

RECEIVED
IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA, 4: 24
SOUTHERN DIVISION

DEBRA B. WACKETT, CLK
U.S. DISTRICT COURT
MIDDLE DISTRICT ALA

GREAT SOUTHERN WOOD)
PRESERVING, INCORPORATED,)

Plaintiff,)

v.)

WESTCHESTER FIRE)
INSURANCE COMPANY and)
WESTCHESTER SURPLUS LINES)
INSURANCE COMPANY,)

Defendants.)

CIVIL ACTION NO.

13-cv-590-MEF-TFM

DEMAND FOR JURY TRIAL

COMPLAINT

Plaintiff Great Southern Wood Preserving, Incorporated ("Great Southern") states the following Complaint against Defendants Westchester Fire Insurance Company ("Westchester Fire") and Westchester Surplus Lines Insurance Company ("Westchester Surplus").

Parties, Venue, and Jurisdiction

1. Great Southern is a corporation organized under the laws of Alabama with its principal place of business in Abbeville, Henry County, Alabama.
2. Westchester Fire is an insurance company organized under the laws of New York with its principal place of business in New York, and that does business and is subject to personal jurisdiction in the district where this lawsuit is filed.

3. Westchester Surplus is an insurance company organized under the laws of Georgia with its principal place of business in Georgia, and that does business and is subject to personal jurisdiction in the district where this lawsuit is filed. Westchester Fire and Westchester Surplus are hereinafter collectively referred to as "Westchester."

4. This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1332. Plaintiff and Defendants are citizens of different states and, as more fully set forth below, the amount in controversy exceeds \$75,000, exclusive of interest and costs.

5. Venue is proper under 28 U.S.C. § 1391. Westchester resides in the district where this lawsuit is filed, and a substantial part of the events giving rise to this claim occurred in this district.

Background

The Policies

6. This lawsuit arises out of Westchester's failure to honor its insurance policies and its failure to honor additional express agreements between Westchester and its insured, Great Southern.

7. Westchester issued two comprehensive insurance policies to Great Southern. The first policy was for the period from June 2, 2003 through June 2, 2004 and was numbered D35889127001. The second policy was for the period

from June 2, 2004 through June 2, 2005 and was numbered D35889127002. Both policies included commercial general liability coverage. These two policies are collectively referred to hereinafter as “the Policies.”

The Whitecap Lawsuit

8. In February 2011, Great Southern was served with a complaint in a lawsuit filed in the United States District Court for the Virgin Islands, Division of St. Thomas and St. John, styled *Whitecap Investment Corp. d/b/a Paradise Lumber v. Putnam Lumber & Export Company, et al.*, case number 3:10-cv-00139-CVG-RM (the “*Whitecap* lawsuit”).

9. The *Whitecap* lawsuit alleged, among other things, that lumber products sold to end users in the Virgin Islands were treated improperly by Great Southern and experienced premature rotting and decay.

10. The *Whitecap* lawsuit alleged that “defective or nonconforming wood products [were] manufactured and sold by Defendants from 2003 to present.”

11. The *Whitecap* lawsuit triggered Westchester’s duty to defend and indemnify Great Southern under both of the Policies.

12. Great Southern timely provided notice of the *Whitecap* lawsuit to Westchester in March 2011 and requested that Westchester defend and indemnify the claim.

13. Westchester assigned the *Whitecap* lawsuit, for claims-handling purposes, to Patricia J. Stanley with ACE North American Claims.

14. On June 21, 2011, Ms. Stanley wrote an email to Great Southern's General Counsel stating:

Chris, per my voice mail, Westchester Fire Insurance Company is willing to participate in the defense of the above captioned matter currently pending in the Virgin Islands. All primary carriers or in the case of your large SIR with Zurich, you, should share equally in the defense. My formal coverage letter will be out shortly, but I wanted to let you know about sharing the defense.

Please, let me know about the assigned attorney and put me on his reporting list. If you have incurred defense costs to date, I can reimburse my share. If a budget for defense of this matter has been submitted, I would like a copy. Please, call me with any questions.

15. Because there were no other "primary carriers" involved in the case or participating in the defense, and as of June 21, 2011, Westchester agreed with Great Southern that Westchester would pay 50% of the defense costs incurred. This agreement was also confirmed over the telephone.

16. Great Southern informed Westchester that it had chosen the Lightfoot, Franklin & White firm in Birmingham Alabama to defend the case, along with local Virgin Islands lawyer Daryl Barnes of the Bryant, Barnes & Blair firm in St. Croix.

17. Westchester did not object to the Lightfoot Franklin firm or the Bryant Barnes firm serving as defense counsel, and did not express any interest at that time in being allowed to select counsel to defend the case.

18. Westchester did not place any limitations on the amount of the defense fees or hourly rates it was willing to share in with respect to the defense.

19. On November 29, 2011, Westchester representative, Patricia Stanley, sent another email to Great Southern stating in pertinent part:

Attached is my coverage letter. After your review, please, contact me to discuss the current status of the litigation. If you will send me your legal bills to date, I will pay 50%, or if other carriers are participating, we should share equally. When sending your legal bills I will need to know the specific amount, how you want the check made out and your Tax ID number.

20. Starting no later than December 21, 2011, Great Southern began forwarding legal bills related to the *Whitecap* case to Westchester, and requested that Westchester pay its 50% share.

21. To date, Great Southern has forward invoices to Westchester showing that it has incurred over \$1 million in defense costs in the *Whitecap* case.

22. Westchester owes 50% of the defense costs pursuant to its Policies and its separate express agreement to pay 50% of fees and costs incurred.

23. Over the last 20 months, Great Southern has repeatedly asked Westchester to honor its Policies and its express agreement to pay 50% of the defense costs.

24. As of the date of filing of this Complaint, Westchester still has not paid one penny of these defense costs.

25. In addition to its failure to pay any of the defense costs it agreed to pay, Westchester also has failed to pay its agreed share of the indemnity costs.

26. The *Whitecap* lawsuit was mediated on May 31, 2013. It settled for a confidential sum paid for by Great Southern.

27. Westchester agreed to pay \$50,000 of the confidential settlement amount in the *Whitecap* lawsuit.

28. Westchester has never paid this amount of money.

29. Therefore, Great Southern was forced to “front” Westchester’s share of the settlement so that Great Southern did not violate the settlement agreement.

30. Great Southern has requested, several times, that Westchester pay its share of the settlement, but Westchester has failed and refused to do so.

The “End-User” Virgin Islands Litigation

31. In addition to the *Whitecap* lawsuit, other related lawsuits have been filed against Great Southern, including but not limited to the following:

Gerald and Martha Hills v. Great Southern Wood Preserving Company, Inc., et al.; Superior Court of the Virgin Islands, Division of St. Thomas and St. John; Case No. 395/2012 (the “*Hills* lawsuit”)

Stephen and Amelia Jones v. Great Southern Wood Preserving Company, Inc., et al.; Superior Court of the Virgin Islands, Division of St. Thomas and St. John; Case No. 117/2012 (the “*Jones* lawsuit”)

John and Marcia Stewart v. Great Southern Wood Preserving Company, Inc., et al.; U.S. District Court for the Virgin Islands, Division of St. Thomas and St. John; Case No. 3:12-cv-00028 (the “*Stewart* lawsuit”)

Cary Chapin, et al. v. Whitecap Investment Corp., et al. v. Great Southern Wood Preserving Company, Inc., et al.; Superior Court of the Virgin Islands, Division of St. Thomas and St. John; Case No. 435/2012 (the “*Chapin* lawsuit”)¹

Jason and Hillarie Oliver, et al. v. Great Southern Wood Preserving Company, Inc., et al.; Superior Court of the Virgin Islands, Division of St. Thomas and St. John; Case No. 10/2013 (the “*Oliver* lawsuit”)

MRL Development and Michael R. Lucht v. Great Southern Wood Preserving Company, Inc., et al.; Superior Court of the Virgin Islands, Division of St. Thomas and St. John; Case No. ST-13-CV-81 (the “*Lucht* lawsuit”)

Victor and Mary J. Belizaire v. Great Southern Wood Preserving Company, Inc., et al.; Superior Court of the Virgin Islands, Division of St. Thomas and St. John (the “*Belizaire* lawsuit”)

Bonita Corbiel v. Whitecap Investment Corp. v. Great Southern Wood Preserving Company, Inc., et al.; Superior Court of the Virgin Islands, Division of St. Thomas and St. John; Case No. ST-13-CV-00136 (the “*Corbiel* lawsuit”)

¹ A similar “*Chapin*” lawsuit was filed in federal court in the Virgin Islands. These two cases are collectively referred to as the “*Chapin* lawsuit”)

32. These lawsuits consist of individual and class action lawsuits filed by end-users who claim to have purchased allegedly defective lumber products. They are collectively hereinafter referred to as “the End-User Virgin Islands lawsuits.”

33. Great Southern gave timely notice of the End-User Virgin Islands lawsuits to Westchester and requested a defense and indemnity.

34. Like the *Whitecap* case, Westchester agreed to participate in the defense of the End-User Virgin Islands lawsuits.

35. For example, in April 2013, Westchester hired the law firm of Butler Pappas in Tampa, Florida to defend Great Southern in all of the Virgin Islands lawsuits.

36. In fact, Westchester retained the Butler Pappas firm to defend Great Southern in all the Virgin Islands lawsuits over Great Southern’s objection. Great Southern objected to Butler Pappas taking over as defense counsel because, among other things, (a) the Lightfoot Franklin firm had been defending the cases (without objection from Westchester) since they were first filed, (b) the trial in the *Whitecap* case was less than two months away, (c) bringing in another firm at the last minute would prejudice Great Southern’s defense and drive up settlement value, and (d) the Butler Pappas firm potentially had a conflict of interest because it had an existing relationship with Westchester but no relationship with Great Southern.

37. Westchester's agreement to defend the End-User Virgin Islands lawsuits was confirmed in numerous letters and emails from Westchester and Butler Pappas. As an example, by email dated April 8, 2013, Westchester stated:

We would appreciate your cooperation in our assignment of defense counsel Butler Pappas in the above matters. Denise Anderson is the lead attorney and she can be contacted at 813-281-1900. We have assigned the matter to her office to defend all of the cases above [which listed the "Whitecap, Hills, and Chapin, et al." lawsuits].

38. Likewise, by email dated May 7, 2013, Butler Pappas confirmed that it had been "retained to provide a defense in all of [the Virgin Islands] matters."

39. Westchester required Great Southern, over Great Southern's objection, to provide copies of its files in the Whitecap case and the End-User Virgin Islands lawsuits to the Butler Pappas firm for purposes of the defense.

40. Although it has been participating in the defense of all the End-User Virgin Islands lawsuits, Westchester did not reserve its rights and never took any coverage position with respect to most of them until August 6, 2013, when it sent letters denying coverage and refusing to pay any of the past defense costs related to the *Jones, Oliver, Lucht*, and *Stewart* lawsuits.

41. Westchester has not paid any of its share of past defense costs incurred in the End-User Virgin Islands lawsuits.

42. To date, Great Southern has incurred over \$500,000 in defense costs with respect to the End-User Virgin Islands lawsuits.

43. Like the *Whitecap* defense costs, Great Southern has repeatedly asked that Westchester pay its share, but Westchester has not paid anything.

Count One: Breach of Contract

44. Great Southern adopts and reasserts the allegations in paragraphs 1 through 43.

45. Westchester issued the Policies to Great Southern.

46. The Policies provide defense and indemnity coverage for the *Whitecap* lawsuit and the End-User Virgin Islands lawsuits.

47. Westchester agreed to and has actually participated in the defense of the *Whitecap* lawsuit and the End-User Virgin Islands lawsuits.

48. Westchester expressly agreed to pay 50% of the Lightfoot Franklin attorney fees, the Bryant Barnes attorney fees, and all other defense costs incurred in the *Whitecap* lawsuit and the End-User Virgin Islands lawsuits.

49. Great Southern has performed all its obligations under the Policies.

50. Westchester has breached the Policies.

51. Westchester has also breached separate agreements to pay 50% of defense fees and \$50,000 of the *Whitecap* settlement.

52. Westchester has waived its right to challenge coverage of many or all of the End-User Virgin Islands lawsuits by virtue of its participation in the defense without reserving any rights.

53. Great Southern has been damaged by virtue of Westchester's breaches of its insurance contract and its separate agreement to pay 50% of the defense costs and \$50,000 of the *Whitecap* settlement.

WHEREFORE, Great Southern seeks all compensatory damages allowed by law, interest, attorney fees, and costs.

GREAT SOUTHERN DEMANDS A TRIAL BY JURY

Respectfully submitted this the 16th day of August, 2013.



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Please Serve The Defendants, Via Certified Mail, As Follows

Westchester Fire Insurance Company
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