IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CARTER FOOTWEAR, INC.,	:	**No. 3:01cv10**
Plaintiff	:	
	:	**(Judge Munley)**
v.	:	
	:	
AMERICAN HOME ASSURANCE COMPANY, AI MARINE ADJUSTERS, INC., and AMERICAN INTERNATIONAL GROUP, INC.,	:	
Defendants	:	

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MEMORANDUM

Before the Court for disposition are cross motions for summary judgment which call upon us to interpret the language of an insurance contract. The plaintiff is Carter Footwear, Inc., ("Carter"), and the defendants are American Home Assurance Company, AI Marine Adjusters, Inc., and American International Group, Inc., (collectively "American"). The parties' motions have been briefed and argued. For the reasons that follow, we will grant in part and deny in part Carter's motion for summary judgment, and we will deny American's motion for summary judgment.

I Background

Carter, along with its subsidiary, Carter Dominican Republic, Inc., was in the business of manufacturing and selling shoes. In September of 1998, Carter had warehouse facilities in Wilkes-Barre, Pennsylvania and a manufacturing plant in the Dominican Republic. Carter would purchase raw materials for its shoes and perform initial processing tasks in Wilkes-

Barre. It would then ship the raw materials to the Dominican Republic where they would be assembled into shoes. The finished shoes would be shipped back to Wilkes-Barre for either direct transfer to customers or storage in Carter's warehouse.

At some point in the spring of 1998, Carter hired Sterling & Sterling, Inc., ("Sterling"), as an insurance broker. Carter instructed Sterling to find replacement marine open cargo insurance coverage with the same terms and conditions as an expiring marine open cargo policy Carter then had. Sterling sought a quote for such coverage from American and sent American a copy of Carter's then effective policy. On April 9, 1998, American and Sterling came to an agreement for Carter's insurance, and American issued Marine Open Cargo Policy No. 87621, (the "policy"), to Carter. It appears from the record that the American policy contained the same terms and conditions as Carter's previous marine open cargo policy; but the parties dispute who is responsible for drafting the policy.[1] (Doc. 28, Ex. F at ex. 8).

The policy provides coverage "[u]pon lawful goods and/or merchandise suitably packed for export, consisting principally of **footwear components and machinery** and similar merchandise usual and incidental to the business of the Assured, shipped under deck and/or on deck by the Assured . . . ." (Doc. 17, Ex. B at § 3) (emphasis in original). There

[1] The parties dispute who was responsible for authoring the policy, particularly Endorsement No. 4. Carter contends that Sterling, at American's request, forwarded Carter's then effective marine open cargo policy to American and that American simply adopted the language as its own. American counters that Sterling and/or Carter insisted on the language included in Endorsement No. 4.

are also two endorsements to the policy that are relevant to this dispute.

Endorsement No. 1 extends the policy's coverage to goods and merchandise stored in approved warehouses. It provides that goods and merchandise stored in such warehouses are covered for any loss or damage caused by physical damage to one of Carter's warehouses as a result of an insured peril. (Doc. 17, Ex. B at Endorsement No. 1). Endorsement No. 4 extends the policy's coverage to consequential damage. It states, in relevant part:

> It is hereby understood and agreed that, in consideration of a charge included in the marine rates hereunder, this Policy is extended to cover consequential damage, including broken lots, sizes or color ranges. Should any loss, damage or destruction resulting from an insured peril occur to any portion or portions of the property insured so as to prevent the Assured from selling such portions at their actual market value, then these Assurers are liable as per the valuation clauses of this policy for the completed property and the realizable values of the remaining portion or portions of the property not lost [sic] damaged or destroyed. . . .

(Doc. 17, Ex. B at Endorsement No. 4).

On September 22, 1998, Hurricane Georges struck the Dominican Republic. The Hurricane severely damaged Carter's facility in Santiago. As a result, Carter submitted claims to American for physically damaged finished shoes, work in process, and raw materials in the Dominican Republic. Carter also submitted a claim for consequential damages for non-physically damaged finished shoes, work in process, and raw materials in Wilkes-Barre.

American paid Carter $775,755.00 for physically damaged finished shoes, work in process, and raw materials in the Dominican Republic. American also paid Carter

consequential damages of $141,430.00 for non-physically damaged finished shoes in Wilkes-Barre. American declined, however, to pay consequential damages for non-physically damaged work in process and raw materials in Wilkes-Barre, concluding that Endorsement No. 4 of the policy covers only finished shoes. Carter contends that Endorsement No. 4 covers consequential damage to raw materials and work in process, as well as finished shoes. Consequently, Carter now seeks consequential damages of $348,945.22 for its non-physically damaged work in process and raw materials. Both parties have filed for summary judgment on their interpretation of the policy's consequential damages provision and its application to this case.

II Jurisdiction

The Court exercises jurisdiction over this case pursuant to the diversity statute, 28 U.S.C. § 1332. Because the Court is sitting pursuant to its diversity jurisdiction, the substantive law of Pennsylvania shall apply. Chamberlain v. Giampapa, 210 F.3d 154, 158 (3d Cir. 2000) (citing Erie R.R. v. Tompkins, 304 U.S. 64, 78 (1938)).

III Standard of Review

Granting summary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. See Knabe v. Boury, 114 F.3d 407, 410 n.4 (3d Cir. 1997) (citing FED. R. CIV. P. 56(C)). "[T]his standard provides that the mere existence of some alleged factual dispute

between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986) (emphasis in original).

In considering a motion for summary judgment, the court must examine the facts in the light most favorable to the party opposing the motion. International Raw Materials, Ltd. v. Stauffer Chem. Co., 898 F.2d 946, 949 (3d Cir. 1990). The burden is on the moving party to demonstrate that the evidence is such that a reasonable jury could not return a verdict for the non-moving party. Anderson, 477 U.S. at 248 (1986). A fact is material when it might affect the outcome of the suit under the governing law. Id. Where the non-moving party will bear the burden of proof at trial, the party moving for summary judgment may meet its burden by showing that the evidentiary materials of record, if reduced to admissible evidence, would be insufficient to carry the non-movant's burden of proof at trial. Celotex v. Catrett, 477 U.S. 317, 322 (1986). Once the moving party satisfies its burden, the burden shifts to the non-moving party, who must go beyond its pleadings, and designate specific facts by the use of affidavits, depositions, admissions, or answers to interrogatories showing that there is a genuine issue for trial. Id. at 324.

IV Discussion

American contends that Endorsement No. 4 provides consequential damages coverage for completed property only. Therefore, it has declined to pay Carter's claims for non-physically damaged raw materials and work in process. American advances two arguments

in support of its position. First, American states that the text of Endorsement No. 4 limits its application to completed property. Second, American contends that the valuation clauses of the policy support its interpretation of the endorsement.

Carter disputes American's interpretation of Endorsement No. 4. It argues that both the text of the endorsement and the policy support application of consequential damage coverage to raw materials and work in process.

Under Pennsylvania law, "the interpretation of an insurance contract is a question of law that is properly decided by the court." Reliance Ins. Co. v. Moessner, 121 F.3d 895, 900 (3d Cir. 1997) (citing Standard Venetian Blind Co. v. American Empire Ins. Co., 469 A.2d 563, 566 (Pa. 1983). Courts should attempt to ascertain "the intent of the parties as manifested by the language of the written agreement." Paylor v. Hartford Ins. Co., 640 A.2d 1234, 1235 (Pa. 1994). "[E]very word in a policy of insurance must be given effect if at all possible." Lumbermens Mut. Ins. Cas. Co. v. Sutch, 197 F.2d 79, 82 (3d Cir. 1952). If the contested language of a contract may be reasonably understood in more than one sense, it is ambiguous. Medical Protective Co. v. Watkins, 198 F.3d 100, 103 (3d Cir. 1999). The contested language of a contract should be read within the context of the entire policy to determine whether it is indeed ambiguous. Id. Additionally, an endorsement to an insurance contract "must be read in conjunction with the policy as a whole." Lumbermens, 197 F.2d at 82.

A. The Text of Endorsement No. 4 and the Policy

1. American's Position

The first sentence of Endorsement No. 4 reads:

> It is hereby understood and agreed that, in consideration of a charge included in the marine rates hereunder, this Policy is extended to cover consequential damage, including broken lots, sizes or color ranges.

(Doc. 17, Ex. B at Endorsement No. 4). American argues that the word *including* in the first sentence of Endorsement No. 4 serves to restrict the application of consequential damage coverage to "broken lots, sizes or color ranges." A lot, American notes, is "a parcel . . . which is the subject matter of a separate sale or delivery. . . ."[2] BLACK'S LAW DICTIONARY 946 (6th ed. 1990). Given that Carter is in the business of selling and manufacturing shoes, American argues that a lot in this case would consist of completed shoes. Carter, American argues, sells lots composed of completed shoes, not work in process or raw materials.

In further support of its position that Endorsement No. 4 applies only to completed property, American points to the endorsement's second sentence. It reads:

> Should any loss, damage or destruction resulting from an insured peril occur to any portion or portions of the property insured so as to prevent the Assured from selling such portions at their actual market value, then these Assurers are liable as per the valuation clauses of this policy for the completed property and the realizable values of the remaining portion or portions of the property not lost [sic] damaged or destroyed.

(Doc. 17, Ex. B at Endorsement No. 4). American reads this sentence as stating that it shall provide consequential damage coverage for damaged, completed property in a lot, (*"then*

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[2] A single item may also constitute a lot when it is the subject of a separate sale or delivery. BLACK'S LAW DICTIONARY 946 (6th ed. 1990). Carter does not contend, however, that it is in the business of selling shoes in single item lots.

these Assurers are liable as per the valuation clauses of this policy for the completed property"), and for undamaged, completed property in a lot, (*"and the realizable values of the remaining portion or portions of the property not lost [sic] damaged or destroyed"*). Thus, American would have the Court insert the word *completed* before the final use of the word *property* in the endorsement's second sentence. Finally, American argues that the valuation clauses of the policy do not cover loss to unfinished goods that have not been shipped to or from the Dominican Republic, like the raw materials and work in process at issue in this dispute.[3]

2. Carter's Position

Carter, as noted, contends that both the text of Endorsement No. 4 and the policy support consequential damage coverage for undamaged raw materials and work in process. Carter states that the word *including*, as used in the first sentence of the endorsement, serves as a word of inclusion, not limitation. Thus, consequential damages are available for insured perils to the property covered by the policy, including "broken lots, sizes or color ranges," but not limited thereto. Next, Carter reads the second sentence of the endorsement as

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[3] The valuation clauses of the policy state, in relevant part:

> A) As respects finished goods (except to or from Dominican Republic) at invoice plus freight plus 10%.
> B) As respects to shipments: U.S.A. to or from Dominican Republic, including while in the Dominican Republic, at invoice cost of materials plus costs which have been incurred for labor including all contractors charges and overhead charges, plus freight plus 10%.

(Doc. 17, Ex. B at § 10).

providing consequential damage coverage for both completed and uncompleted property. Carter notes that the endorsement's second sentence states, in part: "then these Assurers are liable as per the valuation clauses of this policy for the completed property and the realizable values of the remaining portion or portions of the property not lost [sic] damaged or destroyed." It does not state: then these Assurers are liable as per the valuation clauses of this policy for the completed property and the realizable values of the remaining portion or portions of the ***completed*** property not lost [sic] damaged or destroyed. Finally, Carter urges that the endorsement be read in light of the policy's "Goods Insured" section which provides coverage for "footwear components." (Doc. 28, Ex. G at § 3).

3. Analysis

Given the plain language of Endorsement No. 4 and the policy, we hold that Endorsement No. 4 provides consequential damages coverage for raw materials and work in process. The word *including* can be used as either a word of limitation or inclusion. Penn Dairies v. Milk Control Comm'n, 26 A.2d 431, 433 (Pa. 1942). It is, however, more often used as a word of inclusion or addition. See American Sur. Co. v. Marotta, 287 U.S. 513, 517 (1933) ("In definitive provisions of statutes and other writings, 'include' is frequently, if not generally, used as a word of extension or enlargement rather than as one of limitation or enumeration."); In re McGlathery's Estate, 166 A. 886, 887 (Pa. 1933) (stating that *including* has been interpreted as a word of inclusion or enlargement but generally not a word of limitation); BLACK'S LAW DICTIONARY 763 (6th ed. 1990). In the context of the policy, the

word *including* in Endorsement No. 4 is more consistently read as a word of inclusion or addition.

The first sentence of the endorsement states that the "policy is extended to cover consequential damage, including broken lots, sizes or color ranges . . . ." (Doc. 17, Ex. B at Endorsement No. 4). The policy insures "goods and/or merchandise suitably packed for export, consisting principally of **footwear components and machinery** and similar merchandise usual and incidental to the business of the Assured. . . ." (Doc. 17, Ex. B at § 3) (emphasis in original). Therefore, Endorsement No. 4 extends the policy to cover consequential damage to footwear components and machinery, among other items. The phrase *"including broken lots, sizes or color ranges*" serves to further extend consequential damage coverage to broken lots, sizes or color ranges, in addition to the goods and merchandise explicitly covered by the policy. Endorsement No. 4 does not state that consequential damage coverage is for broken lots, sizes or color ranges only, as it could if that were the parties' intention. Accordingly, we hold that the word *including* does not limit the application of Endorsement No. 4 to completed property that is part of a broken lot, size or color range. Instead, the endorsement also covers work in process, and raw materials under appropriate circumstances.

The second sentence of Endorsement No. 4 supports our interpretation of the endorsement. It specifically references the "*property insured*," which logically refers to the goods and merchandise specified in section 3 of the policy, and states that should an insured

peril damage such property, then American will pay consequential damages for the remaining non-damaged property. Those portions of the remaining non-damaged property that are completed will be valued per the valuation clauses of the policy, and those portions of the remaining non-damaged property that are not completed will be valued on the basis of their realizable value. In short, the term "*valuation clauses*" refers to the valuation, for liability purposes, of the non-damaged completed property, and the term "*realizable values*" refers to the valuation, for liability purposes, of the remaining portions of the non-damaged property – by force the non-completed property. The plain text of Endorsement No. 4, as read within the context of the policy, compels the conclusion that non-damaged work in process and raw materials, as well as completed property, are covered for consequential damage. To read the endorsement as American argues would be to read out the phrase "*realizable value*" and to read in the word "*completed*" in the endorsement's second sentence. We decline to make such edits to the plain language of the endorsement.

B. Causation

American correctly argues that even if Endorsement No. 4 covers non-completed work in process and raw materials, Carter still bears the burden of establishing at trial that an insured peril has caused the consequential damage alleged. Smick v. City of Philadelphia, 638 A.2d 287, 289 (Pa. Commw. Ct. 1994). In its motion for summary judgment, American contends that Carter cannot establish to a reasonable certainty that Hurricane Georges is the proximate cause of the claimed consequential damages. We disagree.

Carter has presented evidence from which a fact-finder could reasonably conclude that Hurricane Georges caused the consequential damaged at issue. First, Carter's Chief Financial Officer, David Leiby, states that all of the raw materials and work in process at issue in this case were designated for orders that were damaged by Hurricane Georges. (Leiby Affidavit at ¶ 3). Second, Raymond Mancke, Carter's director of purchasing, similarly states that all raw materials and work in process at issue in this matter were order specific for orders damaged by the hurricane and that they could not be put to use for other projects. (Mancke Affidavit at ¶¶ 3-4). The statements of Leiby and Mancke are supported by the report of RGL Gallagher, PC, certified accountants, which concluded with regard to related litigation that Carter's sales and production were largely equivalent. (Doc. 28, Ex. E). Thus, Carter typically did not store raw materials for general use. Instead, raw materials appear to have been on hand for existing orders. Looked at in the light most favorable to Carter, this evidence could permit a fact-finder to conclude that Hurricane Georges proximately caused the alleged damages.

American counters that Carter's failing business, not Hurricane Georges, was the proximate cause of its inability to use the work in process and raw materials at issue. To support its position it points to the failed sale of Carter to Graystone Worldwide, Inc., ("Graystone"). Graystone had agreed to buy Carter and then backed out of the agreement, apparently leaving Carter in a precarious business posture. (Doc. 17, Ex. E at 41-57). American also notes that Carter had been in a business downturn from 1993 until 1998,

prompting discussion of sale or liquidation of the business. (Doc. 17 , Ex. E at 43-51). All of this evidence does not conclusively connect Carter's inability to use the materials at issue with the health of its business. It does, however, raise genuine questions as to the proximate cause of Carter's alleged consequential damages that are best left for the fact-finder. Accordingly, we will deny both Carter's and American's motion for summary judgment on the issue of causation.

V Conclusion

For the foregoing reasons, we will grant Carter's motion for summary judgment to the extent that we hold that Endorsement No. 4 is not limited to completed shoes, but also applies to work in process and raw materials. We will deny Carter's motion in all other respects. American's motion for summary judgment will be denied. An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CARTER FOOTWEAR, INC.,	:	**No. 3:01cv10**
Plaintiff	:	
	:	**(Judge Munley)**
v.	:	
	:	
AMERICAN HOME ASSURANCE	:	
COMPANY, AI MARINE ADJUSTERS,	:	
INC., and AMERICAN INTERNATIONAL	:	
GROUP, INC.,	:	
Defendants	:	

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ORDER

AND NOW, this 7th day of January 2003, it is hereby **ORDERED** that:

2. Plaintiff's motion for summary judgment (Doc. 19) is **GRANTED** to the extent that Endorsement No. 4 to the policy is held to cover consequential damage to work in process and raw materials; it is **DENIED** in all other respects; and

3. Defendants' motion for summary judgment (Doc. 17) is **DENIED**.

BY THE COURT:

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JUDGE JAMES M. MUNLEY
United States District Court

Filed: January 7, 2003