

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

GIANT EAGLE, INC. and HBC SERVICE)
COMPANY,)

Plaintiffs,)

vs.)

AMERICAN GUARANTEE AND)
LIABILITY INSURANCE COMPANY and)
XL SPECIALTY INSURANCE COMPANY,)

Defendants.)

AMERICAN GUARANTEE AND)
LIABILITY INSURANCE COMPANY,)

Third-Party Plaintiff,)

vs.)

OLD REPUBLIC INSURANCE COMPANY,)

Third-Party Defendant.)

XL SPECIALTY INSURANCE)
COMPANY,)

Third-Party Plaintiff,)

vs.)

OLD REPUBLIC INSURANCE)
COMPANY,)

Third-Party Defendant.)

2:19-cv-00904-RJC

Judge Robert J. Colville

OPINION

Robert J. Colville, United States District Judge

Before the Court is the Motion for Partial Summary Judgment on the Duty to Defend (ECF No. 75) filed by Plaintiffs Giant Eagle, Inc. and HBC Service Company (collectively, “Giant Eagle”). In this declaratory judgment action, Giant Eagle seeks a declaration that Defendants American Guarantee and Liability Insurance Company (“AGLIC”) and XL Specialty Insurance Company (“XL”) owe Giant Eagle a duty to defend and coverage with respect to multiple lawsuits pending against Giant Eagle in the action captioned *In re Nat’l Prescription Opiate Litig.*, No. 2804 (N. D. Ohio) (“Opioid MDL”). Compl. ¶¶ 1-2, ECF No. 46. The Opioid MDL plaintiffs seek to recover damages from Giant Eagle for harm allegedly caused by Giant Eagle’s distribution and sale of prescription opioids. *Id.* Giant Eagle avers that, to date, AGLIC has “denied coverage and refused outright to defend or indemnify Giant Eagle” in the underlying lawsuits, and that “XL, after simply ignoring Giant Eagle’s multiple requests for a defense for six months, issued a reservation of rights without assuming a defense.” *Id.* at ¶ 2.

In its Motion, Giant Eagle seeks partial summary judgment declaring that AGLIC and XL have a duty to defend Giant Eagle in four cases (the “underlying lawsuits”)¹ that have been transferred to the Opioid MDL. Br. in Supp. 1, ECF No. 76. AGLIC and XL collectively oppose Giant Eagle’s Motion for Partial Summary Judgment, and Third-Party Defendant Old Republic Insurance Company (“Old Republic”), against whom AGLIC and XL have each filed a Third-Party Complaint (ECF Nos. 41 and 43), also opposes Giant Eagle’s Motion. This Court has

¹ These cases are: *County of Cuyahoga, Ohio v. Purdue Pharma L.P., et al.*, Case No 17-OP-45004 (N.D. Ohio); *County of Summit, Ohio v. Purdue Pharma L.P., et al.*, Case No 18-OP-45090 (N.D. Ohio); *Artz, et al. v. Endo Health Solutions, Inc., et al.*, Case No 19-op-45459 (N.D. Ohio); and *Frost, et. al. v. Endo Health Solutions, Inc., et al.*, Case No 18-op-46327 (N.D. Ohio). See Proposed Order 2-3, ECF No. 75-1.

jurisdiction in this matter pursuant to 28 U.S.C. § 1332 and 28 U.S.C. § 1367. Giant Eagle's Motion has been fully briefed, and is ripe for disposition.

I. Factual Background & Procedural History

Unless otherwise noted, the following facts are not in dispute:²

Giant Eagle was covered by commercial general liability policies issued by Old Republic which ran from April 1, 2015 to April 1, 2016 (the "2016 Old Republic Policy") and from April 1, 2016 to April 1, 2017 (the "2017 Old Republic Policy") (collectively, the "Old Republic Policies"). Resp. to SOF ¶ 1, ECF No. 88. Each of the Old Republic Policies provides a \$1 million per occurrence limit of liability, subject to a \$1 million self-insured retention ("SIR") obligation and a \$1 million deductible.³ *Id.* at ¶ 3. The Old Republic Policies define "self-insured retention" as "the amount the insured legally must pay with respect to claims or 'suits' to which this insurance applies." Resp. to Additional SOF ¶ 10, ECF No. 94. The Old Republic Policies' SIR endorsements provide:

A. Our obligations under the Coverages of the policy to pay damages on your behalf apply in excess of the "self insured retention". The amount of the "self insured retention" is shown in the Schedule.

B. The "self insured retention" may be satisfied by any combination of the following:

² In reciting the facts of this case, the Court will primarily cite to AGLIC and XL's Joint Response (ECF No. 88) to Giant Eagle's Concise Statement of Material Facts and Giant Eagle's Response (ECF No. 94) to AGLIC and XL's Concise Statement of Additional Material Facts, each of which quotes and responds to Giant Eagle's Concise Statement of Material Facts (ECF No. 77) and Supplemental Concise Statement (ECF No. 86) and AGLIC and XL's Concise Statement of Additional Material Facts, respectively. The Court will cite to AGLIC and XL's Joint Response as "Resp. to SOF ¶ _____, ECF No. 88," and will cite to Giant Eagle's Response as "Resp. to Additional SOF ¶ _____, ECF No. 94." Giant Eagle has attached an Appendix of Exhibits to its Concise Statement of Material Facts. The Court will cite to any of the Exhibits set forth in that Appendix in the following manner: "App. Ex. _____, ECF No. 77." The Court will cite to any Exhibits attached to Giant Eagle's Supplemental Concise Statement of Material Facts as: "Supplemental App. Ex. _____, ECF No. 86." The Court will cite to any Exhibit attached to AGLIC and XL's Response to Giant Eagle's Concise Statements as follows: "Defs.' App. Ex. _____, ECF No. 88."

³ The deductible "[e]quals the Limits of Insurance/Liability as provided under the policy plus all ALAE/Supplementary Payments." App. Ex. 4 at 16, ECF No. 77. There is seemingly no dispute that the amount payable under the deductible obligation at issue herein is \$1 million. *See* Br. in Supp. 13, ECF No. 76; Defs.' Br. in Opp'n 15, ECF No. 87.

1. Damages and medical expenses payable under the applicable Coverage(s).

2. Other amounts payable under the policy.

C. Amounts payable under Supplementary Payments, which include but are not limited to allocated loss adjustment expense(s) (ALAE) do not satisfy the “self insured retention”.

If Supplementary Payments and/or allocated loss adjustment expense(s) are not described in the policy, Supplementary Payments and/or allocated loss adjustment expense(s) are costs associated with the investigation or settlement of any claim or “suit” against an insured and include but are not limited to defense costs, attorneys’ fees, premiums for appeal and bail bonds, prejudgment and post judgment interest, expenses incurred by the insurer, first aid expenses, and/or reasonable travel expenses incurred by the insured at our request when assisting in the investigation or settlement of any claim or “suit”.

D. In addition to the Scheduled “self insured retention” you are responsible for payment of a proportion of Supplementary Payments and/or allocated loss adjustment expenses. Your proportion is equal to the ratio that the “self insured retention” amount bears to the damages and medical expenses paid. If there is no loss payment, your proportion of Supplementary Payments and/or allocated loss adjustment expenses is 100%.

E. The “self insured retention” will apply on the same basis as the Limits of Insurance (Limits of Liability) applicable to the claim or “suit” regardless of the number of persons or organizations who sustain damages. The “self insured retention” is an each and every “self insured retention” and does not have an aggregate.

F. The “self insured retention” will not reduce the applicable Limits of Insurance (Limits of Liability).

G. We do not have a duty to investigate, defend or settle any claim or “suit” for which there may be coverage under this insurance within the “self insured retention”. Our right and duty to defend or settle any claim or “suit” do apply to any claim or “suit” that exceeds the “self insured retention”.

You, at your own expense, must investigate, defend or settle all claims or “suits” within the “self insured retention”. We retain the right to elect to join in the defense of such claims or “suits” and we will pay any expenses we incur in doing so.

Old Republic's Br. in Opp'n 3-4, ECF No. 89 (emphasis omitted) (quoting App. Ex. 3 at 21-22; Ex. 4 at 18-19, ECF No. 77). The Old Republic Policies' deductible endorsements, in relevant part, provide:

A. Our obligations under the Coverages of the policy to pay damages are subject to a deductible. The deductible is shown in the Schedule. Our obligations to pay damages apply only to the amount of damages in excess of the deductible shown in the Schedule.

B. The deductible may be satisfied by any combination of the following:

1. Damages and medical expenses payable under the applicable Coverage(s).
2. Other amounts payable under the policy.
3. Amounts payable under Supplementary Payments, which include but are not limited to allocated loss adjustment expenses (ALAE):

....

X Amounts payable under Supplementary Payments, which include but are not limited to allocated loss adjustment expenses (ALAE) do not satisfy the deductible. In addition to the Scheduled deductible you are responsible for payment of Supplementary Payments and/or allocated loss adjustment expenses.

If Supplementary Payments and/or allocated loss adjustment expenses (ALAE) are not described in the policy, Supplementary Payments and/or allocated loss adjustment expenses are costs associated with the investigation or settlement of any claim or "suit" against an insured and include but are not limited to defense costs, attorneys' fees, premiums for appeal and bail bonds, prejudgment and post judgment interest, expenses incurred by the insurer, first aid expenses, and/or reasonable travel expenses incurred by the insured at our request when assisting in the investigation or settlement of any claim or "suit".

C. The deductible will apply on the same basis as the Coverage(s) Limits of Insurance/Limit of Liability applicable to the claim or "suit" regardless of the number of persons or organizations who sustain damages.

D. The deductible amounts:

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