as *res judicata*, law of the case, etc.

A related but more difficult question arises when **the insured is or should be aware** of an ongoing progressive loss at the time the policy is purchased, but the extent and timing of the loss is uncertain. Some courts rely on a variant of the fortuity doctrine known as the "loss in progress" rule to suggest that where damage has begun [**11] to occur, no part of the loss may be insured against. (See e.g., **Summers v. Harris**, (5th Cir. 1978) 573 F.2d 869, 872; **Presley v. National Flood Insurers Association** (E.D. Mo. 1975) 399 F. Supp. 1242.)

(Emphasis added). Thus, even the footnote from which the district court took its definition of the "loss in progress" doctrine indicates that the doctrine applies only where "the insured is or should be aware of an ongoing progressive loss at the time the policy is purchased"

Moreover, in the main body of its opinion, the court in **Great Southwest** considered the background of the fortuity doctrine, of which it considered the "loss in progress" doctrine to be merely a variant, and emphasized the critical factor of the insured's awareness of impending loss, finding that even losses that have **already occurred** may be insured against, provided their occurrence is unknown to the parties at the time of insurance.

Considerable precedent supports the notion that a loss which has already occurred may be insured against **as long as it is unknown** to the insured at the time the insurance contract is entered into. [**12] As the United States Supreme Court has explained, "No legal obstacle prevents parties, if they so desire, from entering into contracts of insurance to protect against loss that may possibly have already occurred. Marine insurance and antedated fire insurance policies frequently afford protection against risks which, **unknown to the parties**, have already attached." (**United States v. Patryas** (1938) 303 U.S. 341, 345, 58 S. Ct. 551, 554, 82 L. Ed. 883; see also **Pendergast v. Globe & Rutgers Fire Ins. Co.** (1927) 246 N.Y. 396, 159 N.E. 183, 184; see also 12A Appelman, **Insurance Law and Practice** (1981) s7171.)

Id. at 252 (emphasis added). After making this observation, the court then held that a construction subcontractor could insure itself against the risk of its own defective construction provided that it was

unaware of any defects in the project for which it might be held liable" at the time it purchased its policy. **Id.** at 252-53 (emphasis added).

The other cases relied on by the district court also do not support its conception of the "loss in progress" [**13] doctrine because each may be read to require either (1) an awareness of a loss on the part of the insured or (2) an immediate threat of loss tantamount to foreknowledge in order for the doctrine to defeat coverage. In **Summers v. Harris**, 573 F.2d 869 (5th Cir. 1978), a flood insurance policy was purchased by the insured during a time when flood waters were rising and five days **after** he had "peddled a boat across the area of water which then stood in his front yard." Although the Fifth Circuit did not discuss the foreknowledge issue *per se*, plaintiff's foreknowledge of the threat was clear from the facts, and the court concluded that the

[*177] flooding posed an **immediate threat** to Summers' house at least as early as April 20, when Summers had to travel from the road to his house by boat.

Id. at 872 (emphasis added). There can be no question in this case that plaintiff knew of a serious and immediate threat to his property.

In **Mason Drug Company, Inc. v. Harris**, 597 F.2d 886 (5th Cir. 1979), the Fifth Circuit held that the "loss in progress" doctrine barred coverage where a storeowner, whose [**14] store had flooded previously, bought flood insurance during a heavy downpour and only hours before he began caulking the store and moving merchandise to more protected areas. The court relied heavily on the fact that the insurance application form in question stated that the policy would "not cover loss resulting from a flood . . . occurrence already in progress on the date of this application." **Id.** at 887. The flood loss occurred on the same day that the insured submitted his application for insurance.

The last case relied on by the district court, **Presley v. National Flood Insurers Ass'n**, 399 F. Supp. 1242 (E.D. Mo. 1975), observes that the "loss in progress" doctrine is a variant of the "known loss" doctrine n3 which holds that "[a] person may not, **with knowledge of a loss . . .**, make a contract by accepting a policy" **Id.** at 1244 (emphasis added) (quoting **Burch v. Commonwealth County Mut. Ins. Co.**, 450 S.W.2d 838, 840 (Tex. 1970)). The court found that plaintiffs "were **fully aware** of their predicament both at the time

they applied for insurance [**15] and on the effective date of the policy in question. Under these circumstances recovery must be denied." **Id.** at 1245 (emphasis added).
n4

n3 Also sometimes referred to as the "known risk" doctrine.

n4 The plaintiffs were "fully aware of their predicament" because on the date of their application for insurance "the water had already entered plaintiffs' residence for the second time." 399 F. Supp. at 1243.

While none of the cases cited by the district court appear to have applied the doctrine without some regard for the insured's awareness of impending loss, other cases do make it clear that the "loss in progress" doctrine does not defeat coverage unless the insured knew that a loss was in progress at the time the policy was issued. In **Prudential-LMI Commercial Insurance v. Superior Court**, 51 Cal. 3d 674, 274 Cal. Rptr. 387, 798 P.2d 1230 (Cal. 1990), the Supreme Court of California defined the "loss in progress" doctrine as "a fundamental principle of insurance law [which provides] [**16] that an insurer cannot insure against a loss that is **known or apparent to the insured**. **Id.** at 401 n.7. In support of this definition, the court cited **Bartholomew v. Appalachian Insurance Co.**, 655 F.2d 27 (1st Cir. 1981), in which the First Circuit held that the defects against which plaintiffs bought insurance were "fully known" to plaintiffs before the insurance policies in question took effect. **Id.** at 29.

Even prior to the California Supreme Court's decision in **Prudential-LMI**, the lower California appellate courts had defined the "loss in progress" doctrine, to mean

that an insurance company may insure only against contingent or **unknown** risks. Liability will not be imposed under an all-property insurance policy where damages occur **and are apparent** before the date the policy takes effect.

Home Ins. Co. v. Landmark Ins. Co., 205 Cal. App. 3d 1388, 253 Cal. Rptr. 277, 282 (Cal. App. 1988). Moreover, in a case somewhat similar to the present case on its facts, the California Court of Appeals virtually equated the "known loss" rule and the "loss in progress"

doctrine. [**17]

The concept we discuss in this section is sometimes referred to as the "known loss" rule and other times as the "loss in progress" rule. Because references to the "loss in progress" rule are too often tied to the conceptual underpinning of the "manifestation of loss" trigger, we prefer to define this concept as "known loss."

Montrose Chem. Corp. of California v. Admiral Ins. Co., 15 Cal. App. 4th 975, 5 Cal. Rptr.2d 358, 370 n.17 (Cal. App. 1992), **review granted** (May 21, 1992). The court then held that the plaintiff's receipt of a notice from the Environmental [*178] Protection Agency stating that plaintiff was potentially responsible for the costs of a cleanup at one of its manufacturing sites did not constitute such foreknowledge of loss as would bar coverage under the insurance policies plaintiff subsequently bought.

Our holding is simply that where, as here, the insured is under no legal obligation to pay and no lawsuits were filed at the time the policies were purchased, there is an insurable risk within the meaning of sections 22 and 250. Reference to the PRP [potentially responsible party] letter does not affect this conclusion. That notice did no more than formally assert [**18] the government's position and initiate proceeding which would result in subsequent findings and orders.

Id. at 371.

Finally, at least one federal circuit court of appeals has made it clear that only a pending, immediate threat of loss at the time an insurance policy was issued will defeat insurance coverage. In **Insurance Co. of North America v. U.S. Gypsum Co.**, 870 F.2d 148 (4th Cir. 1989), the Fourth Circuit held that the insured's knowledge that its plant was built on a mining site which had suffered several incidents of subsidence over the years did not justify its insurer in denying coverage when an area of more than twenty-one acres collapsed and dropped as much as six feet. Although the insurer could show that other smaller sink holes had appeared from time to time and that the insured periodically hired professors in geology and rock mechanics to evaluate the stability of the site, the insured's witnesses testified that the "catastrophic subsidence" that occurred was entirely unexpected. On these facts, the court held that

the fact that it is **known** that subsidence will occur does

not mean that it will occur [**19] during the policy period. Moreover, there is a fundamental distinction between the certainty of subsidence and the certainty of resulting loss.

Id. at 152 (emphasis added). Significantly, the court went on to reject the insurer's "loss in progress" argument "for the same reasons." **Id.** It concluded that

this is not a case where the forces which eventually led to the subsidence and collapse created an **immediate threat** of loss at the time the policy was issued.

Id. at 153 (emphasis added).

The lesson of these cases defining and applying the "loss in progress" doctrine is that the doctrine operates only where the insured is aware of a threat of loss so immediate that it might fairly be said that the loss was in progress and that the insured knew it at the time the policy was issued or applied for. The district court, in rejecting National Union's attempt to defend under the "known risk" doctrine, held that the question "whether plaintiff reasonably should have known that the water contamination would have ultimately resulted from the Stricker spill" was still an issue of fact in this case, thus posing a genuine issue [**20] of material fact that prevented summary judgment for defendant on the "known risk" defense. **Inland Waters**, 783 F. Supp. at 329. Because the "loss in progress" doctrine also requires foreknowledge of loss or an awareness of an immediate threat of loss on the part of the insured, the district court erred in granting summary judgment when the material issue of the scope of Inland Waters' foreknowledge of the eventual loss remained unresolved.

B.

National Union argues that the district court correctly determined that the Michigan Supreme Court would adopt the "loss in progress" doctrine if presented with the opportunity to do so. Inland Waters disagrees, pointing out that no Michigan case has adopted the doctrine. We agree with the district court that the Supreme Court of Michigan would recognize the "loss in progress" doctrine as we have defined it in an appropriate case. The doctrine has been described "as a fundamental principle of insurance law," Prudential- LMI, 274 Cal. Rptr. at 401, and it has been applied by various courts across the country, including those cited in this opinion, "by virtue of its recognition in [**21] standard insurance law"

Mason Drug Co., 597 F.2d at 887. **See also** Berry R. Ostrager and Thomas R. [*179] Newman, **Handbook on Insurance Coverage Disputes** § 8.02[d] (5th ed. 1992) (describing the "loss in progress" rule as "a commonly accepted premise of insurance law throughout the United States"). We are unaware of any case in which a court has rejected the doctrine as internally fallacious or inconsistent with the general principles of insurance law, and we therefore conclude that the district court was correct in concluding that the doctrine would be recognized by the Supreme Court of Michigan as the law of that state.

C.

Finally, we disagree with Inland Waters that the doctrine, as we have described it, is inconsistent with our previous decision concerning the "trigger of coverage" issue. We believe the "loss in progress" doctrine, as a variant of the "known loss" doctrine, has its roots in the prevention of fraud. Presley, 399 F. Supp. at 1245. Because insurance policies such as these are designed to insure against fortuities, a fraud is worked when they are misused to insure a certainty. On the other hand, [**22] the "trigger of coverage" issue concerns only the question of whether an insurance policy, not obtained in violation of the "loss in progress" doctrine, was in effect at the time of the loss.

III.

For the foregoing reasons, the judgment of the district court is REVERSED, and the cause is REMANDED for further proceedings not inconsistent with this opinion and our previous opinion in the case. Specifically, the district court is directed to determine issues of fact; viz., whether Inland Waters knew or should have known at the time it obtained insurance coverage with National Union that the spill would result in damage to the groundwater or that the spill posed an immediate threat of damage to the groundwater.

APPENDIX 1

Inland Waters Pollution Control, Inc., Plaintiff-Appellant, v. National Union Fire Insurance Company, Defendant-Appellee.

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

997 F.2d 172, *179; 1993 U.S. App. LEXIS 15118, **22

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