

STATE OF WISCONSIN

CIRCUIT COURT

MILWAUKEE

ERIE INSURANCE EXCHANGE vs. HAYWARD PHARMACY, INC. et al

Electronic Filing Notice

Case No. 2021CV004963
Class Code: Declaratory Judgment

FILED
08-16-2021
John Barrett
Clerk of Circuit Court
2021CV004963
Honorable Pedro Colon-18
Branch 18

Handwritten: 8/24 (14)

THE CITY OF WEST ALLIS
7525 W. GREENFIELD AVENUE
WEST ALLIS WI 53214

Form with fields: Time of Service (12:00), Date of Service (8/21), Served upon, at, Personal Service, Substitute personal service.

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Registration is available to attorneys, self-represented individuals, and filing agents who are authorized under Wis. Stat. 799.06(2). A user must register as an individual, not as a law firm, agency, corporation, or other group. Non-attorney individuals representing the interests of a business, such as garnishees, must file by traditional means or through an attorney or filing agent. More information about who may participate in electronic filing is found on the court website.

If you have questions regarding this notice, please contact the Clerk of Circuit Court at 414-278-4120.

Milwaukee County Circuit Court
Date: August 16, 2021

CITY OF WEST ALLIS
23 AUG '21 AM 11:59

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Clerk of Circuit Court
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Honorable Pedro Colon-18
Branch 18

STATE OF WISCONSIN: CIRCUIT COURT :MILWAUKEE COUNTY

ERIE INSURANCE EXCHANGE,
100 Erie Insurance Place
Erie, Pennsylvania 16530

Plaintiff,

Case No.

v.

Case Code:

HAYWARD PHARMACY, INC.
d/b/a SWAN SERV-U PHARMACY
c/o Robert Stresing
709 W. Oklahoma Avenue
Milwaukee, Wisconsin 53215

THE CITY OF FRANKLIN
9229 W. Loomis Road
Franklin, Wisconsin 53132

THE CITY OF GREENFIELD
7325 W. Forest Home Avenue
Greenfield, Wisconsin 53220

THE CITY OF SOUTH MILWAUKEE
2424 15th Avenue
P.O. Box 367
South Milwaukee, Wisconsin 53172

THE CITY OF OAK CREEK
8040 S 6th Street
Oak Creek, Wisconsin 53154

THE CITY OF WEST ALLIS
7525 W. Greenfield Avenue
West Allis, Wisconsin 53214

THE CITY OF CUDAHY
5050 South Lake Drive
Cudahy, Wisconsin 53110,

Defendants.

SUMMONS

THE STATE OF WISCONSIN TO: All Named Defendants.

You are hereby notified that the Plaintiff named above has filed a lawsuit or other legal action against you. The Complaint, which is served upon you, states the nature and basis of the legal action.

Within forty-five (45) days of receiving this Summons, you must respond with a written Answer, as that term is used in Wis. Stat. Ch. 802, to the Complaint. The Court may reject or disregard an Answer that does not follow the requirements of the statutes. The Answer must be sent or delivered to:

Clerk of Courts
Milwaukee County Courthouse
901 North 9th Street, Room 104
Milwaukee, Wisconsin 53233

and to the Plaintiff's attorneys:

Bruce M. Lichtsien
HINKHOUSE WILLIAMS WALSH LLP
180 N. Stetson Ave., Suite 3400
Chicago, IL 60601


You may have an attorney help or represent you.

If you do not provide a proper Answer within forty-five (45) days, the Court may grant Judgment against you for the award of money or other legal action requested in the Complaint, and you may lose your right to object to anything that is or may be incorrect in the complaint. A Judgment may be enforced as provided by law. A Judgment awarding money may become a lien against any real estate you own now or in the future, and may also be enforced by garnishment or

seizure of property.

Dated at Chicago, Illinois, this 16th day of August 2021.

HINKHOUSE WILLIAMS WALSH LLP

By: 

Bruce M. Lichtcsien
WI State Bar No. 1114904
HINKHOUSE WILLIAMS WALSH LLP
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Chicago, IL 60601
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blichtcsien@hww-law.com

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STATE OF WISCONSIN: CIRCUIT COURT :MILWAUKEE COUNTY

ERIE INSURANCE EXCHANGE,
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Erie, Pennsylvania 16530

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THE CITY OF CUDAHY
5050 South Lake Drive
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Defendants.

COMPLAINT

NOW COMES Plaintiff, Erie Insurance Exchange (“Erie”), by its attorneys, Hinkhouse Williams Walsh LLP, and for its Complaint for Declaratory Judgment against Defendants alleges as follows:

NATURE OF CLAIM

1. This is an action for declaratory judgment pursuant to Wis. Stat. § 806.04 and seeking a determination of the rights and obligations of the parties in connection with two insurance policies that Erie issued to Hayward Pharmacy, Inc. d/b/a Swan Serv-U Pharmacy (“Swan”).
2. The City of Franklin, the City of Greenfield, the City of South Milwaukee, the City of Oak Creek, the City of West Allis and the City of Cudahy (“Municipality Defendants”) have filed separate complaints against Swan and others for alleged damages as a result of the alleged opioid crisis in the municipalities. The complaints allege that various manufacturers, distributors and pharmacies intentionally flooded the market with opioids and that they are legally liable for the harm caused to the municipalities.
3. Erie seeks a declaration from this Court that it has no duty, under the terms of the insurance policies that Erie issued to Swan, to defend or indemnify Swan against the facts of the complaints filed by the Municipality Defendants.

THE PARTIES

4. Erie is a reciprocal insurance exchange organized and existing under the laws of the Commonwealth of Pennsylvania, with its principal place of business located in Erie, Pennsylvania. At all relevant times, Erie was authorized to and did conduct business and issue

liability policies in the State of Wisconsin.

5. Upon information and belief, Swan is a corporation organized and existing under the laws of the State of Wisconsin, with its principal place of business in the State of Wisconsin.

6. Upon information and belief, each of the Municipality Defendants is a duly incorporated third class city empowered by the Wisconsin legislature to act under the home rule authority of Wis. Const. art XI, § 3. The Municipality Defendants are named here as necessary parties pursuant to Wis. Stat. § 806.04(11).

JURISDICTION AND VENUE

7. This Court has jurisdiction over the subject matter of this case because the allegations and claims are brought under Wisconsin state law.

8. This Court has personal jurisdiction over the Municipality Defendants pursuant to Wis. Stat. § 801.05(1)(c), (d) and 801.05(3). At all relevant times, each Municipality Defendant had a significant local presence or status in the State of Wisconsin, County of Milwaukee.

9. Swan is a domestic corporation engaged in substantial and not isolated activities within the State of Wisconsin, County of Milwaukee.

10. Venue is proper in Milwaukee County under Wis. Stat. § 801.50(2)(a) and (c), because it is the County in which all or a substantial part of the events or omissions giving rise to the claim occurred and it is the County where one or more Defendants does substantial business.

THE UNDERLYING LITIGATION

11. Each of the Defendant Municipalities filed a separate complaint in the Circuit Court of Milwaukee County.

12. The complaints allege that from 2006 to 2014, Swan dispensed over 1 million doses of oxycontin and hydrocodone to citizens of Milwaukee County.

13. The complaints further allege that Swan marketed, distributed and dispensed opioids in ways that unreasonably interfere with the public health, welfare, and safety in the Defendant Municipalities.

THE POLICIES

The Primary Policy

14. Erie issued the first year of the Ultrapack Plus Policy No. Q97-0390556 (“Primary Policy”) with effective dates of March 31, 2013 to March 31, 2014. “Hayward Pharmacy, Inc. d/b/a Swan Serv-U Pharmacy” is the Named Insured.

15. The Primary Policy has been renewed for eight consecutive annual periods.

16. The Punitive Damages Coverage Endorsement (PK-GN (Ed. 1/10) CL-0061) in the Primary Policy states that Erie “will pay those sums that the insured becomes legally obligated to pay as damages, including punitive or exemplary damages to the extent allowed by law, because of “bodily injury” or ‘property damage” to which this insurance applies.”

17. The Primary Policy defines “Bodily injury” as “bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time.”

18. The Commercial General Liability Coverage Form (CG 00 01 (Ed. 12/07) UF-9708) in the Primary Policy states that the bodily injury coverage only applies if it is “caused by an “occurrence” that takes place in the “coverage territory.”

19. The Primary Policy defines an “occurrence” as “an accident, including continuous or repeated exposure to substantially the same general harmful conditions.”

20. The Wisconsin Amendatory Endorsement (PK-RN (Ed. 1/10) CL-0192) amends the intentional act exclusion in the Commercial General Liability Coverage Form (CG 00 01 (Ed. 12/07) UF-9708) in the Primary Policy. The endorsement states that the Primary Policy does not

apply to bodily injury or property damage “caused intentionally by or at the direction of, and substantially certain to follow from the act of, an insured person.”

21. The Primary Policy contains a Druggists Professional Liability Endorsement (PK-KF (Ed. 1/12) CL-0094). The endorsement excludes “manufacturing” which includes “promotion and marketing of such drugs or devices.”

22. The pollution exclusion in the Commercial General Liability Coverage Form (CG 00 01 (Ed. 12/07) UF-9708) in the Primary Policy states that coverage does not apply to bodily injury or property damage “arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of ‘pollutants.’”

23. The Exclusion–Professional Liability (PK-MQ (Ed. 12/14) CL-0144) in the Primary Policy states that coverage does not apply to bodily injury or property damage due to the rendering the “furnishing or dispensing of drugs or medical, dental, or surgical supplies or appliances.”

24. The Ultrapack Plus Extra Liability Coverages (PK-00-03 (Ed. 7/16) CL-003) in the Primary Policy adds an exclusion to the Commercial General Liability Form (CG 00 01 (Ed. 12/07) UF-9708) that the coverage does not apply to bodily injury or property damage for the “furnishing or dispensing of drugs or medical, dental, or surgical supplies or appliances.”

The Umbrella Policy

25. Erie issued the first year of the Business Catastrophe Liability Policy No. Q27-3170444 (“Umbrella Policy”) with effective dates of March 31, 2013 to March 31, 2014.

26. Most of the terms of the Umbrella Policy follow form to the Primary Policy.

27. Erie now requests a judicial determination that, under the terms and conditions of the Policies, Erie has no obligation to defend or indemnify Swan against the allegations in any of

the underlying complaints filed by the Municipality Defendants.

COUNT I
DECLARATORY JUDGMENT WITH RESPECT TO ERIE'S DUTY TO DEFEND AND
INDEMNIFY SWAN UNDER THE PRIMARY POLICY

28. Erie restates and realleges Paragraphs 1 through 27 as and for its Paragraph 28 of Count I, as if fully set forth herein.

29. Erie contends that the Primary Policy bars coverage to Swan for reasons including but not limited to the following:

- a. The facts in the underlying complaints do not allege any damages “because of” “bodily injury” or “property damage;”
- b. The facts in the underlying complaints do not allege an “occurrence” defined as an “accident;”
- c. The exclusion for intentional acts bars coverage;
- d. The exclusion for “furnishing or dispensing of drugs” bars coverage;
- e. The pollution exclusion bars coverage;
- f. The Professional Liability Exclusion Endorsement (PK-MQ (Ed. 1/10) CL-0144) may bar coverage;
- g. The Druggists Professional Liability Endorsement (PK-KF (Ed. 1/12) CL-0094) excludes coverage for “manufacturing” defined as “promotion and marketing;”
- h. The facts alleged in the underlying complaints allege a known loss;
- i. The facts alleged in the underlying complaints did not take place during the effective dates of the Primary Policy; and
- j. Other terms, conditions, definitions and exclusions that bar coverage.

30. Under the aforementioned terms of the Primary Policy, as well as other terms that also exclude insurance coverage, Erie has no obligation to defend or indemnify Swan in any of the underlying complaints filed by the Municipality Defendants on the grounds that the Primary Policy does not provide insurance coverage for the facts alleged.

WHEREFORE, Plaintiff, Erie Insurance Exchange, requests this Court to enter an Order granting the following relief:

- i. Declaring the respective rights and obligations of the parties under the Primary Policy;

- ii. Declaring that Plaintiff, Erie Insurance Exchange, has no obligation under the Primary Policy to defend or indemnify Defendant, Hayward Pharmacy, Inc. d/b/a Swan Serv-U Pharmacy, in any of the underlying complaints filed by the Municipality Defendants;
- iii. Awarding attorney's fees and costs of this action; and
- iv. Awarding any and all other relief this Court deems appropriate and just.

COUNT II
DECLARATORY JUDGMENT WITH RESPECT TO ERIE'S DUTY TO DEFEND AND INDEMNIFY SWAN UNDER THE UMBRELLA POLICY

31. Erie restates and realleges Paragraphs 1 through 30 as and for its Paragraph 31 of Count II, as if fully set forth herein.

32. Erie contends that the Umbrella Policy bars coverage to Swan for reasons including but not limited to the following:

- a. The facts in the underlying complaints do not allege any damages "because of" "bodily injury" or "property damage;"
- b. The facts in the underlying complaints do not allege an "occurrence" defined as an "accident;"
- c. The exclusion for intentional acts bars coverage;
- d. The exclusion for "furnishing or dispensing of drugs" bars coverage;
- e. The pollution exclusion bars coverage;
- f. The Druggists Professional Liability Endorsement (PK-KF (Ed. 1/12) CL-0094) excludes coverage for "manufacturing" defined as "promotion and marketing;
- g. The Professional Services exclusion may bar coverage;
- h. The facts in the underlying complaints allege a known loss;
- i. The facts alleged in the underlying complaints did not take place during the effective dates of the Umbrella Policy; and
- j. Other terms, conditions, definitions and exclusions that bar coverage.

33. Under the aforementioned terms of the Umbrella Policy, as well as other terms that also exclude insurance coverage, Erie has no obligation to defend or indemnify Swan in any of the underlying complaints filed by the Municipality Defendants on the grounds that the Umbrella Policy does not provide insurance coverage for the facts alleged.

WHEREFORE, Plaintiff, Erie Insurance Exchange, requests this Court to enter an Order granting the following relief:

- i. Declaring the respective rights and obligations of the parties under the Umbrella Policy;
- ii. Declaring that Plaintiff, Erie Insurance Exchange, has no obligation under the Umbrella Policy to defend or indemnify Defendant, Hayward Pharmacy, Inc. d/b/a Swan Serv-U Pharmacy, in any of the underlying complaints filed by the Municipality Defendants;
- iii. Awarding attorney's fees and costs of this action; and
- iv. Awarding any and all other relief this Court deems appropriate and just.

Dated at Chicago, Illinois, this 16th day of August 2021.

HINKHOUSE WILLIAMS WALSH LLP

By: _____



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