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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

FORBIDDEN FRUIT CIDERHOUSE, LLC, dba 2 TOWNS CIDERHOUSE, an Oregon limited liability company,

Plaintiff,

v.

OHIO SECURITY INSURANCE COMPANY, a New Hampshire insurance company; and THE OHIO CASUALTY INSURANCE COMPANY, a New Hampshire insurance company,

Defendant.

Civil No.: 3:20-cv-00844-AC

DEFENDANTS OHIO SECURITY INSURANCE COMPANY AND THE OHIO CASUALTY INSURANCE COMPANY'S MOTION FOR SUMMARY JUDGMENT

Oral Argument Requested

Defendants Ohio Security Insurance Company ("Ohio Security") and The Ohio Casualty Insurance Company ("Ohio Casualty") (collectively, "Ohio") submit this Motion for Summary Judgment. Pursuant to LR 7-1(a), counsel for Ohio certifies that the parties have

conferred in a good faith effort to resolve the issues addressed in the motion but have been unable to do so.

I. MOTION

Pursuant to Fed. R. Civ. P. 56, Ohio respectfully requests that the Court enter an order granting its Motion for Summary Judgment and dismissing the Complaint for Declaratory Relief and Brief of Contract (Dkt. 1) filed by Plaintiff Forbidden Fruit Ciderhouse, LLC d/b/a 2 Towns Ciderhouse ("Forbidden Fruit") with prejudice.

II. INTRODUCTION

This lawsuit involves a dispute over liability coverage for underlying false advertising and consumer protection claims stemming from Forbidden Fruit's marketing of its hard cider products. Last year, Forbidden Fruit was named as the defendant in a class action lawsuit alleging that it had violated the California False Advertising and Unfair Business Practices Laws by advertising its products as containing "no artificial flavors" when in fact they contain DL-Malic Acid. On behalf of a class of consumers, the class action complaint alleges that Forbidden Fruit knew DL-Malic Acid was not a natural flavor and deliberately misrepresented its products as containing no artificial ingredients for the purpose of deceiving consumers. It further alleges that the class members sustained damages "including" lost money and deprivation of a "legally protected interest" in "choos[ing]" the foods and ingredients they buy and ingest. It does not, however, allege that any class member ever actually ingested Forbidden Fruit's product. Nor does it allege that DL-Malic Acid is harmful, or that any class member sustained injury as a result of ingesting it.

Following service of process, Forbidden Fruit tendered the class action complaint to Ohio Security. As set forth more fully therein, Coverage A of the commercial general liability ("CGL") coverage part in the commercial package insurance policy issued by Ohio Security affords coverage for damages because of "bodily injury" caused by an "occurrence[,]" with "bodily injury" defined as "physical injury, sickness or disease" and "occurrence" as an "accident . . . ." The class action complaint does not allege that DL-Malic Acid is physically harmful, however, or that any class member ever sustained injury as a result of consuming it. The class action complaint also does not allege an accidental event. Accordingly, Ohio Security advised Forbidden Fruit that Coverage A was not triggered and, therefore, no defense or indemnity was owed under the commercial package policy.[1] Forbidden Fruit thereafter filed this lawsuit, seeking declaratory relief and alleging breach of contract.

Forbidden Fruit's claims should be dismissed. Under Oregon law, a liability carrier's duty to defend is determined by comparing the allegations within the four corners of the underlying complaint with the terms of the insurance policy. Here, the policy clearly and unambiguously requires, among other things, "physical injury, sickness or disease" to trigger coverage for bodily injury. The class action complaint alleges no such injury. It does not allege that DL-Malic Acid is in any way physically harmful. Rather, it seeks recovery solely for economic injuries and the deprivation of a protected "interest" in making an informed buying decision. These allegations make clear that the class representative is not seeking

[1] Ohio also concluded that Coverage B of the CGL coverage part of the commercial package policy did not apply since the class action complaint failed to allege any of the offenses enumerated in the policy's definition of "personal and advertising injury." Similarly, Ohio Casualty concluded that no defense or indemnification was owed under the commercial umbrella policy it issued to Forbidden Fruit.

damages for consuming DL-Malic Acid. But even if he did, courts in Oregon and around the country have held that mere unwanted physical contact, without adverse physical effects, is insufficient to trigger liability coverage for "bodily injury" defined as "physical injury, sickness or disease." And under binding Oregon case law, the mere fact that a complaint against an insured introduces the list of damages using the nonexclusive "includes" does not expand the insurer's duty to defend beyond the complaint's factual allegations.

Any Coverage A coverage under the CGL policy is also foreclosed for the separate reason that the injuries alleged were not "caused by an 'occurrence,'" defined as an "accident . . . ." Although the determination of whether an event qualifies as an "accident" is subjective under Oregon law, Oregon courts infer a subjective intent to cause harm when that is the only reasonable inference that may be drawn from the allegations. The fact that the claimant could, in the abstract, prove a similar claim without evidence of a harmful purpose is irrelevant when the complaint alleges only intentionally caused harm. The class action complaint here consistently alleges that Forbidden Fruit deliberately misrepresented its product for the purpose of deceiving consumers. These allegations, if true, permit only the conclusion that Forbidden Fruit intended to cause harm. As such, even if the class action complaint did allege bodily injury, there would still be no coverage available since such harm was not caused by an "occurrence."

Finally, Coverage B of the CGL policy is plainly inapplicable, as is any coverage under the commercial umbrella policy issued by Ohio Casualty. Coverage B clearly limits the scope of such coverage to seven discrete categories of predicate offenses specified in the definition of "personal and advertising injury," none of which are alleged in the class action complaint.

And Coverages A and B of the CGL coverage part of the commercial package policy issued by Ohio Security contain the same contours as paragraphs B.1 and B.2 of the commercial umbrella policy issued by Ohio Casualty. Accordingly, because the allegations within the four corners of the underlying complaint demonstrate that there is no coverage under the relevant coverages of either the Ohio Security or Ohio Casualty Policies, Ohio properly declined to defend Forbidden Fruit in the underlying action, and the Complaint for Declaratory Relief and Breach of Contract (Dkt. 1) should be dismissed with prejudice.

III. FACTS

A. The Underlying Complaint

Forbidden Fruit operates a craft cider brewery based in Corvallis, Oregon that manufactures and distributes hard cider products under the name "2 Towns Cider." (Dkt. 1-1, ¶¶ 5, 7). On March 12, 2020, one Richard Winters initiated a class action against Forbidden Fruit in the United States District Court for the Southern District of California (the "Underlying Action") claiming it violated the California False Advertising Law, Cal. Business & Professions Code §§ 17500, *et seq*., and the California Unfair Business Practices Law, Cal. Business & Professions Code §§ 17200, *et seq*. (Dkt. 1, ¶ 5; Dkt. 1-1). The class action complaint alleges Forbidden Fruit advertises its cider drinks as containing "no artificial flavors" when they in fact contain DL-Malic Acid. (Dkt. 1-1, ¶ 55).

According to the class action complaint, the packaging on Forbidden Fruit's products emphasizes that they consist of "whole ingredients," "locally crafted in Oregon," and contain "no artificial flavors." (Dkt. 1-1, ¶ 44). Specifically, such packaging allegedly states:

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