

NONPRECEDENTIAL DISPOSITION

To be cited only in accordance with FED. R. APP. P. 32.1

United States Court of Appeals**For the Seventh Circuit****Chicago, Illinois 60604**

Argued January 30, 2024

Decided February 27, 2024

BeforeDIANE S. SYKES, *Chief Judge*THOMAS L. KIRSCH II, *Circuit Judge*DORIS L. PRYOR, *Circuit Judge*

No. 23-1443

TOKIO MARINE SPECIALTY
INSURANCE COMPANY,*Plaintiff-Appellant,**v.*

ALTOM TRANSPORT, INC.,

*Defendant-Appellee.*Appeal from the United States District
Court for the Northern District of
Illinois, Eastern Division.

No. 20 C 7006

Charles P. Kocoras,
*Judge.***ORDER**

Tokio Marine Specialty Insurance Company sued Altom Transport, Inc., seeking a declaration that it does not have a duty to defend Altom in three suits based on injuries arising from Altom's transportation of a contaminant. On cross-motions for summary judgment, the district judge agreed with Altom and correctly concluded that Tokio Marine has a duty to defend because the allegations in the underlying lawsuits potentially fall within the policy's coverage for "bodily injury ... arising out of contamination that is caused by transportation." We thus affirm.

I. Background

Tokio Marine issued an insurance policy on which Altom is listed as an insured. The policy was effective from August 3, 2018, to August 3, 2021. The key provision relevant to this appeal states that Tokio Marine will cover losses “that the insured becomes legally obligated to pay as a result of a claim for bodily injury ... arising out of contamination that is caused by transportation.” The policy then defines “[t]ransportation” as beginning “upon loading your goods, products, materials or waste onto a vehicle” and ending when those items have been “unloaded from a vehicle.” And it defines “[c]ontamination” broadly to include “[t]he discharge, dispersal, release or escape of any contaminant into or upon land, or any structure on land.”

In 2019 a driver for Altom transported a truck containing isopentane (a highly flammable liquid) to New Jersey. After delivering the isopentane, the driver returned to Indiana and left the truck at a storage facility for cleaning. The owner of the facility assigned three workers to clean the truck who then discovered about 40 gallons of isopentane still in the truck’s tank. At the direction of their supervisor, the workers drained the liquid into the facility’s grated floors and drainage system. When the liquid reached an adjacent boiler room, it reacted with an open flame and caused “a massive explosion.” The workers were “still in the work area working on the tankard-trailer when the explosion took place,” and they received first- and second-degree burns to their faces and bodies.

The three workers sued Altom and the storage facility in separate but nearly identical suits in Illinois state court. They allege that Altom was negligent for failing to disclose to the facility the amount of isopentane that remained inside the tank, for failing to exercise reasonable care in delivering the truck to the facility, and for leaving an unsafe amount of highly flammable liquid inside the truck. Altom tendered the suits to Tokio Marine. The insurer denied coverage, reasoning that the plaintiffs did not allege bodily injuries “arising out of contamination caused by transportation” as defined by the policy.

Tokio Marine then filed suit in federal court seeking a declaration that it does not owe Altom a duty to defend or indemnify in connection with the state-court litigation. At the pleadings stage, the judge determined that the question of Tokio Marine’s indemnification duty could not be resolved until the conclusion of the underlying litigation, so he stayed that part of the case as unripe. The parties then filed cross-motions for summary judgment on the duty to defend, and the judge found in

Altom's favor. He first explained that Tokio Marine did not dispute that isopentane was a "contaminant" as that term is defined in its policy, or that draining the isopentane from the truck qualified as "contamination." He then determined that the injuries alleged in the underlying state-court actions "potentially occurred while [the plaintiffs] were still draining the isopentane from the tankard-trailer and therefore arose out of contamination." And because the plaintiffs may still have been draining the liquid—i.e., "unloading" it—from the truck when the explosion occurred, the judge reasoned the "transportation" of the contaminant had not yet ended. The judge concluded that, liberally construed, the allegations in the underlying state-court complaints at least potentially fall within the policy's coverage. He therefore granted Altom's motion for summary judgment and denied Tokio Marine's.

Tokio Marine asked the judge to enter a partial final judgment in favor of Altom on the duty-to-defend claim. *See* FED. R. CIV. P. 54(b). In response the judge vacated his previous stay of the duty-to-indemnify claim, dismissed that claim without prejudice for lack of ripeness, denied Tokio Marine's motion as moot, and entered judgment in favor of Altom.

This appeal followed. We initially questioned whether the judgment was appealable and remanded it to the district court "to enter a judgment that fully and completely implements its decisions." On remand the judge issued an amended judgment complying with that order.

II. Discussion

We review *de novo* a ruling on cross-motions for summary judgment, *Blow v. Bijora, Inc.*, 855 F.3d 793, 797 (7th Cir. 2017), and the construction of an insurance policy, *Lexington Ins. Co. v. RLI Ins. Co.*, 949 F.3d 1015, 1021 (7th Cir. 2020).

The parties do not dispute that Illinois law governs this policy and that in Illinois an insurer's duty to defend is broader than its duty to indemnify. *See United Fire & Cas. Co. v. Prate Roofing & Installations, LLC*, 7 F.4th 573, 579 (7th Cir. 2021) ("It is difficult to overstate the breadth of an insurer's duty to defend." (quotation marks omitted)). To determine whether an insured owes a duty to defend, we compare the allegations in the underlying complaint to the relevant provisions of the insurance policy. *Id.* at 579–80. If those allegations even potentially fall within the policy's coverage, the duty to defend is triggered. *Id.* at 580. We construe policies and complaints liberally "in favor of imposing

a duty to defend,” *id.*, and we resolve ambiguities “in favor of the insured,” *Am. Bankers Ins. Co. of Fla. v. Shockley*, 3 F.4th 322, 328 (7th Cir. 2021).

At the outset, the parties debate the significance of Tokio Marine’s first argument that the purpose of the policy, which bears the word “Environmental” in its title and subtitle, is to cover only injuries arising from pollution. In Tokio Marine’s view, this pollution-based purpose negates a duty to defend claims about “injuries suffered in a cleaning-facility explosion.” Altom counters that because Tokio Marine did not raise this argument in the district court, it is waived on appeal. It is true that in the district court Tokio Marine did not—as it does here—cite other portions of the policy that support its point. But where the issue is “a matter of interpreting the contract, which must be read as a whole,” we are not required to overlook relevant provisions. *St. Paul Fire & Marine Ins. Co. v. Schilli Transp. Servs. Inc.*, 672 F.3d 451, 460 (7th Cir. 2012). Indeed, the exercise of contract interpretation is to determine the intent of the parties by looking first to the ordinary meaning of the contract language in its entirety. *See Shockley*, 3 F.4th at 327.

Nonetheless, Tokio Marine does not persuade us that the policy is restricted to pollution-based injuries. First, a policy’s title and subtitle do not end the inquiry about a contract’s meaning; the meaning is influenced by all the terms. *NewSpin Sports, LLC v. Arrow Elecs., Inc.*, 910 F.3d 293, 303–04 (7th Cir. 2018); *see also Lexington Ins. Co.*, 949 F.3d at 1023 (“We determine the character of a contract from its substantive effects, not from the labels that parties prefer to place on its provisions.” (quoting *Learning Curve Int’l, Inc. v. Seyfarth Shaw, LLP*, 911 N.E.2d 1073, 1079 (Ill. App. Ct. 2009))). Second, none of the provisions Tokio Marine highlights (and indeed, no provision in the policy) mentions “pollutant” or “pollution”; the policy uses the terms “contaminant” and “contamination.” Third, Tokio Marine does not dispute that the isopentane meets the policy’s definition of “contaminant,” and the definition of “contamination” appears to include draining the isopentane.

Tokio Marine next argues that the underlying suits do not allege bodily injury “arising out of contamination” because the complaints allege that the injuries were caused by an explosion—not by exposure to isopentane. But nothing in the policy conditions coverage on exposure to or physical contact with a contaminant; rather, the policy covers bodily injuries “arising out of contamination.” And Illinois courts have routinely held that “arising out of” is a “broad and vague phrase which must be liberally construed in favor of the insured.” *Shockley*, 3 F.4th at 330 (internal quotation marks omitted). A “but for” causal connection will suffice: The injuries need only have

“flow[ed] from” the contamination. *Zurich Am. Ins. Co. v. Ocwen Fin. Corp.*, 990 F.3d 1073, 1079 (7th Cir. 2021). Moreover, the policy broadly defines “contamination” as “[t]he discharge, dispersal, release or escape of any contaminant into or upon land, or any structure on land.” That definition arguably covers draining the isopentane from the truck into the drainage system at the storage facility. Because the explosion would not have occurred but for that draining, the underlying tort injuries “aris[e] out of contamination.”

Tokio Marine also contends that draining the isopentane is not “contamination,” but as far as we can tell, it never pressed that argument in the district court. As mentioned above, the judge noted that it was “undisputed that the draining of the isopentane from the tankard-trailer ... falls within the Policy’s definition of ‘contamination.’” In any event, Tokio Marine does not develop the argument on appeal, so we need not consider it. See *M.G. Skinner & Assocs. Ins. Agency, Inc. v. Norman-Spencer Agency, Inc.*, 845 F.3d 313, 321 (7th Cir. 2017) (“Perfunctory and undeveloped arguments are waived ...”).

Tokio Marine urges alternatively that even if draining is contamination, it still need not defend because Altom is not alleged to have drained the tanks. But the absence of that allegation is irrelevant. Coverage occurs if Altom “becomes legally obligated to pay as a result of a claim for bodily injury ... arising out of contamination that is caused by transportation.” If, as the injured plaintiffs allege, Altom negligently transported the truck and failed to warn the facility owner about the excess contaminant in the tank, then it may become legally obligated to pay the underlying plaintiffs for the bodily injuries arising out of the release of that contaminant.

Tokio Marine’s final argument is also unavailing. It contends that the underlying suits do not allege that “transportation” caused the contamination because in Tokio Marine’s view, transportation had ended by the time Altom relinquished the tanker for cleaning. Tokio Marine cites the provision stating that “transportation” starts when “loading your goods, products, materials or waste onto a vehicle” and ends when those items have been “unloaded.” It then urges us to use the “complete operations doctrine” to interpret the term “unloaded.”

That doctrine does not help Tokio Marine. Illinois courts use the “complete operations doctrine” to interpret loading and unloading clauses in auto insurance policies. See *Estes Co. of Bettendorf v. Emps. Mut. Cas. Co.*, 402 N.E.2d 613, 615–16 (Ill. 1980). Under this approach, unloading is complete when “subsequent to removal of the

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material from the vehicle, the deliverer has finished his handling of it, and the material has been placed in the hands of the receiver at the designated reception point.” *Id.* at 614. But as Altom observes, neither our court nor any Illinois court has used this doctrine to interpret loading and unloading clauses in contamination-coverage policies—only automobile policies. And whether, as Tokio Marine urges, this policy’s transportation provision is analogous enough to an automobile policy to invoke the doctrine is a question of indemnification.

We therefore take the “loading or unloading” clause here at face value and construe any ambiguity in Altom’s favor. *See Shockley*, 3 F.4th at 328. In doing so, we observe that the clause can reasonably be read to mean that “transportation” is ongoing any time a contaminant is in the truck. By its terms, “transportation” ends when “goods, products, materials or waste” have been “unloaded” from the vehicle. And the tort plaintiffs allege that at the time of the explosion, they were “working on the tankard-trailer.” This can be reasonably understood to mean that they were still unloading the isopentane (arguably a “good” or “waste”), 40 gallons of which were in the truck when they began their work. The allegations, thus, at least potentially fall within the “transportation” coverage, and Tokio Marine has a duty to defend.

AFFIRMED