Not Reported in F.Supp.2d, 2004 WL 2958458 (D.Kan.)
(Cite as: 2004 WL 2958458 (D.Kan.))

HOnly the Westlaw citation is currently available.

United States District Court,
D. Kansas.
FARMLAND INDUSTRIES, INC. Plaintiff,
v.
NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PENNSYLVANIA, et al., Defendants,
No. Civ.A. 02-4135.

Dec. 16, 2004.

Lee M. Smithyman, Smithyman & Zakoura, Chtd., Overland Park, KS, for Plaintiff.

Christopher F. Burger, Peter K. Curran, Stevens & Brand, L.L.P., Lawrence, KS, Ethan V. Torrey, Matthew M. Burke, Ropes & Gray, Boston, MA, for Defendants.

MEMORANDUM AND ORDER DENYING MOTION TO RECONSIDER

ROBINSON, J.

***1** This matter is before the Court on plaintiff **Farmland Industries**, Inc.'s Motion to Reconsider Order Denying Summary Judgment (Doc. 43). Plaintiff filed a Motion for Summary Judgment (Doc. 29) and defendants filed a Cross-Motion for Summary Judgment (Doc. 33). This Court denied both motions by Order dated August 27, 2004 (Doc. 43). Plaintiff asks the Court to reconsider its Order denying plaintiff's Motion for Summary Judgment. For the reasons set forth below, plaintiff's motion is denied.

Plaintiff seeks reconsideration of the Court's Order denying summary judgment pursuant to Federal Rules of Civil Procedure 59(e). A motion to alter or amend judgment pursuant to Rule 59(e) may be granted only if the moving party can establish: (1) an intervening change in the controlling law; (2) the availability of new evidence that could not have been obtained previously through the exercise of due diligence; or (3) the need to correct clear error or prevent manifest injustice.[FN1] A losing party should not use a motion for reconsideration as a vehicle to rehash arguments previously considered and rejected.[FN2] Nor does a party's failure to present its strongest case in the first instance entitle it to a second chance in the form of a motion for reconsideration.[FN3] The decision to grant or deny a motion for reconsideration is committed to a court's discretion.[FN4]

FN1. *Servants of Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir.2000).

FN2. *Voelkel v. Gen. Motors Corp.*, 846 F.Supp. 1482, 1483 (D.Kan.1994).

FN3. *Sac & Fox **Nation** of Missouri v. LaFaver*, 993 F.Supp. 1374, 1375-76 (D.Kan.1998).

FN4. *Brown v. Presbyterian Healthcare Servs.*, 101 F.3d 1324, 1332 (10th Cir.1996); *cert. denied* 520 U.S. 1181, 117 S.Ct. 1461, 137 L.Ed.2d 564 (1997).

When supplementing a Rule 59(e) motion with additional evidence, the movant must show either that the evidence is newly discovered or, if the evidence was available at the time of the decision being challenged, that counsel made a diligent yet unsuccessful effort to discover the evidence.[FN5] Merely claiming that one did not previously know the importance of the evidence is not sufficient to support a motion to reconsider.[FN6]

FN5. *See Webber v. Mefford*, 43 F.3d 1340, 1345 (10th Cir.1994).

FN6. *See id.*

Plaintiff bases its request for reconsideration on newly discovered evidence. Plaintiff attaches to its motion the following exhibits: a letter from Mountain Energy Corporation to Terra Nitrogen Corporation; a Manchester Gas Storage Facility Injection/Withdrawal Schedule; Rod Donovan's September 24, 2003 deposition testimony; Michael Eichenberg's September 24, 2003 deposition testimony; an invoice from Mountain

Energy Corporation to **Farmland**; an invoice from Mountain Energy Corporation to Tenaska Marketing Ventures; and Eichenberg's affidavit dated September 8, 2004. With the exception of Eichenberg's affidavit, all of the evidence proffered is not newly discovered evidence, but rather was previously available to plaintiff. Indeed, plaintiff relied upon the deposition testimony of Donovan and Eichenberg in support of its motion for summary judgment. The documentary exhibits were likewise previously available. Even plaintiff admits that this evidence was generated during "pretrial discovery." That plaintiff did not realize the importance of these documents until after the Court issued its summary judgment ruling does not transform otherwise previously available evidence into newly discovered evidence.

***2** Plaintiff also proffers Eichenberg's affidavit. The affidavit is new in the sense that plaintiff did not seek the affidavit until after the Court's summary judgment ruling. However, plaintiff's belated attainment of the affidavit is not newly discovered evidence, because plaintiff could have obtained the affidavit prior to the Court's decision. Plaintiff has not even attempted to show that it previously made a diligent yet unsuccessful effort to discover the affidavit. Nor could plaintiff make such a showing; Eichenberg was deposed prior to the summary judgment motion. In fact, the affidavit references and reiterates portions of Eichenberg's deposition testimony. Thus, Eichenberg's testimony was clearly available to plaintiff at the time it submitted its summary judgment motion; that plaintiff did not previously seek the affidavit is not a proper basis for the Court to reconsider its ruling and plaintiff's motion must be denied.

IT IS THEREFORE ORDERED BY THE COURT that Plaintiff's Motion to Reconsider (Doc. 43) is denied.

IT IS SO ORDERED.

D.Kan.,2004.
Farmland Industries, Inc. v. National Union Fire Ins. Co. of Pittsburgh, Pennsylvania
Not Reported in F.Supp.2d, 2004 WL 2958458 (D.Kan.)

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359 F.Supp.2d 1144
(Cite as: 359 F.Supp.2d 1144)

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United States District Court,
D. Kansas.
FARMLAND INDUSTRIES, INC., Plaintiff,
v.
NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, Pennsylvania, et al., Defendants.
No. 02-4135-JAR.

March 3, 2005.

Background: Insurers sought summary judgment on the issue of quantification of insured's damages for lost natural gas under all risk policy.

Holdings: The District Court, Robinson, J., held that:
(1) policy provision pertaining to "petroleum products other than crude petroleum" provided the basis for settlement for lost natural gas;
(2) policy provided that the basis of settlement for lost natural gas was the market value at the time of loss, regardless of whether the price of natural gas increased or decreased after the time of loss; and
(3) time of loss was time when the gas had been converted, rather than when insured discovered, investigated and verified the loss through an audit.

Motion granted.

West Headnotes

[1] Insurance 217 2181

217 Insurance
217XVI Coverage--Property Insurance
217XVI(A) In General
217k2180 Valuation
217k2181 k. In General. Most Cited Cases
All risk policy provision pertaining to "petroleum products other than crude petroleum" provided the basis for settlement for lost natural gas, despite insured's contention that its natural gas loss fell under the valuations of loss for "real and personal property," or "raw stock, supplies or other merchandise not manufactured by the insured."

[2] Insurance 217 2090

217 Insurance
217XV Coverage--in General
217k2090 k. In General. Most Cited Cases
Court may not use its inventive powers to rewrite an insurance policy to provide coverage for which the parties never contracted, absent a statute or public policy requiring coverage.

[3] Insurance 217 2105

217 Insurance
217XV Coverage--in General
217k2105 k. Amount of Coverage; Policy Limits. Most Cited Cases
Damages pursuant to an insurance contract are not analogous to damages in tort; it is the express contractual provisions, not a tort theory, which provides the appropriate damage valuation.

[4] Insurance 217 2181

217 Insurance
217XVI Coverage--Property Insurance
217XVI(A) In General
217k2180 Valuation
217k2181 k. In General. Most Cited Cases

Insurance 217 2185

217 Insurance
217XVI Coverage--Property Insurance
217XVI(A) In General
217k2184 Repair or Replacement
217k2185 k. In General. Most Cited Cases
All risk policy provided that the basis of settlement for lost natural gas was the market value at the time of loss, regardless of whether the price of natural gas increased or decreased after the time of loss; to allow insured to recover under a replacement cost valuation simply because the price of natural gas was fluid, when the policy expressly provided for a market value at the time of loss basis of settlement, would be inequitable.

359 F.Supp.2d 1144
(Cite as: 359 F.Supp.2d 1144)

[5] Insurance 217 2181

217 Insurance
217XVI Coverage--Property Insurance
217XVI(A) In General
217k2180 Valuation
217k2181 k. In General. Most Cited Cases
Under all risk policy provision establishing basis of settlement for lost natural gas as the market value at the time and place of the loss, time of loss was time when the gas had been converted, rather than when insured discovered, investigated and verified the loss through an audit.

[6] Evidence 157 448

157 Evidence
157XI Parol or Extrinsic Evidence Affecting Writings
157XI(D) Construction or Application of Language of Written Instrument
157k448 k. Grounds for Admission of Extrinsic Evidence. Most Cited Cases

Insurance 217 1854

217 Insurance
217XIII Contracts and Policies
217XIII(G) Rules of Construction
217k1854 k. Usage of Trade or Business. Most Cited Cases
Only when an ambiguity exists under insurance policy may a court resort to extrinsic evidence, such as industry custom, to show intent.

***1145 Lee M. Smithyman, Smithyman & Zakoura, Chtd.,** Overland Park, KS, for Plaintiff.

Christopher F. Burger, Peter K. Curran, Stevens & Brand, L.L.P., Lawrence, KS, Ethan V. Torrey, Matthew M Burke, Ropes & Gray, Boston, MA, for Defendants.

MEMORANDUM ORDER AND OPINION GRANTING MOTION FOR SUMMARY JUDGMENT AND DENYING MOTION FOR HEARING

ROBINSON, District Judge.

This matter comes before the Court on defendants' Motion for Summary Judgment (Doc. 49). Defendants National Union Fire Insurance Company of Pittsburgh, Pennsylvania; Qatar General Insurance and Reinsurance Company; Certain Underwriters at Lloyd's of London; ***1146** Gerling Konzern Allgemeine Versicherungs-AG; and Allianz Insurance Company (collectively "the Insurers") seek summary judgment on the discrete issue of quantification of plaintiff **Farmland Industries**, Inc.'s (" **Farmland**") damages. In turn, **Farmland** has requested oral argument on the Insurers' motion (Doc. 67). For the reasons set forth below, the Insurer's Motion for Summary Judgment is granted, and **Farmland's** Motion for Oral Argument is denied.[FN1]

FN1. Pursuant to District of Kansas Local Rule 7.2, "requests for oral argument on motions shall be granted only at the discretion of the court.... Otherwise, motions shall be submitted and determined on the written memoranda of the parties." In this instance, oral argument on the Motion for Summary Judgment is unnecessary, particularly considering that Farmland was granted leave to file a sur-reply, ostensibly to respond to arguments made for the first time in the Insurers' reply brief. Moreover, the Court notes that to the extent Farmland's sur-reply rebuts arguments made by the Insurers in their original summary judgment memorandum, the sur-reply goes beyond the purpose for which it was allowed and constitutes an impermissible "second bite at the apple."

I. Uncontroverted Facts [FN2]

FN2. Because a detailed factual account was set forth in the Court's *Memorandum Order Denying Motion for Summary Judgment and Denying Cross Motion for Summary Judgment* (Doc. 43), the Court includes only those facts relevant to the issue of quantification of damages.

Prior to April 5, 2000, Mountain Energy Corporation ("MEC") purchased from Terra Nitrogen Corporation 1.5 bcf of physical natural gas (the "Terra gas"). At that time, the Terra gas was located in a storage facility owned by Manchester Gas Storage, Inc. ("Manchester") and managed by MEC. On or about April 5, 2000, Farmland entered into a transaction with MEC for .5 bcf of the Terra gas. At the same time as the Farmland transaction, MEC entered into a virtually identical transaction with Tenaska Marketing Ventures ("Tenaska") for .5 bcf of the Terra gas.

Sometime in early April of 2000, MEC committed to withdraw 635,000 MMBtu of the Terra gas on a ratable basis over the month of April for sale to its customers in the Kansas City area. MEC's Kansas City supply customers received this gas on a ratable basis of 20,000 MMBtu per day, beginning on April 1. On April 17, 2000, Manchester advised MEC that it would not permit MEC to remove the Terra gas from the storage facility. After Manchester's refusal, MEC sold the remainder of the Terra gas to Anadarko Energy Services Company ("Anadarko") in May 2000.

Section I.4B of the insurance policy governing this dispute ("the Policy") titled "Basis of Settlement" provides:

> In the event of claim for loss to crude petroleum, the basis of settlement shall be the posted market price thereof on the date of the loss, plus the gathering and transportation charges to include also, where crude petroleum is delivered in railroad tankers, cars, tank ships or tank trucks, loading and unloading charges, if incurred, plus earned freight revenue, and *in the event of claim for loss or damage to other petroleum products, the basis of settlement shall be the market value thereof at the time and place of loss.* [FN3]

FN3. Emphasis added.

The Inside FERC WNG Index provides the market value of natural gas. According to the Inside FERC WNG Index, the market value of natural gas was $2.79/MMBtu on April 30, 2000, and $2.94/MMBtu on May 31, 2000.

II. Summary Judgment Standard

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories,***1147** and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." [FN4] The requirement of a "genuine" issue of fact means that the evidence is such that a reasonable jury could return a verdict for the nonmoving party.[FN5] Essentially, the inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." [FN6]

FN4. Fed.R.Civ.P. 56(c).

FN5. *See* *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

FN6. *Id.* at 251-52, 106 S.Ct. 2505.

The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact. This burden may be met by showing that there is a lack of evidence to support the nonmoving party's case.[FN7] Once the moving party has properly supported its motion for summary judgment, the burden shifts to the nonmoving party to show that there is a genuine issue of material fact left for trial.[FN8] "A party opposing a properly supported motion for summary judgment may not rest on mere allegations or denials of [its] pleading, but must set forth specific facts showing that there is a genuine issue for trial." [FN9] Therefore, the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment.[FN10] The Court must consider the record in the light most favorable to the nonmoving party. [FN11] The Court notes that summary judgment is not a "disfavored procedural shortcut"; rather, it is an important procedure "designed to secure the just, speedy and inexpensive determination of every action." [FN12]

FN7. *See* *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

FN8. *See* *Anderson*, 477 U.S. at 256, 106 S.Ct. 2505.

FN9. *Id.*

FN10. *See id.*

FN11. *See* *Bee v. Greaves*, 744 F.2d 1387, 1396 (10th Cir.1984), *cert. denied*, 469 U.S. 1214, 105 S.Ct. 1187, 84 L.Ed.2d 334 (1985).

FN12. *Celotex*, 477 U.S. at 327, 106 S.Ct. 2548 (quoting Fed.R.Civ.P. 1).

III. Discussion

The Insurers argue that summary judgment is appropriate because under the Policy, the basis of settlement for any

loss of petroleum products other than crude petroleum is the "market value thereof at the time and place of loss." Since the loss took place no later than the end of April 2000 as to 0.135 bcf and no later than the end of May 2000 as to 0.365 bcf, the Insurers' assert that Farmland's loss should be valued at $2.79/MMBtu and $2.94/MMBtu, respectively. In response, Farmland asserts that the Policy valued the gas not at the time of loss, but instead at the time of replacement, and thus its loss should be valued at $5.19/MMBtu, the value of natural gas in October 2000. Additionally, Farmland urges that it was not "actually damaged" until October 2000, when the loss was discovered, investigated and verified, such that the loss should be valued according to October 2000 market prices.

A. Basis for Settlement under the Policy

[1] The parties disagree over which provision of the Policy provides the measure***1148** of damages for lost natural gas. The Insurers contend that section I.4B of the Policy pertaining to "petroleum products other than crude petroleum" provides the basis for settlement, while Farmland contends that its natural gas loss falls under the valuations of loss for "real and personal property," or "raw stock, supplies or other merchandise not manufactured by the Insured." Alternatively, Farmland urges that the Policy provisions are ambiguous.

"Rules governing the interpretation of insurance policies are well settled." [FN13] In interpreting an insurance contract, courts "read the contract as a whole and determine the intent of the parties, giving effect to that intent by enforcing the contract as written." [FN14] Language used in an insurance contract is given its plain and ordinary meaning.[FN15] Plain or ordinary meaning is the meaning that the average layperson would understand, as determined by consulting standard English language dictionaries.[FN16] Where insurance contracts are written in plain and unambiguous terms, the court must enforce the policy according to those terms,[FN17] and rules of construction are inapplicable.[FN18] The Court may not distort unambiguous policy language to create an ambiguity.[FN19] Nor may a court "use its inventive powers to ... rewrite a policy to provide coverage for which the parties never contracted, absent a statute or public policy requiring coverage." [FN20]

FN13. *Shahan v. Shahan*, 988 S.W.2d 529, 535 (Mo.1999) (en banc).

FN14. *Mo. Employers Mut. Ins. Co. v. Nichols*, 149 S.W.3d 617, 625 (Mo.App.2004).

FN15. *Id.*; *Farmland Indus. Inc. v. Republic Ins. Co.*, 941 S.W.2d 505, 508 (Mo.1997) (en banc).

FN16. *Shahan*, 988 S.W.2d at 535.

FN17. *Rice v. Fire Ins. Exch.*, 946 S.W.2d 40, 42 (Mo.App.1997).

FN18. *Mansion Hills Condo. Ass'n v. Am. Family Mut. Ins. Co.*, 62 S.W.3d 633, 637 (Mo.App.2001).

FN19. *Am. Motorists Ins. Co. v. Moore*, 970 S.W.2d 876, 878 (Mo.App.1998) (citing *Krombach v. Mayflower Ins. Co.*, 827 S.W.2d 208, 210 (Mo.1992) (en banc)).

FN20. *Lang v. Nationwide Mut. Fire Ins. Co.*, 970 S.W.2d 828, 830 (Mo.App.1998) (citing *Rodriguez v. Gen. Accident Ins. Co.*, 808 S.W.2d 379, 382 (Mo.1991) (en banc)).

In this case, the Policy unambiguously provides for a measure of damages for lost natural gas in section I.4B. Section I.4B states that "in the event of claim for loss or damage to other petroleum products [other than crude], the basis of settlement shall be the market value thereof at the time and place of the loss." Petroleum is commonly defined as: "[a] naturally occurring complex liquid hydrocarbon which after distillation yields combustible fuels, petrochemicals, and lubricants; can be gaseous (*natural gas*), liquid (crude oil, crude petroleum), solid (asphalt, tar, bitumen), or a combination of states." [FN21] Thus, according "petroleum" its plain and ordinary meaning, natural gas is clearly a petroleum product, making the appropriate measure of damages the market value of the natural gas at the time and place of the loss.

FN21. MCGRAW-HILL DICTIONARY OF SCIENTIFIC AND TECHNICAL TERMS 1569 (6th ed.2003) (emphasis added); *see also* THE AMERICAN HERITAGE COLLEGE DICTIONARY 1041 (4th ed.2002) (defining petroleum as: "[a] thick, flammable, yellow-to-black mixture of gaseous, liquid, and solid hydrocarbons that occurs naturally beneath the earth's surface, can be separated into fractions including

natural gas, gasoline, naphtha, kerosene, fuel and lubricating oils, paraffin wax, and asphalt and is used as raw material for a wide variety of derivative products.").

***1149** Moreover, the Policy itself demonstrates that natural gas was a "petroleum product," as that term is used in section I.4B. In an exclusion section of the Policy, the parties agreed that: "[t]his section does not cover ... [s]ubterranean strata except coverage is provided for *crude petroleum and its products including but not limited to natural gas* and other minerals while stored in strata of any nature after initial recovery above ground unless otherwise provided under this policy." [FN22] The Court therefore concludes that, based upon a plain reading of the four corners of the Policy, natural gas is a petroleum product.

FN22. Emphasis added.

Even though natural gas falls squarely within the purview of petroleum products covered in section I.4B of the Policy, Farmland urges that its lost natural gas must be valued according to the personal property or raw stock Policy provisions, both of which measure damages based upon the cost of replacement. Such a valuation, according to Farmland, is necessary as it furthers "the overarching intent of the Basis of Settlement provisions ... to fully reimburse the insured through cost of replacement." Thus, Farmland contends that the market value basis of settlement for damages to petroleum products, such as natural gas, is inconsistent with the Policy as a whole and is contrary to the stated intention to fully indemnify the insured.

[2] The presence of a different damage valuation for losses to petroleum products, as compared with other risks insured under the Policy, does not aid Farmland's proffered contract interpretation. "In construing a contract, [courts] assume that the use of different language to define different obligations was deliberate and accompanied by an intention to convey different meanings rather than the same one." [FN23] Here, the presence of both a valuation based upon the market value at the time of loss and the cost of replacement merely suggests that the parties contracted for different measures of damages depending upon the type of risk insured. In the case of a petroleum product like natural gas, the parties agreed that the basis of settlement would be the market value at the time and place of the loss, not the cost of replacement. Only by impermissibly rewriting the Policy to provide additional coverage could the Court find that Farmland's damages should be measured by the cost of replacement natural gas.[FN24]

FN23. *Mo. Pac. R. Co. v. Winburn Tile Mfg. Co.*, 461 F.2d 984, 988-89 (8th Cir.1972); *Taracorp, Inc. v. NL Indus., Inc.*, 73 F.3d 738, 744-45 (7th Cir.1996) ("[W]e assume that the same words have the same meaning ... and that the choice of substantially different words to address analogous issues signals a different approach.").

FN24. The Court may not "use its inventive powers to ... rewrite a policy to provide coverage for which the parties never contracted, absent a statute or public policy requiring coverage." *Lang*, 970 S.W.2d at 830 (citation omitted).

[3] Farmland also implores the Court to value its damages on a replacement cost basis under fraud, bailment, or conversion law. Damages pursuant to an insurance contract are not analogous to damages in tort. [FN25] In this case, it is the express contractual provisions, not a tort theory, which provides the appropriate damage valuation. Thus, notwithstanding the damage valuation under fraud, bailment or ***1150** conversion law, the basis of settlement, as set forth in the Policy, is the market value at the time and place of the loss.

FN25. *See Self Towing, Inc. v. Brown Marine Servs., Inc.*, 837 F.2d 1501, 1506 (11th Cir.1988) (noting that the tort law standard for a damage award difference from the insurance law standard); *Arnold v. Liberty Mut. Ins. Co.*, 469 So.2d 1155, 1157-58 (La.App.1985) (rejecting authorities cited by defendant because "all such cases ... were dealing with tort claims in which the measure of damages is different from that established by the Insurance Code").

[4] In yet another attempt to avoid the express contractual provisions, Farmland urges that it is inequitable to value its natural gas as of the time of the loss, rather than at the time of replacement, because natural gas is subject to price fluctuations. In *Hartford Fire Insurance Co. v. Producer's Gin of Hernando, Inc.*,[FN26] the insured sought indemnity for destroyed cotton under an insurance policy, which required indemnification for the "actual cash value of the property at the time of the loss." [FN27] The price of cotton like the price of natural gas fluctuated over time. In holding that the insurance policy fixed liability as of the date of loss, the court stated:

FN26. 326 So.2d 807 (Miss.1976).

FN27. *Id.* at 810.

Had the cotton decreased in value from 30 cents per pound from [the] time of sale to 20 cents per pound at [the] time of loss, defendants could have logically argued that their liability was limited to the terms of the policies: cash value at the time of the loss. The policy terms also govern the liability of defendants in the event of an increase in the value of the cotton from [the] time of sale to [the] time of loss: cash value at the time of loss.[FN28]

FN28. *Id.*

Similarly, in this case, the insurance policy provides that the basis of settlement for petroleum products is the market value at the *time of loss*, regardless of whether the price of natural gas increases or decreases after the time of loss. To allow Farmland to recover under a replacement cost valuation simply because the price of natural gas is fluid, when the Policy expressly provides for a market value at the time of loss basis of settlement, would be truly inequitable.

Finally, the Court observes that Farmland has previously admitted that the basis of settlement set forth in section I.4B of the Policy governs this dispute. In its amended complaint, Farmland quantified its damages and stated: "[t]his sum constituted the market value of the natural gas at the time and place of the loss, as that loss is computed in paragraph I(4) of the ALL RISK POLICY." [FN29] As a general rule, a party is bound by allegations or admissions of fact in his own pleadings.[FN30] By parroting the language of section I.4B and by expressly alleging that the basis of settlement is the market value at the time and place of the loss, Farmland is estopped from now denying that section I.4B provides the appropriate damage valuation.

FN29. The Court notes that Farmland's original complaint, included this identical statement, but cited more precisely to section I(4)(B) of the Policy, rather than to section I(4) generally. Farmland subsequently sought leave to amend its complaint to: "(1) Reflect Farmland's bankruptcy, change of name to Reorganized FLI, Inc., and transfer of its cause of action to J.P. Morgan Trust Company, N.A., the Liquidating Trustee of FI Liquidating Trust; and (2) Substitute reference to V.A.M.S. § 375.420 and V.A.M.S. § 408.020 for their corresponding Kansas Statutes." (Doc. 53). Magistrate Judge Humphreys granted Farmland's motion to amend on these two grounds. *See* Doc. 61. In an apparent attempt to amend its damages valuation, Farmland now cites only to section I(4). Farmland, however, was not granted leave to amend its request for damages. Thus, this amendment is unauthorized and is hereby stricken. *See Ambrose Packaging, Inc. v. Flexsol Packaging Corp.*, No. 04-2162, 2004 WL 2075457, at *3 (D.Kan. Sept. 16, 2004) (striking an unauthorized amendment).

FN30. *E.g.*, *Buatte v. Gencare Health Sys., Inc.*, 939 S.W.2d 440, 443 (Mo.App.1996).

***1151 B. Time of Loss**

[5] Pursuant to the Policy, the basis of settlement for **Farmland's** lost natural gas is the market value at the time and place of the loss. The Insurers assert that the time of loss is April and May 2000. **Farmland**, on the other hand, urges that the time of loss is October 2000-the date it was actually damaged and discovered the loss. Lastly, **Farmland** asserts that it is customary in the **industry** to value lost natural gas after an investigation of the loss. Missouri courts look to injury or damage in fact to determine the time of any alleged loss.[FN31] The time of the occurrence of an event within the meaning of an indemnity policy is not the time the wrongful act was committed but the time when the complaining party was actually damaged. [FN32]

FN31. *See Indep. Petrochemical Corp. v. Aetna Cas. & Sur. Co.*, 672 F.Supp. 1, 3 (D.D.C.1986) (noting that Missouri law applies an injury in fact trigger).

FN32. *Am. Family Mut. Ins. Co. v. McMullin*, 869 S.W.2d 862, 864 (Mo.App.1994) (citing *Kirchner v. Hartford Accident & Indem. Co.*, 440 S.W.2d 751, 756 (Mo.App.1969)).

Farmland argues that it was not actually damaged until October 2000, when it was "denied its contractual entitlement" to natural gas by MEC's failure to deliver the gas. To support this contention, Farmland directs the Court to the Insurers' arguments in a prior summary judgment brief, in which the Insurers argued that the gas was not covered by the Policy because Farmland possessed only a contract right to delivery of the gas, rather than physical

natural gas itself. In response, Farmland characterized the Insurers assertion as "remarkable" and emphasized that it purchased gas in April, that the gas was present in the facility and that the agreement with MEC was merely "a storage commitment." The Court, in its Order, agreed with Farmland and concluded that "the contracting parties' intent demonstrates that Farmland purchased 500,000 MMBtu of existing physical natural gas from MEC, not a bare contract right to later delivery." This ruling is law of the case and Farmland may not now argue that it possessed only a contract right to delivery of the gas.[FN33] Because Farmland owned physically existing gas in April, it was actually damaged when its gas was converted by MEC.

FN33. *See McIlravy v. Kerr-McGee Coal Corp.*, 204 F.3d 1031, 1034 (10th Cir.2000) (quoting *United States v. Monsisvais*, 946 F.2d 114, 115 (10th Cir.1991)) ("[T]he law of the case 'doctrine posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case.' ").

The undisputed facts demonstrate that the time of loss of Farmland's natural gas was April and May 2000. Some of Farmland's gas was converted in April 2000 and all of its gas was lost by the end of May 2000. The relevant chronology based upon the undisputed facts is as follows:

• Prior to April 5, 2000	MEC purchased 1.5 bcf of gas from Terra
• Early April 2000	MEC committed to withdraw 635,000 MMBtu of the Terra gas for sale to Kansas City customers
• April 5, 2000	Farmland sold .5 bcf of the Terra gas to Farmland
• April 5, 2000	Farmland sold .5 bcf of the Terra gas to Tenaska
• April 1-17, 2000	Farmland sold the Terra gas to Kansas City customers on a ratable basis of 20,000 MMBtu/day
• May 2000	MEC sold the remainder of the Terra gas to Anadarko

It is clear that by May 2000 all of the Terra gas had been converted by MEC. [FN34] ***1152** The only fact in dispute is how much gas MEC actually delivered to Kansas City customers in April 2000. Farmland argues that the transfers to Kansas City customers stopped on April 17, 2000, when Manchester advised MEC that it would not permit MEC to remove the Terra gas from the facility. The Insurers agree that MEC transferred gas to the Kansas City customers from April 1-17, 2000, but additionally assert that the transfers continued until April 30, such that the entire 635,000 MMBtu of Terra gas was transferred to Kansas City customers by the end of April. Because this fact is controverted, the Court cannot determine the exact amount of natural gas that was lost in April 2000 versus the amount lost in May 2000. The Court concludes, however, that all of Farmland's gas was lost no later than May 2000. Because the Policy provides that the basis of settlement for natural gas is the market value at the time and place of the loss, and because the parties agree that the Inside FERC WNG Index provides the applicable market value, the loss will be valued at $2.79/MMBtu for losses in April and $2.94/MMBtu for losses in May.

FN34. Even Farmland previously argued that its gas was lost in May 2000. In its summary judgment reply brief, Farmland stated:

> The parties agree that MEC sold approximately 635,000 of this gas to Kansas City area customers in April of 2000.... The parties further agree that the remaining Terra natural gas was subsequently sold to Anadarko in May of 2000. Given the inherent ambiguities of this fungible, commingled product, *this is the best "date of*

> *loss" available.* Sale by a bailee constitutes theft, which is covered by this ALL RISK insurance [policy].

Farmland argues that the "time of loss" under the Policy provision did not occur until October 2000, when Farmland discovered, investigated and verified the loss through an audit.[FN35] The Policy does not provide for a basis of settlement as of the *discovery of the loss*, but instead, provides that the measure of damages is the *market value at the time and place of the loss.* Like parties to any written contract, parties to an insurance policy are bound by the policy's terms.[FN36] Thus, Farmland is bound by the basis of settlement set forth in the Policy and is entitled only to the market value of its natural gas at the time the gas was lost. As the Court has already discussed, the time of loss was April and May 2000.

> FN35. The Court notes that, in an apparent attempt to prevent its claim from falling within the exclusion for "shortage[s] revealed by audit of inventory," Farmland previously argued that it discovered the shortage on September 27, 2000, when Rod Donovan informed Farmland that MEC could not deliver the gas, not in October 2000.

> FN36. *Brattin Ins. Agency, Inc. v. Triple S. Properties, Inc.*, 77 S.W.3d 687, 688(Mo.App.2002)

[6] In another attempt to value its lost gas at October 2000 prices, **Farmland** asserts, without supporting authority, that it is common practice for insurance companies to value the loss of stored fungible goods after notice, investigation and valuation of the amount of property lost. In essence, **Farmland** asks the Court to look to **industry** custom to explain the parties' intent. Only when an ambiguity exists, however, may a court resort to extrinsic evidence, such as **industry** custom, to show intent.[FN37] Here, the Policy provision mandating a market value at the time of loss basis of settlement is not ambiguous. Indeed, **Farmland** does not contend that this provision is ambiguous. The absence of an ambiguity, therefore, renders it unnecessary and improper to look to the custom and usage of the **industry** as **Farmland** urges.[FN38]

> FN37. *Clayton Brokerage Co. v. Raleigh*, 679 S.W.2d 376, 378 (Mo.App.1984).

> FN38. *See id.*

IT IS THEREFORE ORDERED BY THE COURT that the Insurer's Motion for Summary Judgment on Quantification (Doc. 49) is GRANTED.

***1153 IT IS FURTHER ORDERED BY THE COURT** that Farmland's Motion for Oral Argument (Doc. 67) is DENIED.

IT IS SO ORDERED.

D.Kan.,2005.
Farmland Industries, Inc. v. National Union Fire Ins. Co. of Pittsburgh, Pa.
359 F.Supp.2d 1144

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333 F.Supp.2d 1133
(Cite as: 333 F.Supp.2d 1133)

H

United States District Court,
D. Kansas.
FARMLAND INDUSTRIES, INC., Plaintiff,
v.
NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PENNSYLVANIA, et al., Defendants.
No. 02-4135-JAR.

Aug. 27, 2004.

Background: Insured corporation that had contracted to buy quantity of natural gas for future delivery sued all-risk insurers after denial of claim based on bankrupt seller's failure to deliver.

Holdings: On cross-motions for summary judgment, the District Court, Robinson, J., held that:
(1) issue of material fact existed as to whether purchased gas was physically present at storage facility at time of purchase contract with facility's marketing agent;
(2) policy exclusion for "shortage revealed only by audit or upon taking inventory" did not apply; and
(3) exclusion for "unexplained or mysterious disappearance of property" also did not apply.

Motions denied.

West Headnotes

[1] Insurance 217 2117

217 Insurance
217XV Coverage--in General
217k2114 Evidence
217k2117 k. Burden of Proof. Most Cited Cases
Under Missouri law, insured has burden of proving that loss and damages claimed are covered by insuring provisions, and insurer has burden of proving applicability of any exclusion upon which it relies.

[2] Insurance 217 1863

217 Insurance
217XIII Contracts and Policies
217XIII(G) Rules of Construction
217k1863 k. Questions of Law or Fact. Most Cited Cases
Under Missouri law, disputes arising from interpretation and application of insurance contracts are matters of law for court where there are no underlying facts in dispute.

[3] Federal Civil Procedure 170A 2501

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(C) Summary Judgment
170AXVII(C)2 Particular Cases
170Ak2501 k. Insurance Cases. Most Cited Cases
Issue of material fact existed as to whether natural gas purchased by insured for later delivery, via oral contract with storage facility's marketing agent, was physically present at facility at time of contract, and thus as to whether insured had suffered "direct physical loss" of covered property within meaning of all-risk insurance policy's coverage provision, precluding summary judgment for insured in its action against insurer seeking to recover after facility owner and agent declared bankruptcy prior to delivery and without having sufficient gas to satisfy contract.

[4] Insurance 217 1835(2)

217 Insurance
217XIII Contracts and Policies
217XIII(G) Rules of Construction
217k1830 Favoring Insureds or Beneficiaries; Disfavoring Insurers
217k1835 Particular Portions or Provisions of Policies
217k1835(2) k. Exclusions, Exceptions or Limitations. Most Cited Cases
Under Missouri law, exclusionary clauses in insurance policies are strictly construed against insurer.

[5] Insurance 217 2152

217 Insurance
217XVI Coverage--Property Insurance
217XVI(A) In General
217k2139 Risks or Losses Covered and Exclusions
217k2152 k. Disappearance. Most Cited Cases

Under Missouri law, all-risk insurance policy's exclusion for "shortage revealed only by audit or upon taking inventory" did not apply to insured's claim for loss of quantity of natural gas, which insured had purchased for future delivery from storage facility's marketing agent, where insured's employee conducted audit revealing fact that facility did not have purchased quantity only after loss had been revealed by several other events, including conversation in which agent indicated he could not make delivery, independent pressure testing showing severe drop in quantities at facility, and facility owner's press release blaming agent for storage problems.

[6] Insurance 217 2152

217 Insurance
217XVI Coverage--Property Insurance
217XVI(A) In General
217k2139 Risks or Losses Covered and Exclusions
217k2152 k. Disappearance. Most Cited Cases

Insurance 217 2199

217 Insurance
217XVI Coverage--Property Insurance
217XVI(A) In General
217k2196 Evidence
217k2199 k. Burden of Proof. Most Cited Cases

Under Missouri law, all-risk insurance policy's exclusion for "unexplained or mysterious disappearance of property" did not apply to insured's claim for loss of quantity of natural gas, which insured had purchased for future delivery from storage facility's marketing agent, where insured's investigation of facility's inability to deliver purchased quantity led insured to suggest that theft had occurred; insured did not have burden to prove who was responsible for suspected theft, but rather insurer had burden to prove that disappearance was truly unexplained.

***1134 Lee M. Smithyman,** Overland Park, KS, for Plaintiff.

Christopher F. Burger, Peter K. Curran, Lawrence, KS, Ethan V. Torrey and Matthew M. Burke, Ropes & Gray, Boston, MA, for Defendants.

MEMORANDUM ORDER DENYING MOTION FOR SUMMARY JUDGMENT & DENYING CROSS-MOTION FOR SUMMARY JUDGMENT

ROBINSON, District Judge.

This diversity action involves coverage under an all-risk insurance policy in a dispute between the insured plaintiff, **Farmland Industries**, Inc. ("**Farmland**") and the insurer defendants **National Union** Fire Insurance Company of Pittsburgh, Pennsylvania; Qatar General Insurance and Reinsurance Company; Certain Underwriters at Lloyd's of London; Gerling Konzern Allgemeine Versicherungs-AG; and Allianz Insurance Company (the "Insurers"). This matter comes before the Court on **Farmland's** Motion for Summary Judgment (Doc. 29) and the Insurers' Cross-Motion for Summary Judgment (Doc. 33). For the reasons stated below, **Farmland's** motion is denied and the Insurers' cross-motion is denied.

I. Uncontroverted Facts [FN1]

> FN1. The Court has excluded all irrelevant facts and "facts" which are in essence merely legal conclusions. In particular, the Court has excluded the Insurers' numerous references to the gas contained in account 4622, which are irrelevant and serve only to confuse matters, as even the Insurers recognize that the natural gas at issue in this case was not contained in that account.

On October 1, 1998, Farmland entered into a natural gas storage agreement with Manchester Gas Storage, Inc., ("Manchester") that entitled Farmland to purchase, receive and store natural gas at the Manchester Storage Facility ("Facility") in Grant County, Oklahoma. The Facility is a depleted natural gas reservoir consisting of "working gas" and "cushion gas." Working gas is the amount of gas in a storage reser-

voir that may be withdrawn. Cushion gas is gas that must remain in the reservoir to provide the pressure necessary to allow the withdrawal of working gas. Manchester's owner, William Davis, also owned Mountain Energy Corporation ("MEC"). In 1999, Mr. Davis sold MEC to Michael Eichenberg and Roderick Donovan. On February 1, 1999, Manchester appointed MEC as its marketing and managing agent for the Facility.

On April 1, 1999, MEC entered into a Gas Sales and Purchase Contract with Anadarko Energy Services Company ("Anadarko"), a large natural gas supplier. Pursuant to the contract, Anadarko would provide natural gas to MEC for storage and resale. Anadarko also entered into a Firm Storage Service Agreement with Manchester for utilization of the Facility.

On April 5, 2000, Craig Smyth of **Farmland** and Mr. Eichenberg reached an oral agreement in which " **Farmland** buys .5 bcf ***1135** [or 500,000 MMBtu] physical gas from [MEC], transferred in place to 2nd **Farmland** account with Manchester." The agreement further provided that " **Farmland** agrees to take the gas out in October-either by withdrawal or in-place transfer to **Farmland's** regular storage account, or settle financially." **Farmland** had no right to receive, withdraw, or use the natural gas until October 2000. At the same time as **Farmland's** sale, MEC also entered into a virtually identical transaction with Tenaska Marketing Ventures (Tenaska).

Prior to **Farmland's** purchase, MEC bought 1.5 BCF of natural gas from Terra Nitrogen Corporation ("Terra"). The Terra natural gas was physically present in the Facility. Mr. Donovan testified that the 500,000 MMBtu sale of natural gas to **Farmland** "was natural gas that related directly to the purchase of the remaining storage balance of Terra." Both Mr. Donovan and Mr. Eichenberg testified that the 500,000 MMBtu of natural gas sold to **Farmland** was physically present in the Facility at the time of the sale. Additionally, **Farmland** employee Richard Schuck testified that based upon his review of storage records and the testimony of Mr. Donovan and Mr. Eichenberg, he concluded that the natural gas was physically present in the Facility in April 2000.

From February 2000 through June 2000, MEC prepared a monthly storage inventory for the Facility reflecting the amount of cushion gas and working gas, by account, in the Facility. From July 2000 through October 2000, similar storage inventory records were prepared by Manchester. The storage inventory records were one way to track the amount and ownership of gas in the Facility. Manchester also periodically confirmed the total amount of gas in the Facility through a physical estimate of the gas using reservoir size and current average reservoir pressures, which was performed by Lee Keeling and Associates.

MEC and later Manchester generated monthly statements reflecting the beginning and ending inventory and any activity during the month for each customer. Farmland received these monthly statements, which showed that 500,000 MMBtu of natural gas was physically present in the facility from April 2000 through August 2000. Farmland relied on the monthly statements, among other documents, to account for the existence and amount of natural gas held at the Facility. Manchester did not receive a statement showing Farmland's purchase of 500,000 MMBtu of natural gas; instead the statement listed only Terra's account.

Sometime in April of 2000, MEC committed to the withdrawal of 635,000 MMBtu of the Terra gas on a ratable basis over the month of April for sale to its customers in the Kansas City area. Manchester's intention was to sell the remaining approximately 800,000 MMBtu of Terra gas into the market during the summer of 2000. On April 17, 2000, however, Manchester sent MEC a letter accusing MEC of violating its contractual obligations as agent of the Facility and prohibited MEC from releasing any portion of the Terra gas. MEC subsequently sold the remainder of the Terra gas to Anadarko.

In July 2000, Manchester terminated MEC as agent of the Facility and commenced managing the Facility itself. On July 15, 2000, MEC sent Manchester a fax concerning financial disagreements, which stated "you asked me not to-call on Farmland because if they choose to withdraw gas the facility will not physically be able to perform for Anadarko and Farmland both." Farmland was unaware of the dispute or the communication between Manchester and MEC.

***1136** In September, MEC had difficulties in delivering gas to all of its customers. On September 27, 2000, Mr. Schuck had a conversation with Mr. Do-

novan, in which Mr. Schuck asked MEC to deliver Farmland's natural gas in October or to transfer it into another storage account with Manchester. Mr. Donovan indicated that he could not make delivery of the gas and could not transfer it to Farmland's other storage account. This conversation made Mr. Schuck believe "at that time that the gas was not there. Otherwise, he would have been able to do one or the other." Sometimes in early October after Farmland was unable to receive delivery of its gas, Mr. Schuck reviewed Manchester's inventory records. Mr. Schuck's record review led him to conclude that Manchester, MEC or Anadarko took Farmland's 500,000 MMBtu of natural gas. Around this same time, Tenaska conducted an audit which similarly revealed a shortage of gas at the Facility. By October 2000, MEC had outstanding deals with various parties totaling at least 5 BCF, but the total natural gas in the Facility was 7.01BCF, and of that amount 6.139 BCF was cushion gas and .871 BCF was working gas.

On October 25, 2000, Manchester issued a press release concerning its problems with MEC which stated that "Manchester has allowed all of [MEC's] customers to conduct independent audits of the storage records to establish that the 'alleged' purchased gas was never located in the Manchester storage facility." MEC and Manchester subsequently went into bankruptcy. Manchester contended in court filings connected to its bankruptcy that although MEC represented to certain customers that it had purchased natural gas for future delivery that was currently stored in the Facility, the gas was not actually purchased by MEC.

MEC never paid Farmland for the 500,000 MMBtu of natural gas Farmland purchased in April 2000. Farmland has not recovered any of the natural gas. Farmland did, however, recover $700,000 from this transaction.

Farmland is covered by an all-risk policy (Policy) for which the Insurers have underwritten various percentages of liability. The policy period is November 1, 1997 to November 1, 2000. The annual premium for the Policy was $3,705,000.00. The policy insures: "ALL RISKS OF DIRECT PHYSICAL LOSS OR DAMAGE, except as hereinafter excluded, to the property of the Insured as described herein, and for the coverages designated in the policy territory." The definition of property provided by the Policy is:

All Real and Personal Property of any kind and description, now owned by the Insured or hereafter acquired or in which the Insured has or may acquire an interest including property in the course of construction or installation, including contractors interest, property of others for which the Insured may have assumed liability or property in the Insured's care, custody, and control for which the Insured may be legally liable, all while situated in or while in transit within the territorial limits of this policy.

The territorial limits of the Policy are the United States, Mexico and Canada.

A policy exclusion addresses natural gas. Specifically excluded from the Policy is: "Subterranean strata except coverage is provided for crude petroleum and its products including but not limited to natural gas and other minerals while stored in strata of any nature after initial recovery above ground unless otherwise provided for under this policy ...."

The Policy also excludes:

Unexplained or mysterious disappearance of any property, or shortage revealed***1137** only by audit or upon taking inventory; or any fraudulent, dishonest or other act intended to result in the financial gain of the Insured or any associate, proprietor, partner, director, trustee, elected officer, employee or agent of the Insured ....

Farmland has filed a notice of claim and made demands for payment for the loss of natural gas under the Policy, but the Insurers have refused Farmland's demand.

II. Summary Judgment Standard

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." [FN2] The requirement of a "genuine" issue of fact means that the evidence is such that a reasonable jury could return a verdict for the nonmoving party.[FN3]

Essentially, the inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." [FN4]

FN2. Fed.R.Civ.P. 56(c).

FN3. *See* *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

FN4. *Id.* at 251-52, 106 S.Ct. 2505.

The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact. This burden may be met by showing that there is a lack of evidence to support the nonmoving party's case.[FN5] Once the moving party has properly supported its motion for summary judgment, the burden shifts to the nonmoving party to show that there is a genuine issue of material fact left for trial.[FN6] "A party opposing a properly supported motion for summary judgment may not rest on mere allegations or denials of [its] pleading, but must set forth specific facts showing that there is a genuine issue for trial." [FN7] Therefore, the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment.[FN8] The Court must consider the record in the light most favorable to the nonmoving party. [FN9]

FN5. *See* *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

FN6. *See* *Anderson*, 477 U.S. at 256, 106 S.Ct. 2505.

FN7. *Id.*

FN8. *See id.*

FN9. *See* *Bee v. Greaves*, 744 F.2d 1387, 1396 (10th Cir.1984), *cert. denied* 469 U.S. 1214, 105 S.Ct. 1187, 84 L.Ed.2d 334 (1985).

The Court notes that summary judgment is not a "disfavored procedural shortcut"; rather, it is an important procedure "designed to secure the just, speedy and inexpensive determination of every action." [FN10]

FN10. *Celotex*, 477 U.S. at 327, 106 S.Ct. 2548 (quoting Fed.R.Civ.P. 1).

III. Discussion

Farmland's claim is made on an "all-risk" policy. The Policy provides first-party property insurance and covers "ALL RISKS OF DIRECT PHYSICAL LOSS OR DAMAGE, except as hereinafter excluded, to the property of the insured." The insured's property is "all real and personal property of every kind and description, now owned by the Insured or hereafter acquired or in which the Insured has or may acquire an interest ... while situated in or while in transit within the ***1138** territorial limits of this policy." The policy also contains a provision specific to natural gas which states, "coverage is provided ... to natural gas and other minerals while stored in strata of any nature."

In spite of Policy language suggesting that natural gas is insurable, the Insurers argue that the lost gas is not insured property because: (1) the gas was not in existence so there could be no physical loss; and (2) if the gas was insured property, it is excluded because it was "revealed only by audit or upon taking inventory;" and it is an "unexplained or mysterious disappearance" of property.

An all-risk insurance policy creates a special type of insurance extending to risks not usually contemplated.[FN11] All-risk policies, however, are not "all loss" policies.[FN12] Instead, all-risk policies contain express written exclusions and implied exceptions which have been developed by courts over the years.[FN13] Thus, recovery under an all-risk policy will generally be allowed, at least for all losses of a fortuitous nature, in the absence of fraud, or other intentional misconduct of the insured, unless the policy contains a specific provision expressly excluding the loss from coverage." [FN14]

FN11. *Texas E. Transmission Corp. v. Marine Office-Appleton & Cox Corp.*, 579 F.2d 561, 564 (10th Cir.1978).

FN12. *Port Auth. of New York & New Jersey v. Affiliated FM Ins. Co.*, 245 F.Supp.2d 563,

579 (D.N.J.2001); *Intermetal Mexicana S.A. v. Ins. Co. of N. Am.*, 866 F.2d 71, 75 (3d Cir.1989).

FN13. *GTE Corp. v. Allendale Mut. Ins. Co.*, 258 F.Supp.2d 364, 373 (D.N.J.2003).

FN14. *Texas E. Transmission Corp.*, 579 F.2d at 564; *Pakmark Corp. v. Liberty Mut. Ins. Co.*, 943 S.W.2d 256, 259 (Mo.Ct.App.1997).

[1][2] State law governs the interpretation of insurance contracts, and in this case, Missouri law controls.[FN15] "[I]n Missouri, the insured has the burden of proving that the loss and damages claimed are covered by the insuring provisions, and the insurer has the burden of proving the applicability of any exclusion upon which it relies." [FN16] Disputes arising from interpretation and application of insurance contracts are matters of law for the court where there are no underlying facts in dispute.[FN17] Thus, Farmland bears the initial burden of demonstrating that there is no genuine issue of material fact that it has suffered a physical loss or damage to insured property.

FN15. Kansas choice of law rules apply in this diversity action. *United States Fid. & Guar. Co. v. Federated Rural Elec. Ins. Co.*, 286 F.3d 1216, 1218 (10th Cir.2002). Under those rules, the law of the state where the contract was entered into controls. *Aselco, Inc. v. Hartford Ins. Group*, 28 Kan.App.2d 839, 21 P.3d 1011, 1020 (2001). "In interpreting an insurance contract where there is a conflict of laws, Kansas follows the ex loci rule, and the law of the state where the contract is made governs." *Id.* In cases involving insurance policies, the contract is made where the policy is delivered. *Layne Christensen Co. v. Zurich Canada*, 30 Kan.App.2d 128, 38 P.3d 757, 767 (2002). The Policy was delivered to **Farmland** in Missouri, and therefore, the contract was made in Missouri. Missouri law thus controls this dispute.

FN16. *Nat'l **Union** Fire Ins. Co. of Pittsburgh, Pennsylvania v. Structural Sys. Tech., Inc.*, 964 F.2d 759, 761 (8th Cir.1992) (applying Missouri law).

FN17. *Watters v. Travel Guard Int'l*, 136 S.W.3d 100, 107 (Mo.Ct.App.2004).

A. Insured Property

[3] The Insurers argue that Farmland cannot meet its burden of proof of showing that the natural gas is covered property because Farmland cannot demonstrate that it actually owned the natural gas, as compared with merely holding a contractual right to the delivery of gas at a later ***1139** date. It follows, the Insurers contend, that if Farmland did not actually own the gas, it never suffered a "direct physical loss" as required to recover under the Policy.

To determine whether Farmland received a bare contract right, or physical natural gas from MEC in the April 2000 transaction, the Court must scrutinize the oral agreement between the parties to discover the parties' intent. [FN18] On April 5, 2000, Farmland and MEC reached an oral agreement in which "Farmland buys .5 bcf [or 500,000 MMBtu] physical gas from [MEC], transferred in place to 2nd Farmland account with Manchester." The agreement further provided that "Farmland agrees to take the gas out in October-either by withdrawal or in-place transfer to Farmland's regular storage account, or settle financially." During the conversation which culminated in the oral contract, the parties mention "physical volumes," "in place," "in the ground at Manchester." In addition, the storage deal related to the April 5 purchase lists the purchase cost of "gas in-place at Manchester" and provides "Farmland buys .5bcf physical gas from [MEC]." Thus, the contracting parties' intent demonstrates that Farmland purchased 500,000 MMBtu of existing, physical natural gas from MEC, not a bare contract right to later delivery.

FN18. *See CB Commercial Real Estate Group, Inc. v. Equity P'ships Corp.*, 917 S.W.2d 641, 646 (Mo.Ct.App.1996) ("The primary rule of contract interpretation is to ascertain the intent of the parties and to give effect to that intent").

Disputed facts remain regarding whether the natural gas was physically present in the Facility in April 2000. MEC purchased 1.5 bcf of natural gas from Terra in March or early April of 2004 and this gas was

physically present in the Facility. Mr. Donovan testified that the 500,000 MMBtu sale of natural gas to Farmland "was natural gas that related directly to the purchase of the remaining storage balance of Terra." Both Mr. Donovan and Mr. Eichenberg testified that the 500,000 MMBtu of natural gas sold to Farmland was physically present in the Facility at the time of the sale. Additionally, Mr. Schuck testified that based upon his review of storage records and the testimony of Mr. Donovan and Mr. Eichenberg, he concluded that the natural gas was physically present in the Facility in April of 2000. Monthly storage summaries provided by MEC to Farmland showed that the gas was physically present in the Facility from April 2000 through August 2000.

The Insurers suggest, on the other hand, that Farmland's gas was not physically present at the Facility. The Insurers note that MEC sold approximately 635,000 MMBtu of the Terra gas to customers in the Kansas City area in April of 2000. Additionally, at the same time as the Farmland sale, MEC sold 500,000 MMBtu of the Terra gas to Tenaska. If the Kansas City and the Tenaska sale occurred before Farmland's purchase, there would only be approximately 365,000 MMBtu of Terra gas still physically present in the Facility, short of the 500,000 MMBtu necessary to cover Farmland's purchase. [FN19] Moreover, Manchester concluded that although MEC represented to certain customers that it had purchased natural gas for future delivery that was being stored in the Facility, the gas was not actually purchased by MEC. The monthly inventory statements provided by MEC to Manchester***1140** did not show Farmland's 500,000 MMBtu purchase, but instead only listed Terra's account. Consequently, the Court concludes that genuine issues of material fact remain regarding whether the natural gas was physically present in the Facility at the time of Farmland's purchase on April 5, 2000.[FN20]

FN19. The Insurers also note that MEC intended to sell approximately 800,000 MMBtu of the Terra gas into the market in the Summer of 2000, but this fact is irrelevant; MEC's ill intentions in the Summer of 2000 are not important, rather the amount of physical gas acquired by Farmland on April 5, 2000 is the key inquiry.

FN20. Because disputed issues of material fact remain regarding whether the natural gas was covered property, the Court need not reach the issue of physical loss.

B. Policy Exclusions

[4] The Insurers argue that even if whether the natural gas was covered property is a disputed fact, summary judgment is still appropriate because two Policy exclusions bar Farmland's recovery. First, they contend that the gas shortage was "revealed only by audit or upon taking inventory;" and is thus excluded. Additionally, the Insurers claim that the gas is excluded as it is an "unexplained or mysterious disappearance" of property. The Insurers bear the burden of proving that the lost natural gas is an excluded peril.[FN21] Under Missouri law exclusionary clauses are to be strictly construed against the insurer, but if the contract language is clear and unambiguous, the Court must construe the policy as written for it lacks the power to rewrite the policy.[FN22] Insurance contracts are designed to furnish protection, and therefore, they will be interpreted to grant coverage rather than defeat it.[FN23]

FN21. *See* *Russell v. Reliance Ins. Co.*, 645 S.W.2d 166, 170 (Mo.Ct.App.1982).

FN22. *United States Fid. & Guar. Co., v. First State Bank & Trust Co.*, 941 F.Supp. 101, 105 (E.D.Mo.1996) (applying Missouri law).

FN23. *Centermark Properties, Inc. v. Home Indem. Co.*, 897 S.W.2d 98, 100-101 (Mo.Ct.App.1995).

1. Shortage Revealed Only By Audit or Upon Taking Inventory

[5] The Policy excludes from coverage a "shortage revealed only by audit or upon taking inventory." When interpreting the language of an insurance contract, Missouri courts give the language its plain meaning.[FN24] "The plain or ordinary meaning is the meaning that the average layperson would understand" as found in standard English language dictionaries.[FN25] Thus, audit means "[a]n examination of records or financial accounts to check their accuracy" and inventory means "[a] detailed itemized record of

things in one's view or possession, esp. a periodic survey of all goods and materials in stock." [FN26]

FN24. *Shahan v. Shahan*, 988 S.W.2d 529, 535 (Mo.1999) (en banc).

FN25. *Id.*

FN26. Am. Heritage College Dictionary 90, 714 (3d ed.2000).

There is no question that there was a shortage of natural gas at the Facility in October 2000. By October 2000, MEC had outstanding deals with various customers totaling at least 5 BCF. The natural gas balance at the Facility, however, was only 7.01 BCF, with 6.139 BCF consisting of cushion gas and only .071 BCF in working gas. There is similarly no question that the "shortage revealed only by audit or upon taking inventory exception" applies to fungible goods, such as natural gas.[FN27]

FN27. *See, e.g., Jones v. Employers Mut. Cas. Co.*, 230 Neb. 549, 432 N.W.2d 535 (1988) (shortage of gasoline stored in underground tank); *Empire Underground Storage, Inc. v. Protective Nat'l Ins. Co. of Omaha*, 685 F.Supp. 1187, 1191 (D.Kan.1988).

The focus then becomes whether the gas shortage was revealed only upon audit or inventory. The Insurers argue that the storage inventory records were the only ***1141** manner in which the amount and ownership of gas in the Facility could be tracked, and thus, the only possible means of uncovering a shortage. It is undisputed that the storage inventory records were one way to track the amount and ownership of gas at the Facility, and that Farmland relied in part upon the inventory records to account for the existence and amount of gas held at the Facility. It is also undisputed that on approximately October 11, 2000, Mr. Schuck traveled to Farmland's office and made copies of documents provided by Manchester and that sometime after receiving those documents, Mr. Schuck reviewed the records. From his review of the documents, Mr. Schuck concluded:

I could tell at one point in time Terra had approximately 1.5 BCF of gas in their storage field. I could tell that part of that gas was withdrawn and part of it was transferred over to a contract held by Anadarko .... I could also tell the gas was subsequently withdrawn off the Anadarko contract. I could not get a level of detail that would allow me to specifically track our half of BCF."

In response, Farmland notes that the shortage was revealed not only through inventory records, but through other means, including the September 27, 2000, conversation in which Farmland asked MEC to deliver the natural gas in October or to transfer it into another storage account with Manchester. Mr. Donovan indicated that he could not make delivery of the gas and could not transfer it to Farmland's other storage account. This conversation made Mr. Schuck believe "at that time that the gas was not there. Otherwise, he would have been able to do one or the other." Farmland additionally points to Lee Keeling's pressure testing which showed a severe drop in natural gas quantities, newspaper articles appearing in the Kansas City Star, which referenced MEC's inability to supply gas to its customers, accusations that MEC had diverted gas held for another business, and Manchester's October 25, 2000 press release which blames MEC for storage problems. Farmland contends that all of these events occurred before Mr. Schuck's review of inventory records.

To fall within the exclusion, the lost natural gas must have been discovered only by audit or upon taking inventory. The undisputed facts demonstrate that the natural gas loss was revealed by a number of facts, some of which certainly occurred before the audit by Farmland.[FN28] Indeed, Farmland's audit was precipitated by MEC's failure to deliver the gas, which made Farmland believe that the gas was not in the Facility. The purpose of the audit appeared to be to track Farmland's gas to discover how it was lost, not to establish that it had been lost.[FN29] Construing the exclusionary clause strictly against the Insurers, the Court concludes that the lost natural gas was not revealed only by audit or upon taking inventory.

FN28. The Insurers assert that the October 2000 newspaper articles and the October 25, 2000 press release regarding MEC's difficulties "post-date the discovery of the shortage by audit or upon taking inventory." While it is undisputed that on approximately

October 11, 2000, Mr. Schuck made copies of Manchester's records, he did not review the records until some time thereafter. The record does not reveal precisely when Mr. Schuck reviewed the storage records, nor when Mr. Schuck reached his conclusions regarding the lost natural gas.

FN29. Mr. Schuck testified that he looked at storage statements between April and October, but he "couldn't really tell exactly what happened" and that from his review of the records, he "could not get a level of detail ... that would allow [him] to specifically track [Farmland's] half of BCF."

***1142 2. Unexplained or Mysterious Disappearance of Property**

[6] Finally, the Insurers argue that the lost gas is excluded from the Policy as an "unexplained or mysterious disappearance of property." A mysterious disappearance is "any disappearance or loss under unknown, puzzling or baffling circumstances which arouse wonder, curiosity, or speculation, or circumstances which are difficult to understand or explain." [FN30] The Insurers argue that Farmland "can furnish no explanation whatsoever" for its loss. Farmland, however, has suggested a reason for its loss. Mr. Schuck testified that his record review led him to conclude that Manchester, MEC or Anadarko took Farmland's 500,000 MMBtu of natural gas. Theft is not a mysterious disappearance.[FN31] Farmland need not prove who is responsible for the theft to overcome the Policy exclusion; it is the Insurer's burden to prove that the Policy exclusion is applicable.[FN32] Farmland has presented facts to suggest that something other than a mysterious disappearance accounts for its lost natural gas, and summary judgment on this exclusion is therefore inappropriate.[FN33]

FN30. *Gifford v. M.F.A. Mut. Ins. Co.*, 437 S.W.2d 714, 716 (Mo.Ct.App.1969)

FN31. *See Van Dutch Prods. Corp v. Zurich Ins. Co.*, 67 A.D.2d 844, 413 N.Y.S.2d 8, 9 (N.Y.App.1979) (a loss is not unexplained or mysterious where there is evidence of theft); *Balogh v. Jewelers Mut. Ins. Co.*, 167 F.Supp. 763, 770 (S.D.Fla.1958) (insurer failed to establish that mysterious disappearance exclusion was met in view of evidence tending to show that the loss was caused by theft); *Stella Jewelry Mfg., Inc. v. Naviga Belgamar Through Penem Int'l Inc.*, 885 F.Supp. 84, 85-86 (S.D.N.Y.1995) (same).

FN32. *See Betty v. Liverpool & London & Globe Ins. Co.*, 310 F.2d 308, 310-11 (4th Cir.1962) (An all risk policy exclusion for unexplained losses or mysterious disappearances of property did not shift the burden of proving that loss fell within exclusion from the insurer to the insured).

FN33. *Sphere Drake Ins. PLC v. Trisko*, 24 F.Supp.2d 985, 997 (D.Minn.1998)("[P]laintiffs have offered an explanation, supported by circumstantial evidence from several sources, which if believed by the trier of fact could reasonably support an inference of theft .... Defendant has failed to show that this version of events is so illogical, implausible or speculative as to warrant summary judgment for the insurer .... [W]e conclude that Summary Judgment is not warranted, for either party, on the basis of the "unexplained loss" or "mysterious disappearance" exclusion.").

IT IS THEREFORE ORDERED BY THE COURT that Farmland's Motion for Summary Judgment (Doc. 29) is DENIED.

IT IS FURTHER ORDERED BY THE COURT that the Insurers' Cross-Motion for Summary Judgment (Doc. 33) is DENIED.

IT IS SO ORDERED.

D.Kan.,2004.
Farmland Industries, Inc. v. National Union Fire Ins. Co. of Pittsburgh, Pennsylvania
333 F.Supp.2d 1133

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