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United States District Court, D. Kansas.

COFFEYVILLE RESOURCES REFINING & MARKETING, LLC, Plaintiff,

v.

ILLINOIS UNION INSURANCE COMPANY and National Union Fire Insurance Company of Pittsburgh, PA., Defendant.

CIVIL ACTION No. 08-1204

Signed 02/25/2015

Attorneys and Law Firms

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MEMORANDUM AND ORDER

Monti L. Belot, UNITED STATES DISTRICT JUDGE

*1 Before the court are the following sets of motions and briefs:

1. Motions for Judgment as a Matter of Law or for New Trial. Illinois Union's Motion for Judgment as a Matter of Law or for New Trial (Doc. 556, 557); National Union's Renewed Motion for Judgment as a Matter of Law (Doc. 558) and Motion for New Trial (Doc. 559, 560); Coffeyville's Response to Illinois Union (Doc. 565); National Union's Response to Illinois Union (Doc. 566); Coffeyville's Response to National Union (Doc. 567) and to Illinois Union (Doc. 549); Replies of National Union and Illinois Union (Docs. 575, 576); as well as the parties' prior motions for judgment as a matter of law (Docs. 534-538, 549, 550).

2. Coffeyville's Motion to Add Prejudgment Interest (Doc. 552, 553); Illinois Union's Response (Doc. 568) and National Union's Response (Doc. 572); Coffeyville's Reply (Doc. 579); as well as the parties' prior briefs on the subject (Docs. 444, 445, 455, 458, 461).

3. Coffeyville's Motion for Attorney's Fees (Doc. 554, 555); Illinois Union's Response (Doc. 569) and National Union's Response (Doc. 570); Coffeyville's Reply (Doc. 580); as well as the parties' prior briefs on the subject (Docs. 448, 449, 456, 457, 462).

4. National Union's Motion for Sanctions (Doc. 571) and Illinois Union's Joinder in the Motion (Doc. 573); Coffeyville's Response (Doc. 578); and National Union's Reply (Doc. 581).

I. Background.

This action resulted from an unprecedented flood of the Verdigris River in Coffeyville, Kansas, on June 30, 2007. The rapidly rising flood waters required an emergency shutdown of the Coffeyville Resources refinery, which was located next to the river. During the shutdown, Coffeyville Resources accidentally released a large amount of crude oil into the flood waters. The flood waters transported the crude oil into and around the City of Coffeyville, causing extensive damage.

Coffeyville Resources filed this action in July of 2008 against its liability insurance carriers. The complaint alleged that Coffeyville Resources had spent more than $50 million investigating and settling oil damage loss claims and remediating pollution from the oil release, and that the insurance carriers had breached their respective policies by denying coverage and failing to reimburse Coffeyville Resources. In September 2008, Coffeyville Resources settled its claims against one of the insurers, Liberty Surplus, which paid over its policy limits of $25 million. Doc. 44.

An initial round of summary judgment motions was filed in October of 2008, followed by several protracted discovery battles, including motions to quash and motions to compel. Discovery ensued in earnest, followed by an additional round of summary judgment motions and additional motions to strike and to compel. Mediation was conducted in September of 2009 but was unsuccessful. In April 2010, Judge Brown issued a 90-page summary judgment ruling. Doc. 299. The parties filed motions for clarification, for reconsideration, and for immediate appeal, which were ruled on by Judge Brown in October 2010. Doc. 311. The foregoing orders determined the general order and scope of insurance coverage for the oil release, while identifying several issues remaining for trial, including the extent to which Coffeyville Resources' payments to third parties were made to settle property damages claims caused by the oil release, as opposed to flood damage for which defendants provided no coverage.

*2 The parties engaged in additional discovery and motion practice throughout 2012. This was followed by extensive motions in limine and an additional round of summary judgment motions. The court ruled on the foregoing motions in October of 2013. Doc. 438. By October 2014, an amended pretrial order was on file and the case was ready for trial. Doc. 476.

The case was presented to a jury beginning on November 12, 2014, and ended with a jury verdict on November 25, 2014. In the course of trial the jury heard testimony from sixteen witnesses and considered hundreds of exhibits pertaining to the oil release and Coffeyville Resources's response to it. The jury found that Coffeyville Resources had shown it made settlements or payments covered by the policies of Illinois Union and National Union, and that it was entitled to reimbursement from defendants in the following amounts: $13,123,214.00 for settlement of property damage claims; $975.00 for settlement of bodily injury claims; $7,249,933.00 for payment of clean up costs; $556,408.00 for payment of civil fines or penalties; and $6,168,935.00 for reimbursement of defense and administrative expenses. Doc. 545. Based on defendants' respective coverages for these items, the court entered judgment against Illinois Union in the amount of $19,849,532.00 and against National Union in the amount of $7,249,933.00. Doc. 546.

II. Motions for Judgment or New Trial.

A. Standards. A district court may grant a motion for judgment as a matter of law under Rule 50 if it "finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the [prevailing] party on [the] issue." Fed. R. Civ. P. 50(a). That standard is met "only when all the inferences to be drawn from the evidence are so in favor of the moving party that reasonable persons could not differ in their conclusions." J.I. Case Credit Corp. v. Crites, 851 F.2d 309, 311 (10th Cir. 1988). In other words, it is "appropriate only if the evidence points but one way and is susceptible to no reasonable inferences which may support the nonmoving party's position." Elm Ridge Exploration Co. v. Engle, 721 F.3d 1199, 1216 (10th Cir. 2013).

A motion for new trial under Rule 59, by contrast, is committed to the court's discretion and may be granted "for any reason for which a new trial has heretofore been granted in an action at law in federal court." Fed. R. Civ. P. 59(a). Motions for new trial should be granted with great caution and only "when the court believes the verdict is against the weight of the evidence, prejudicial error has occurred, or substantial justice has not been done." Wirtz v. Kansas Farm Bureau Svcs., Inc., 311 F.Supp.2d 1997, 1226 (D. Kan. 2004). When the motion claims the verdict was against the weight of the evidence, the movant bears the "burden of demonstrating that the verdict was clearly, decidedly, or overwhelmingly against the weight of the evidence." Blanke v. Alexander, 152 F.3d 1224, 1236 (10th Cir. 1998); Veile v. Martinson, 258 F.3d 1180, 1188 (10th Cir. 2001). When the motion seeks a new trial based on alleged errors in the admission or exclusion of evidence, the moving party must demonstrate that a legal error or abuse of discretion occurred and that it affected the substantial rights of the parties. McDonough Power Equip., Inc. v. Greenwood, 464 U.S. 548, 553 (1984). The court "must disregard all errors and defects that do not affect any party's substantial rights." Fed. R. Civ. P. 61.

A. Illinois Union.

*3 1. RPP Payments. Illinois Union first contends the jury could not have reasonably considered any portion of Coffeyville Resources's Residential Purchase Program (RPP) payments to be covered property damage. It contends the jury had no basis other than speculation for finding that RPP payments settled property damage claims and no basis for allocating RPP payments between flood and oil damage. It argues Coffeyville Resources

failed to show that the RPP payments resulted from anything other than governmentally-imposed clean-up obligations. It further contends Coffeyville Resources failed to present evidence that the RPP payments were in response to "claims" within the meaning of the policy. (Doc. 557 at 3-13).

Coffeyville Resources's justification for the RPP was that it was a cost-effective way of satisfying its dual obligations to compensate property owners for damage caused by oil contamination and to remediate the oil spill in accordance with environmental laws. It presented substantial evidence to support that view, including evidence that the cost to remediate many residences would have exceeded the properties' pre-flood fair market value. It offered some evidence that purchasing homes throughout the affected area facilitated the settlement of claims and the remediation of contaminated areas, such that it was a practical method of addressing both property damage liability and environmental compliance. The RPP also had the effect of precluding future claims of bodily injury. As the instructions indicated, Coffeyville Resources's potential liability for oil damage to personal residences could have exceeded the pre-injury fair market value of those properties. (Doc. 543 at 11). Taking all of the circumstances into account, the jury had a reasonable basis for concluding that Coffeyville Resources's RPP payments for 110% of fair market value constituted a reasonable settlement methodology for homeowners' property damage liability claims.

One of the major disputes at trial, of course, was whether damage to residential and other properties was caused by oil contamination or by flooding. Illinois argues that Coffeyville Resources "never gave the jury any way to identify what subset of [the RPP amount] could be recovered by a property damage claimant...." But as Judge Brown noted in his summary judgment order and as this court instructed the jury, the extent to which payments were made to resolve claims arising from oil damage as opposed to flood damage was a question of fact for the jury to decide from the evidence. The jury heard all of the circumstances of the flood and the oil release, as well as the bases for Coffeyville Resources' settlements with property owners, and it resolved the conflicting evidence largely in Coffeyville Resources' favor. Viewing the evidence as a whole and in the light most favorable to Coffeyville Resources, a jury could reasonably find that a substantial majority of property damage in the affected area was due to oil contamination. More to the point, perhaps, the jury could rationally conclude that Coffeyville Resources reasonably settled claims by property owners whose damage resulted from oil contamination. See Neustrom v. Union Pac. R. Co., 156 F.3d 1057, 1067 (10th Cir. 1998) (challenge to settlement of claim "ignores the fact that [the indemnified party] was at all times subject to potential liability" for the claim).

Illinois Union notes it was undisputed that flooding occurred before the oil release. It contends the fair market value of the properties "before the injury" necessarily had to be based on a "post-flood but pre-oil appraisal" of the properties. As an initial matter, Illinois Union overstates the significance of the undisputed fact that flooding occurred prior to the oil release. That agreed-upon fact clearly does not mean that all of the flood damage occurred before the oil was released or that the damage caused by oil contamination was inconsequential. On the evidence presented the jury could reasonably find that the oil damage and flood damage occurred as part of a continuous and connected chain of circumstances that made it impossible to consider them as entirely separate matters. For example, there was testimony that the flood waters would have done far less damage but for the fact that oil was carried on top of the waters, meaning oil contamination began at the high water mark and then spread throughout properties as flood waters receded. Moreover, a review of the parties' contentions and the verdict gives rise to a fair inference that the jury in fact made some reduction in the property damage award to reflect damage that was caused by flooding.

*4 It is true that with respect to personal property damage claims, Coffeyville Resources generally paid only 50% as oil damage and allocated 50% to non-compensable flood damage. As an initial matter, the fact that Coffeyville Resources made a different — and by the insurance companies' lights — favorable settlement with respect to personal property damage claims does not mean that its settlement of real property claims was unreasonable. Moreover, as Coffeyville Resources points out, its potential liability for property damage was qualitatively different with respect to residences and could have exceeded the fair market values of the residential properties. Considering all of the factors relating to reasonableness (see Instruction No. 10), a jury could find the RPP payments represented a reasonable

settlement of residential property damage claims given Coffeyville Resources's potential liability for having carelessly released oil into the town and having rendered a substantial number of residences uninhabitable.

Illinois Union's contention that the RPP payments were actually "clean up costs" paid only by reason of Coffeyville Resources's obligations under environmental laws is not supported by the record or by common sense. The corollary of this argument is that none of the RPP payments to homeowners were in fact made to settle claims for oil damage — a proposition clearly contradicted by evidence that both Coffeyville Resources and the homeowners considered the RPP payments as being made precisely for that purpose. The absence of any requirement that homeowners sign releases in exchange for the RPP payments does not change this fact. As a practical matter, the RPP payments effectively resolved Coffeyville Resources's liability to homeowners for property damage caused by the oil release. The RPP payments were reasonably regarded as property damage settlements by the jury.

As for Illinois Union's argument that Coffeyville Resources was not presented with "claims" within the meaning of the policy, this contention is refuted by the uncontroverted facts. The Illinois Union policy defined "claim" as a written demand received by the insured seeking a remedy or asserting liability or responsibility on the part of the insured for loss. See Doc. 557 at 12. Even if the class action petitions against Coffeyville Resources are not considered claims by all potential class members because no class was ever certified, the evidence still showed that the homeowners and other property owners made written demands seeking remedies against Coffeyville Resources. Their claims were submitted in the course of the settlement programs administered by Pilot Catastrophe. Coffeyville Resources set up these programs to resolve its potential liability outside of the court system, and it facilitated the processing and settlement of property owners' demands. (A fact of which the insurers were well aware). The fact that Coffeyville Resources did so does not negate the character of the homeowners' written submissions for payment under these programs as "claims" within the meaning of the policy. [1]

2. EPA Fine.

The jury found Coffeyville Resources was entitled to reimbursement for payment of $556,408 in civil fines or penalties, which is the amount of a civil penalty imposed on Coffeyville Resources by the EPA. Illinois Union argues Coffeyville Resources cannot recover for this penalty because there was no evidence that it was imposed due to property damage caused by the oil spill. Illinois Union claims instead that it was imposed because Coffeyville Resources violated the Clean Water Act by releasing oil into the Verdigris River.

The underlying Liberty policy, to which the Illinois Union policy followed form, provided coverage for settlement of compensatory damages arising out of bodily injury or property damage, as well as for "civil fines, civil penalties, and civil assessments, and where allowable by law, punitive, exemplary or multiple damages for such 'bodily injury' and 'property damage.' " Doc. 1-1 at 15-16.

*5 The parties disagree over whether this coverage provision even requires a showing that a civil penalty was imposed "for such ... 'property damage.' " But assuming it does, the standard was satisfied. The jury was instructed that civil penalties were covered if they were imposed "as a result of property damage due to oil contamination," and the verdict form required the jury to make such a finding before reimbursing Coffeyville Resources for any civil penalty. The evidence was sufficient to permit the jury's finding that this penalty was in fact imposed for property damage. The circumstances of the release and the resulting EPA action provide a rational basis for concluding that the penalty was imposed because Coffeyville Resources's release of oil caused widespread property damage.

B. National Union.

1. Demolition costs. National Union asserts that the costs incurred by Coffeyville Resources in demolishing affected homes cannot qualify as "clean up costs" covered by National Union's policy. It points out that Coffeyville Resources purchased the homes prior to their demolition, and it argues that the policy provides no coverage for the insured's own property. It contends the jury's award of $7.2 million for clean up costs is not supported by evidence or is against the weight of the evidence. It further contends the court erred in instructing the jury on "third party property." It argues judgment as a matter in its favor or a new trial is warranted for the foregoing reasons.

The court instructed the jury that "clean up costs" referred to governmentally mandated costs necessary to clean up property belonging to any third party, and that "third party property" meant property owned by individuals or businesses other than the refinery "at the time of the oil release."

The court rejects the argument that Coffeyville Resources's purchase of the affected homes somehow destroyed existing insurance coverage for clean up costs. The court again finds that the relevant date for the "owned property" determination was the date of the oil release. As of that date the National Union policy provided coverage for Coffeyville Resources's legal obligation to remediate oil contamination on third party properties. It is true that the subsequent purchase of the homes was a voluntary decision by Coffeyville Resources, but National Union does not substantiate its argument that this act somehow destroyed the policy's existing coverage. Nothing in the policy says that coverage for clean up costs would be terminated in that event. Nor does National Union cite any case law finding coverage terminated under similar circumstances. (National Union would surely be singing a different tune if Coffeyville Resources had sold the refinery immediately after the spill, and then claimed insurance coverage for clean up costs because that property was "third party property.") Coffeyville Resources substantiated both the basis for the demolition of homes within the area of the spill and the cost of doing so, and the jury's inclusion of such costs within its award for "clean up costs" was not against the weight of the evidence.

2. Coast Guard Assessment. National Union also argues the jury's award of $7.2 million in clean up costs "was excessive and against the substantial weight of the evidence, because it included CRRM's $1,746,772 million settlement of the Coast Guard assessment claim" from an EPA lawsuit. The court agrees with Coffeyville Resources, however, that this argument is based upon speculation as to what costs or categories the jury found to be reimbursable as clean up costs. The court chose not to include Coffeyville Resources's expense categories on the verdict form or to require the jury to make findings as to those categories. That was largely due to defendants' objections that Coffeyville Resources's categories were subjective or slanted and did not correspond to the policy coverage provisions.

*6 Having asked the jury to determine reimbursement under the general coverage categories of the policies, rather than under Coffeyville Resources's particular expense categories, the court will not now go back and speculate as to what expense categories were or were not included in the jury's award for "clean up costs." While it is possible that the jury included the Coast Guard assessment in clean up costs, National Union's argument relies on guesswork (see Doc. 560 at 6) and provides no grounds for a new trial or for altering the judgment.

3. Admission of invoices and cost summary.
National Union argues the court's rulings and comments about Coffeyville Resources's invoices and cost summary constituted prejudicial error. Focusing on a particular comment by the court that it "may be the most important part of this case" for the jury to understand how Coffeyville Resources's expenses were organized, National argues that its substantial rights were prejudiced — even though it raised no contemporaneous objection to this comment at trial. It also claims prejudice from the fact that the court allowed the cost summary to go to the jury room and because the court ultimately admitted all of Coffeyville Resources's invoices into evidence. (Doc. 560 at 7-10).

These arguments are entirely unpersuasive. National Union clearly exaggerates the potential impact of a single comment by the court to the effect that it was vital for the jury to understand the evidence. (National Union neglects to mention the court's immediately ensuing comment: "I'm not suggesting how you ought to decide it;...")[2] Throughout this case the parties were largely unable to agree on any aspect of how to present the case to the jury, including whether Coffeyville Resources's expense categories should be considered and how the Liberty settlement and allocation should be taken into account. The court admonished the parties more than once that they had not given these questions adequate consideration, and said that "[i]f defendants intend to challenge the reasonableness of plaintiff's settlements, the jury will have to consider all of the circumstances for plaintiff's actions, including its explanation for developing the cost categories and its allocations of payments under those categories." Doc. 412 at 15. Prior to trial the court reiterated that "[r]egardless of the origin of plaintiff's cost categories, the jury will have to hear this evidence in context to gauge its relevancy. At this point the court

will simply say that in view of defendants' challenge to the reasonableness of the settlements made by plaintiff, plaintiff – like defendants – will be given a full opportunity to explain its position to the jury." Doc. 438 at 19. Of course, that's exactly what defendants did: challenge the reasonableness of the settlements.

It must have been obvious to all of the parties that the jury was going to need some means of tracking and organizing expenses by Coffeyville Resources that ran into the tens of millions of dollars. It would hardly be surprising if the jury chose to use Coffeyville Resources's cost categories and cost summary as guides for determining reimbursable expenses, given that defendants basically denied any responsibility for the expenditures and offered the jury no viable alternative. But neither that fact nor the court's ultimate admission into evidence of Coffeyville Resources's invoices caused National Union any unfair prejudice.

*7 National Union claims that, had it known the invoices were going to be admitted as substantive as opposed to demonstrative exhibits, it "would have structured its cross-examination differently" and would have spent more time cross-examining "as to the details of many specific invoices...." Doc. 560 at 9-10.

These gossamer allegations of prejudice are not persuasive. National Union provides no specific examples of additional cross-examination to support its claim. It alleges that it was unable to ask Coffeyville Resources which particular invoices were covered by the Liberty settlement, but it did in fact cross-examine Coffeyville Resources's witnesses about the substance of various invoices and about allocation of the Liberty payments. Its assertion that it was deprived of an opportunity to individually attack the thousands of invoices produced by Coffeyville Resources — invoices to which defendants have had access for years — is not accurate and is not grounds for a new trial.

A litigant " 'is entitled to a fair trial, but not a perfect one,' for there are no perfect trials." McDonough Power Equip., Inc. v. Greenwood, 464 U.S. 548, 533 (1984). National Union had a fair opportunity to present and argue its side of the case to the jury.

4. Testimony of Lee Ann Koch.

National Union next argues that the court erroneously allowed attorney Lee Ann Koch to offer previously undisclosed legal opinions at trial, which allegedly prevented National Union from adequately preparing to cross examine her regarding those opinions and "increas[ed] the likelihood that the jury would place more of CRRM's claimed costs into the cleanup costs category...." Doc. 560 at 12.

This assertion of prejudice is no more persuasive than the prior ones. As an initial matter, National Union has not made a credible showing that it was prevented from asking Koch about any particular topic during her pretrial interview.[3] Regardless of whether that interview degenerated into a debate between counsel as to what constituted an "opinion," insofar as the court can tell National Union could have asked Koch any substantive question it wanted concerning her representation of the refinery, including questions about the basis for Coffeyville Resources's settlement with the EPA. Nor does National make any real showing of prejudice from Koch's trial testimony, which, as Coffeyville Resources points out, was more akin to the testimony of a treating physician than a retained expert. National Union does not say why it could not effectively cross examine her. Instead it hypothesizes that some unspecified opinion by Koch influenced the jury's verdict. Such speculation does not warrant a new trial.

5. Exclusion of testimony regarding an IPO.

National Union argues it was prejudiced because the court sustained an objection to questions about an initial public offering (IPO) involving the refinery's parent company. National Union argues this evidence was relevant because it could have shown that the refinery wanted to quickly settle property damage claims so as not to interfere with the IPO, rather than because the claims had merit.

Even if evidence about an IPO by the refinery's parent company had some theoretical relevance to this case, the danger of confusion of the issues and wasting the jury's time warranted its exclusion. See Fed. R. Evid. 403. It was undoubtedly difficult enough for the jury to follow the parties' claims and arguments about settlements and cleanup expenses without wandering into the intricacies of an IPO. (Coffeyville Resources correctly pointed out that any evidence about the IPO would have opened the door for its own inquiry into defendants' motives for not

paying claims, including evidence that National's parent company AIG was on the verge of insolvency and had to take a government bailout.) National Union disagrees with the court's ultimate conclusion that evidence about the IPO was "a big, long rabbit trail," but that description was apt, for reasons explained by a Texas court:

> *8 The danger of "confusion of the issues" and "misleading the jury" arises when circumstantial evidence tends to sidetrack the jury into consideration of factual disputes only tangentially related to the facts at issue in the current case. The classic explanation of this danger comes from Dean Wigmore: "The notion here is that, in attempting to dispute or explain away the evidence thus offered, new issues will arise as to the occurrence of the instances and the similarity of conditions, [and] new witnesses will be needed whose cross examination and impeachment may lead to further issues." 2 John H. Wigmore, Evidence § 443, at 528–29 (Chadbourn rev.1979). In short, the evidence is a "rabbit trail."

Wiley v. State of Texas, 74 S.W.3d 399, 407, n.21 (Tex. Crim. App. 2002).

For the foregoing reasons, National Union and Illinois Union's motions for judgment as a matter of law and for new trial are denied.

III. Coffeyville Resources's Motion to Add Prejudgment Interest.

Coffeyville Resources contends it is entitled to prejudgment interest under K.S.A. § 16-201 and/or Lightcap v. Mobil Oil Corp., 221 Kan. 448, 562 P.2d 1 (1977). Doc. 553. It argues the amounts owed under the insurance policies were liquidated because they were ascertainable by mathematical computation as of the date that the settlement and expense invoices were sent to defendants. It says the dispute over flood-versus-oil damage did not "unliquidate" those amounts. Coffeyville Resources also points out that in closing arguments, one or both defendants essentially conceded the reasonableness of some of Coffeyville Resources's expenses, such as the Oil Pollution Act (OPA) settlements. Coffeyville Resources further argues that defendants' refusal to pay after the court made coverage determinations in 2010 means defendants have enjoyed the benefit of millions of dollars in settlements made by Coffeyville Resources, while Coffeyville Resources has been deprived of that money, and it contends an equitable award of prejudgment under Lightcap is warranted.

Standards for prejudgment interest.[4] Prejudgment interest in Kansas is governed by K.S.A. 16–201. The general rule is that prejudgment interest is allowable only on liquidated claims. A claim becomes liquidated when both the amount due and the date on which such amount is due are fixed and certain or when the same become definitely ascertainable by mathematical calculation. Owen Lumber Co. v. Chartrand, 283 Kan. 911, 925-26, 157 P.3d 1109 (2007). A good faith dispute over whether insurance coverage exists does not preclude a grant of prejudgment interest where the amount of the insured's damages are liquidated. See Owen Lumber Co., supra; Crawford v. Prudential Ins. Co. of America, 245 Kan. 724, 737, 783 P.2d 900 (1989); Friedman v. Alliance Ins. Co., Inc., 240 Kan. 229, 239, 729 P.2d 1160 (1986)(good faith dispute over coverage precluded an award of attorney's fees, but prejudgment interest was properly awarded where insurance company stipulated at trial that the amount of damages claimed was correct).

Kansas courts have also recognized an equitable exception to the general rule. This exception gives a district court discretion to award prejudgment interest on an unliquidated claim "when the defendant has had the use of the money, the plaintiff has been deprived of the use of the money, and the order is necessary to award full compensation." Farmers State Bank v. Production Credit Ass'n. of St. Cloud, 243 Kan. 87, 102, 755 P.2d 518 (1988) (citing Lightcap v. Mobil Oil Corp., 221 Kan. 448, 467-69, 562 P.2d 1, cert. denied, 434 U.S. 876 (1977)).

*9 Discussion. This case involves far more than a dispute over coverage for a clearly ascertainable amount of damages. As such, most of the Kansas cases cited by Coffeyville Resources are inapposite. For example in Hamilton v. State Farm Fire and Cas. Co., 263 Kan. 875, 883, 953 P.2d 1027 (1988), the court noted the dispute was solely about coverage and "there was really no dispute regarding damages in this case." Most of the other cases cited by Coffeyville Resources similarly involved an undisputed or readily ascertainable amount of damages. See also Edward Kraemer & Sons, Inc. v. City of Overland Park, 19 Kan.App.2d 1087, 1096, 880 P.2d 789

(1994) (the amount due for incentive pay was expressly set by contract based upon the number of days involved, which easily could be counted, so the amount due was a liquidated sum); Miller v. Botwin, 258 Kan. 108, 899 P.2d 1004 (1995) (amount of fee owed to an attorney was ascertainable under a contingency fee contract, which specified a percentage basis from a determinable date); Blair Const., Inc. v. McBeth, 273 Kan. 679, 44 P.3d 1244 (2002) ("because the promissory note was in writing and evidenced by a specific amount of indebtedness, the claim was liquidated"); Smart v. Hardware Dealers Mut. Fire Ins. Co., 181 F.Supp. 575 (D. Kan. 1960) ("the amount due the plaintiff was not disputed if it should be determined finally that the loss resulted from a covered risk").

The case of A.C. Ferrellgas Corp., Inc. v. Phoenix Ins. Co., 187 Kan. 530, 358 P.2d 786 (1961) is somewhat analogous to this case in that it involved two possible causes of property damage, one of which was covered by insurance and one of which was not, but again there was no real dispute as to the amount of damage sustained. (Moreover, the Ferrellgas opinion contained no discussion of prejudgment interest or the standard for awarding it.)

Another somewhat analogous case is Neustrom v. Union Pac. R. Co., 156 F.3d 1057 (10th Cir. 1998), involving an appeal from this court. In Neustrom, a Union Pacific employee brought a personal injury claim against Union Pacific, which in turn sought indemnification from the contractor whose actions caused the injuries. When the indemnitor-contractor failed to defend the injury claim, Union Pacific made a settlement with the employee and then sought indemnification from the contractor. This court granted Union Pacific's motion for indemnification of the settlement amount and also awarded prejudgment interest. In reviewing that ruling, the court of appeals said the settlement amount would be considered liquidated barring a showing that the settlement amount was unreasonable or was made in bad faith. Because the indemnitor did not make such a showing, the award of prejudgment interest was affirmed. Neustrom, 156 F.3d at 1067.

Returning to this case, the court would be hard-pressed to characterize Coffeyville Resources's multitude of settlements and expenses as a liquidated damages claim. As defendants point out, the jury rejected over $5 million in costs that Coffeyville Resources claimed were owed by Illinois Union and nearly $1 million in costs that it claimed were owed by National Union. To be sure, there were some settlement expenses that defendants did not really challenge at trial. Case law indicates it is appropriate to award prejudgment interest on such claims. See Royal College Shop, Inc. v. Northern Ins. Co. of N.Y., 895 F2d 670, 674 (10th Cir. 1990). But a substantial amount of the settlement expenses paid by Coffeyville Resources were challenged and were subject to conflicting proof on causation of damages. There were other variables as well potentially affecting the reasonableness of the Coffeyville Resources's payments, including the extent of damage to various properties, the correct fair market values of residential properties, and the need for environmental remediation of some of the properties. The jury ultimately awarded most of these claimed damages but reduced them by a not inconsequential degree — roughly 20% or so. Most of the claimed expenses were "hotly contested" and were not fixed or certain. Cf. Royal College Shop, 895 F.2d at 675. These factors distinguish Neustrom and the Kansas cases cited by Coffeyville Resources dealing with easily identifiable or readily calculable amounts due on a specific date. Cf. Miller, 258 Kan. at 120 ("If the contract is clear as to the method of fee calculation and as to the date the fees are due, the fees under the contract are liquidated."). But see Reynolds Metals Co. v. Alcan Inc., 2006 WL 1806186 (W.D. Wash. June 29, 2006) (settlement amounts were liquidated notwithstanding challenges). By and large, the expenses claimed by Coffeyville Resources were not liquidated. Cf.Fidelity & Deposit Co. of Maryland v. Hartford Cas. Ins. Co., 215 F.Supp.2d 1171, 1194 (D. Kan. 2002) (amount of property damage was not liquidated where it was disputed and could not be readily calculated).

***10** Notwithstanding that most of the damages were unliquidated, Kansas law provides some discretion to award prejudgment interest. As noted previously, it may be awarded "when the defendant has had the use of the money, the plaintiff has been deprived of the use of the money, and the order is necessary to award full compensation." Farmers State Bank v. Production Credit Ass'n. of St. Cloud, 243 Kan. 87, 102, 755 P.2d 518 (1988) (citing Lightcap v. Mobil Oil Corp., 221 Kan. 448, 467-69, 562 P.2d 1, cert. denied, 434 U.S. 876 (1977)).

Such an award is not available in a garden variety case of unliquidated damages, but it may be appropriate when "unusual circumstances" justify it. See Kearney v. Kansas Public Serv. Co., 233 Kan. 492, 505, 665 P.2d 757 (1983) ("There are no unusual circumstances in the present case which would justify prejudgment interest on the unliquidated claim of plaintiffs."); Fidelity & Deposit Co. of Maryland v. Hartford Cas. Ins. Co., 216 F.Supp.2d 1240, 1246 (D. Kan. 2002). An examination of the relevant factors persuades the court that some award of prejudgment interest is appropriate in this case.

The monies at issue here are the substantial sums paid out by Coffeyville Resources to settle claims arising from the oil release. Coffeyville Resources was clearly deprived of the use of that money after it was paid out. Conversely, defendants derived a benefit from it in the sense that they were able to retain and use an equivalent amount of their own funds, instead of indemnifying Coffeyville Resources for any settlements, for an extended period of time. Cf. Lightcap, 221 Kan. at 468 ("Interest has been defined as the compensation allowed by law or fixed by the parties for the use, detention, or forbearance of money.").

The equities of the case, and particularly the need to provide Coffeyville Resources with full compensation, balance in favor of an award of at least some prejudgment interest. Being deprived of the use of $27 million for up to seven years without receiving any contracted-for indemnification weighs in favor of some assessment of interest to adequately compensate Coffeyville Resources. This is an unusual (and, in this court's experience, unique) case in that Coffeyville Resources organized a rapid response to the spill and paid out a number of settlements fairly quickly — too quickly, as it turned out, for Coffeyville Resources's insurers. Litigation ensued, in which all parties sought a judicial determination on the order and extent of coverage. Judge Brown issued an extensive order on April 28, 2010, setting forth the parameters of coverage. Despite that, as Coffeyville Resources points out, defendants have provided no indemnification whatsoever, even for millions of dollars worth of expenses which they now more or less concede were reasonable in amount. Defendants' reasons for this, at best, are unclear. This was in essence the unfair retention of a benefit rightfully belonging to another.

The court does not fault defendants for seeking a judicial determination of coverage. Nor does it blame them (or Coffeyville Resources) for the lengthy litigation process. This was a complicated and unusual case. The primary factor favoring an award of interest here is simply the need to provide Coffeyville Resources with the full relief to which it is entitled under law. Cf. 22 Am.Jur.2d Damages § 476 ("Prejudgment interest is not a penalty but simply a cost of having the use of another person's money for a specified period; such interest is intended to indemnify successful plaintiffs for the nonpayment of what was due to them and is not meant to punish defendants.").

National Union argues an award of prejudgment interest is barred by Coffeyville Resources's "unclean hands." Doc. 572 at 13-14. It blames Coffeyville Resources for dilatory or excessive briefing and suggests that this prolonged the litigation. None of the parties can claim complete innocence on that score, however. If there was any issue in this case that wasn't briefed at considerable length at least two or three times, it was surely due to oversight rather than a lack of effort. National Union also contends Coffeyville Resources wanted to delay the litigation to increase the amount of prejudgment interest it could collect. But voicing a preference for a trial instead of another round of mediation (Doc. 572 at 13-14) is not evidence of bad faith and does not warrant a denial of prejudgment interest.

***11** Coffeyville Resources concedes the court has broad discretion in choosing a prejudgment interest accrual methodology. Doc. 579 at 4. Based on its discretion and the specifics of the case, the court determines that Coffeyville Resources's claim for prejudgment interest should be significantly limited. An award of over $15 million in prejudgment interest in these circumstances, as requested by Coffeyville Resources, would amount to an unjustified punitive sanction. In part that is because the Kansas fixed statutory rate of 10% interest for liquidated damages (K.S.A. § 16-201), which Coffeyville Resources used to calculate prejudgment interest, is far above recent market rates of interest on capital. It would be punitive given the exceptional circumstances of the case, which included massive damage caused by the oil release but also by flooding, and an unprecedented response by Coffeyville Resources in rapidly purchasing, destroying and remediating properties on a broad scale. From a community standpoint, that response was commendable. From an insurance standpoint, it created difficult and

debatable claims over coverage. Given the underlying dispute of how much damage was caused by the oil release and how much was due to the flood, there really was no definitive way to determine the reasonableness of the settlements — or the underlying factual question of how much damage was caused by the oil release — without submitting those issues to a jury. Notwithstanding Coffeyville Resources's expenditure of substantial sums, it would be inequitable under these circumstances to sanction defendants with 10% annual interest for the period it took to litigate these claims.

The extent of the court's discretion in these circumstances is not entirely clear. If it were limited to a stark choice between awarding the $15 million sought by Coffeyville Resources or granting no prejudgment interest at all, frankly the court would award none at all. A $15 million assessment is simply too great a sanction given the circumstances outlined above. Because "[c]onsiderations of fairness and traditional equitable principles are to guide the exercise" of the court's discretion (see Lightcap, 221 Kan. at 468), the court concludes it is appropriate here to effectively limit the applicable interest rate and the period over which prejudgment interest is payable. This reduction reflects the substantial degree to which the reimbursement owing was disputed and unliquidated, as well as limiting the rate of interest to an amount reasonably necessary to compensate Coffeyville Resources for the deprivation of its own funds prior to obtaining the judgment. Given the circumstances, simple interest at an annual rate of 3% is far more realistic and is sufficient to provide Coffeyville Resources with full compensation. Such a rate more accurately reflects the actual cost of capital and the return on a secure capital investment for the period in question, which was a period of historically low interest rates. [5]

While the court could require the parties to do a revised, complex calculation based on a reduced interest rate, the precision gained from such a detailed approach would add little or nothing to the equity of a more general approach.

In determining an appropriate award of prejudgment interest, the court concludes that the reduced interest rate indicated above should be applied to the approximately four-year period from when Judge Brown clarified the parameters of insurance coverage (see Doc. 311, Oct. 25, 2010) until the date of judgment. Using these factors as a guide for the amount of compensation that should be made, the court concludes that a single assessment of 12% [6] interest on the final judgment provides Coffeyville Resources with fair compensation for the deprivation of its own funds for the period before judgment. Accordingly, the court finds that the judgment should include an award of prejudgment interest in plaintiff's favor in the amount of $3,251,935 (12% of $27,099,465). Of this amount, $2,381,943 will be assessed to Illinois Union (12% of $19,849,532), and $869,992 will be assessed to National Union (12% of $7,249,933).

IV. Coffeyville Resources's Motion for Attorney's Fees.

*12 Coffeyville Resources next argues it is entitled to recover attorney's fees of $1.8 million under K.S.A. § 40-256. Doc. 555. It argues that the court's summary judgment rulings as well as the evidence at trial clearly showed that the policies provided coverage; that defendants relied on strained policy interpretations to deny payment and that they ignored the court's summary judgment rulings. Coffeyville Resources contends an award of attorney's fees is necessary to make it whole because it was unjustifiably forced to sue its insurers to collect payment.

Section 40-256 requires an allowance of attorney's fees if an insurer "has refused without just cause or excuse to pay the full amount of such loss,..." A refusal is without just cause or excuse if the denial of the claim "was frivolous, unfounded and 'patently without any reasonable foundation.' " Hartford Cas. Ins. Co. v. Credit Union 1 of Kansas, 268 Kan. 121, 131, 992 P.2d 800 (1999) (citing Clark Equip. Co. v. Hartford Accident & Indemn. Co., 227 Kan. 489, 494, 608 P.2d 903 (1980)). "A refusal of payment is not unfounded or frivolous if there exists a good faith legal controversy as to coverage or a bona fide and reasonable factual dispute." First Nat. Bank, Abilene, Tx. v. American States Ins. Co., 134 F.3d 382 (Table), 1998 WL 30246, *4 (10th Cir., Jan. 9, 1998) (citing Clark Equip. Co., 608 P.2d at 907)). Whether just cause exists is to be determined by the circumstances facing the insurer when payment is denied, judged as they would appear to a reasonably prudent person having a duty to investigate in good faith. Hartford Cas. Co., 268 Kan. at 131.

Judged against these standards, neither Illinois Union nor National Union refused without just cause or excuse to pay the full amount of the loss. In arguing

there was no good faith dispute, Coffeyville Resources cherry-picks portions of the court's prior orders finding coverage for certain categories of losses, but ignores other parts of the same orders showing there remained a number of genuine issues for trial. The degree to which settlement payments were due to flooding as opposed to oil damage, for example, was clearly the source of a good faith and reasonable factual dispute between the parties — one that permeated many of Coffeyville Resources's claimed expense categories. (Given Coffeyville Resources's reduction of personal property settlements by up to 50% to account for non-covered flood damage, defendants clearly had a good faith basis for rejecting Coffeyville Resources's claim that its real property settlements were attributable entirely to covered oil damage.) There were other good faith disputes as well, including the extent and proper classification of residential demolition payments and other claimed clean up expenses. The court is satisfied that the insurers' refusals to pay were the product of good faith legal controversies as to coverage or bona fide and reasonable factual disputes.

Illinois Union's duty to defend. Coffeyville Resources previously moved for a determination that Illinois Union breached a duty to defend it on the underlying claims. Doc. 419 at 1. The court took that issue under advisement, concluding it was a matter for post-trial determination. Doc. 438 at 17. (Although Coffeyville Resources did not raise that claim in its pleadings, it included assertions in the pretrial order that it was entitled to "[d]amages and costs associated with Illinois Union's breach of its duty to defend the oil release claims asserted against Coffeyville Resources," Doc. 476 at 7, including attorney's fees. Doc. 476 at 28.) None of Coffeyville Resources's post-trial motions, however, have raised the issue.

*13 For reasons previously outlined, see Doc. 438 at 15-17, the court finds that Illinois Union had a duty to defend Coffeyville Resources as of September 23, 2008, when the Illinois Union policy became primary coverage for the oil release. Illinois Union clearly failed to provide any defense at that point or thereafter. The uncontroverted facts on summary judgment and the evidence at trial thus show that Illinois Union breached a duty to defend Coffeyville Resources. Despite this failure, Coffeyville Resources has not articulated how it has suffered any additional uncompensated loss from the breach. Cf. Miller v. Westport Ins. Corp., 288 Kan. 27, 38, 200 P.3d 419, 426 (2009) (as a result of breach of duty to defend, plaintiff was entitled to recover its defense and settlement costs incurred as a consequence of the breach). The jury verdict obtained by Coffeyville Resources included the reasonable defense costs that Coffeyville Resources incurred in defending and settling the underlying claims covered by the Illinois Union policy. Coffeyville Resources has thus been compensated for the consequences of Illinois Union's failure to defend. Cf. 1 Allan D. Windt, Insurance Claims & Disputes § 4:35 (6th ed.) ("the only attorneys' fees that should be awarded are those that are incurred after the insurer's refusal to defend and that are actually attributable to defending the insured against the plaintiff's claims. The attorneys' fees incurred in ... suing the insurer are not normally compensable."). The attorney's fees now sought by Coffeyville Resources — i.e., those incurred in the instant case — are governed by K.S.A. § 40-256. Spruill Motors, Inc. v. Universal Underwriters Ins. Co. 212 Kan. 681, 689, 512 P.2d 403, 409 (Kan. 1973) ("In considering the issue of attorney fees in this action, ... we have a different situation. In this action the provisions of K.S.A. 40-256 ... must be applied."). For the reasons already stated the court concludes that defendants' refusals to pay were not without just cause or excuse. As such, the court denies Coffeyville Resources' request for attorney's fees.

V. National Union Motion for Sanctions.

National Union seeks sanctions against Coffeyville Resources for disclosing a settlement offer made by defendants in mediation. Illinois Union joins the motion. Coffeyville Resources disclosed the offer in its post-trial motion for attorney's fees as part of an effort to show that defendants had unjustifiably refused to pay what it owed under the policies. Doc. 555 at 2. Defendants contend this disclosure breached the confidentiality requirement of D. Kan. R. 16.3, and argue that Coffeyville Resources's motions for attorney's fees and for prejudgment interest should be denied as a sanction for the violation. (Citing Hand v. Walnut Valley Sailing Club, 475 Fed.Appx. 277, 2012 WL 1111137 (10th Cir. 2012) (affirming dismissal of case as sanction for disclosure of confidential mediation information)). [7]

District of Kansas local rule 16.3(i) provides, with certain exceptions, that all attorneys and parties involved in court-ordered mediation [8] must treat as "confidential

information" anything that happened or was said by a participant in the mediation, including any position taken by a party. Confidential information generally must not be disclosed to the trial judge. D. Kan. R. 16.3(i)(2). Exceptions to the rule allow, among other things, "disclosures as are otherwise required by law." D. Kan. R. 16(j)(6). See also 28 U.S.C. § 652(d) (requiring local rules to prohibit disclosure of confidential dispute resolution communications).

Coffeyville Resources responds that K.S.A. § 40-256 requires consideration of the tender amount made by an insurer, such that it triggers the exception in Rule 16.3 for disclosures required by law. It argues the local rule must be interpreted to allow disclosure of the settlement offer so as not to conflict with § 40-256 or with Fed. R. Evid. 408, which, according to Coffeyville Resources, permits evidence of settlement offers to be used to show the justification for an award of attorney's fees.

*14 The court need not decide here whether Coffeyville Resources's disclosure was a violation of the local rule. Even if it was, it would not merit the drastic sanctions requested by defendants. Cf. D. Kan. R. 16(c)(5) ("In appropriate circumstances, the court may impose sanctions pursuant to Fed.R.Civ.P. 16(f).")

To begin with, Coffeyville Resources has asserted at least a colorable claim of good faith for its disclosure based on the Kansas statute examining offers to pay and unjustified refusals to pay by insurance companies. Moreover, Coffeyville Resources has gained no unfair advantage from the disclosure, nor has the disclosure caused any discernible prejudice.[9] Regardless of the dollar amount of defendants' initial or subsequent offers in mediation, the court has determined that Coffeyville Resources's motion for attorney's fees under § 40-256 should be denied because there were good faith legal and factual disputes behind defendants' refusal to pay the claims in full. Defendants' request for denial of the foregoing motion as a sanction is therefore moot. As for defendants' further request to deny Coffeyville Resources's motion for prejudgment interest as a sanction, the disclosure by Coffeyville Resources likewise in no way affected the court's analysis or conclusion on that motion. Defendants have not, and cannot, show that a denial of the latter motion would be a proportional sanction for a disclosure that, as far as the court is concerned, was not made in bad faith and had absolutely no effect on my decision.

Lastly, National Union's request to recover its attorney's fees incurred in filing the instant motion is likewise denied. The court denied Coffeyville Resources's request for attorney's fees based on the existence of a good faith dispute and the same principle warrants denial of National Union's request. In fact, defendants' request for sanctions has done little more than waste everyone's time arguing about a peripheral matter when the case cries out for a final resolution on the merits.

VI. Conclusion.

All parties' Motions for Judgment as a Matter of Law or for New Trial (Docs. 534, 536, 538, 556, 558, and 559) are denied.

Coffeyville Resources's Motions to Add Prejudgment Interest (Docs. 444, 552) are granted. The court will direct the entry of an amended judgment that includes the prejudgment interest authorized by this order.

Coffeyville Resources's Motions for Attorney's Fees (Docs. 448, 554) are denied.

Defendants' Motions for Sanctions (Docs. 571, 573) are denied.

Coffeyville Resources's Motion in Limine to admit a revised cost summary (Doc. 522) was previously granted.

No motions to reconsider this order shall be filed. The court will not revisit any ruling made in this case. To the extent any of the parties feel aggrieved by any of the court's rulings in this case, their relief lies with the Tenth Circuit.

IT IS SO ORDERED.

Dated this 25th day of February 2015, at Wichita, Kansas.

All Citations

Not Reported in Fed. Supp., 2015 WL 11090388

Footnotes

1 In view of this finding the court need not consider Coffeyville Resources's contention that Illinois Union waived any such defense by failing to defend Coffeyville Resources. Doc. 565 at 8.

2 Nor does National Union mention the instruction to the jury that "neither in these instructions, nor in any ruling, action or remark that I have made during the course of this trial have I intended to express any opinion or suggestions as to how I would resolve any of the issues of this case. If I have made any ruling, action or remark that you believe indicates how I would decide this case, I instruct you to disregard it." Doc. 543 at 24 (Instruction No. 20).

3 National Union's true complaint is that the court refused its demand to depose Koch and instead authorized an interview.

4 Coffeyville Resources's motion is technically asserted under Fed. R. Civ. P. 59(e), because the court entered a judgment immediately upon receipt of the verdict. See Doc. 546. Although grounds for review under Rule 59(e) are ordinarily quite narrow (see Servants of Paraclete v. Does, 204 F.3d 1005 (10th Cir. 2000)), in this instance the court deferred the issues of prejudgment interest and attorney's fees until after entry of the foregoing judgment.

5 Cf. Farmer's State Bank v. Prod. Credit Ass'n. Of St. Cloud, 243 Kan. 87, 755 P.2d 518 (1988). In Farmer's State Bank, the trial court awarded prejudgment interest at a rate of up to 15%, relying on the statute for post-judgment interest. The Kansas Supreme Court reduced the award to the 10% statutory rate in K.S.A. § 16-201, saying that was the "correct statutory rate."

The court nevertheless concludes that Farmer's State Bank does not prohibit consideration of all the circumstances in making a Lightcap award, and that Kansas law allows the district court to limit prejudgment interest to an amount necessary to provide just compensation under the circumstances. Cf Restatement (First) of Restitution § 156 (1937) (person who has a duty to pay the value of a benefit received is under a duty to pay interest if "payment of interest is required to avoid injustice.")

6 Four years x 3%.

7 The glaring factual dissimilarities between Hand and this case make it a poor platform for defendants' argument. In Hand the plaintiff sent a pretrial email to all forty-four members of a sailing club he was suing — many of whom were likely witnesses in the case — and disclosed all of the details of the mediation, including the comments of the mediator, as well as disparaging the club's settlement offer, for no better reason than he believed club members "had a right to know." Hand, 475 Fed.Appx. at 278-79.

8 The undersigned judge did not order, and would not have ordered, mediation. Mediation has value only when the attorneys and parties pursue it voluntarily and with a common expectation that it may help them resolve their differences. It is very apparent from the way this case has been, and continues to be, conducted that no such expectation ever existed.

9 Defendants' counsel are indeed uninformed if they believe that the dollar amounts of offers carry weight with this court in this kind of case.