

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No.

UNITED SPECIALTY INSURANCE COMPANY
(a Delaware corporation),

Plaintiff,

v.

GAIA'S GARDEN, LLC
(a Colorado Limited Liability Corporation);
WAYNE KOHNKE,
MARTI KOHNKE, and
TAMARA HEMAN,
individually and as next friends of
AK, CK, and EK, minors,

Defendants.

COMPLAINT FOR DECLARATORY JUDGMENT

Pursuant to Federal Rule of Civil Procedure 57, Plaintiff United Specialty Insurance Company (“United Specialty”) complains as follows against Gaia’s Garden, LLC (“Gaia’s”).

INTRODUCTION

This is an insurance coverage dispute involving tragic circumstances and a relatively new Colorado industry—marijuana edibles. In 2013, United Specialty issued a commercial lines insurance policy to Gaia’s Garden, a medical marijuana “bakery,” which produces cookies, candies, and other edibles containing or infused with THC, the active ingredient in marijuana. The policy explicitly did not cover losses due to any products manufactured or sold by Gaia’s

once they left Gaia's possession and also included a specific "psychotropic substances" loss exclusion.

On April 14, 2014, Richard Kirk of Denver, allegedly ingested a marijuana edible in the form of candy manufactured by Gaia's. He allegedly became psychotic as a result. That evening, he shot to death his wife Kristine, mother of their three children. The three children, through their legal guardians, filed suit on April 13, 2016 against Gaia's (and other defendants) in District Court for the City and County of Denver, Colorado in negligence and strict liability for failure to warn of the dangers and side effects of the highly potent edible marijuana candy (the "Lawsuit"). An amended complaint ("Amended Complaint") was filed on May 9, 2016.

In April 2017, Gaia's notified United Specialty of the Lawsuit. United Specialty has offered a defense under a reservation of rights. United Specialty here seeks an application of the plain language of its insurance policy and a declaration that it has no further obligations to Gaia's, nor to anyone else claiming an interest in that Policy, including no further duty to defend or to indemnify Gaia's for any adverse judgment.

GENERAL ALLEGATIONS

A. The Parties, Jurisdiction, and Nature of the Case

1. United Specialty issued an insurance policy to Gaia's, bearing number USA 4013276, in effect from October 22, 2013 to October 22, 2014 ("the Policy"). Relevant pages of the Policy are attached as **Exhibit 1**.

2. United Specialty is a Delaware corporation with its principal place of business in Texas. United Specialty is authorized to do business in the State of Colorado. United Specialty is a citizen of Delaware and Texas for purposes of diversity jurisdiction.

3. Gaia's is a limited liability company organized under the laws of Colorado.

Based on a review of Gaia's organizational documents and amendments thereto, Gaias's has two members, both of whom are individuals. Both of Gaia's members are residents and citizens of Colorado. Therefore, for diversity jurisdiction purposes, Gaia's is a citizen of Colorado.

4. According to the Lawsuit, AK, CK, and EK are the children of Richard Kirk and Kristine Kirk. Wayne Kohnke, Marti Kohnke and Tamara Heman are the legal co-guardians of AK, CK, and EK. *See Order of Appointment of June 3, 2014, by the Denver Probate Court, Case No. 14PR30614.* Collectively, the children and their guardians are the "Children Defendants." Each of the Children Defendants is a resident and citizen of the State of Colorado.

5. This is an action for declaratory judgment pursuant to 28 U.S.C.A. § 2201 for the purpose of determining a question of actual controversy between the parties.

6. The Children Defendants are named as Defendants in this complaint because if they are successful in the Lawsuit and obtain a judgment against Gaia's, they would have an interest in the proceeds of Gaia's insurance policy if the judgment they were to obtain was caused by an occurrence covered under the Policy. It is United Specialty's position that the Children Defendants' Lawsuit against Gaia's is not the result of a covered occurrence under the Policy.

7. Jurisdiction of this action is based on 28 U.S.C. § 1332(a), there being diversity of citizenship between the parties. Given the nature of the occurrence alleged in the underlying Lawsuit for which Gaia's seeks coverage (the murder of a mother of three), coupled with the attorneys' fees involved in defending such a case, the amount in controversy exceeds the sum of Seventy-Five Thousand Dollars (\$75,000.00), exclusive of interest and costs.

8. Venue is proper in this Court, pursuant to 28 U.S.C. § 1391(a), because the Defendant is a Colorado business, the insurance policy at issue was issued in Colorado, and the alleged occurrence that forms the basis of this dispute occurred in Colorado.

B. The Murder of Kristine Kirk and the Lawsuit

9. On May 9, 2016, the Children Defendants, the Kirk's three minor children, through their guardians, filed the Amended Complaint in the Lawsuit brought in Denver District Court, Case No. 16cv31310. The Lawsuit names as defendants Nutritional Elements, Inc., Gaia's, and Richard Kirk. A copy of the Amended Complaint from the Lawsuit is attached as **Exhibit 2.**

10. According to the Amended Complaint, on April 14, 2014, Kristine Kirk was at the family home in Denver's Observatory Park, when she was shot and killed by her husband, Richard Kirk.

11. According to the Amended Complaint, Richard Kirk had become delirious, paranoid, and psychotic after consuming edible marijuana candy. Kristine Kirk called 911 and spoke to the 911 dispatcher for approximately 12 minutes. Kristine Kirk reported that her husband was "acting irrationally," "hallucinating," and was "talking about the end of the world."

12. According to the Amended Complaint, the explanation Kristine Kirk gave to the 911 operator was that Richard had ingested marijuana in the form of an edible and possibly a prescription painkiller. Kristine Kirk told the 911 operator that her husband "has the gun." Kristine could be heard begging Richard Kirk to "please stop." The 911 operator then heard a single gunshot. Kristine Kirk had been shot dead.

13. According to the Amended Complaint in the Lawsuit, Richard Kirk was charged with his wife's murder. In early February 2017, Richard Kirk pled guilty to the charge of second-degree murder in exchange for District Attorney dropping a first-degree murder charge. Richard Kirk was sentenced to 30 years in Colorado state prison.

14. Nutritional Elements, Inc. is a South Denver licensed marijuana dispensary.

15. The Amended Complaint alleges that the night of the killing, Richard Kirk consumed "Karma Kandy Orange Ginger," a marijuana-infused candy manufactured by Gaia's and sold by Nutritional Elements. *See Amended Complaint ¶¶ 18-20.*

16. The Lawsuit makes claims of strict liability and negligence against Gaia's, alleging that the marijuana-infused candy had dangerous side effects, including hallucinations, paranoia, and psychosis. *See Amended Complaint ¶ 24, ¶¶ 55-67, ¶¶ 68-85.*

17. The Lawsuit asserts that Gaia's failed to exercise reasonable care by selling and marketing the marijuana-infused candy, without giving appropriate warnings to users and consumers that they might experience delirium, paranoia, psychosis, or other such symptoms on ingestion of the Karma Kandy Orange Ginger edibles.

18. The Lawsuit claims that as a result of selling a defective and dangerous product, and failing to adequately warn of the dangers of the product, Gaia's indirectly caused Kristine Kirk's death – through the actions of the delirious and psychotic Richard Kirk.

19. The Lawsuit seeks compensatory damages against Gaia's, Nutritional Elements, and Richard Kirk. *Amended Complaint ¶ 77, ¶ 85, ¶ 93.*

20. For much of the past year, the Lawsuit has been stayed pending resolution of the criminal charges against Richard Kirk.

C. Gaia's Provides Notice of Loss to United Specialty

21. By a notice dated April 14, 2017, Gaia's (through its insurance agency) provided a notice of loss to United Specialty—sending a copy of the Amended Complaint and asking that United Specialty provide Gaia's with a legal defense to the Lawsuit. A copy of the Liability Notice of Occurrence/Claim document is attached as **Exhibit 3**.

22. United Specialty agreed to provide a defense to Gaia's under a reservation of rights.

D. The Policy does not cover the alleged loss and specifically excludes any losses as a result of the sale, manufacture, or ingestion of psychotropic substances, including marijuana.

23. The Policy is a commercial lines policy with a number of specific exclusions.

24. The Policy notes on its declarations page that the “Business Description” of Gaia's Garden is “Medical Marijuana Bakery.”

25. The Policy, via an endorsement titled “Exclusion – Products –Completed Operations Hazard” coverage “*does not apply* to ‘bodily injury’ or ‘property damage’ included within the ’products – completed operations hazard’.” (emphasis added). This specific endorsement is attached as **Exhibit 4**.

26. Pursuant to the Policy’s definition, “Products – completed operations hazard,” includes “all ‘bodily injury’ and ‘property damage’ that arises out of ‘your products’ if the ‘bodily injury’ or ‘property damage’ occurs *after you have relinquished possession of those products.*” (emphasis added).

27. In other words, the Policy specifically did not cover, and was not intended to cover, bodily injury arising out of one of Gaia's products where the injury occurred *after* Gaia's had "relinquished possession" of the product –i.e., after the product was sold and distributed.

28. In this instance, per the allegations of the Lawsuit, the bodily injury (the death of Kristine Kirk) occurred after the distribution and sale of the product. *See* Amended Complaint ¶ 79 (alleging that Richard Kirk had "purchased and consumed" the edible sold by Nutritional elements and Gaia's). Therefore, it was not a covered hazard under the Policy.

29. The Policy also specifically excludes from coverage, via an endorsement titled "Exclusion - Psychotropic Substances," any bodily injury "which would not have occurred, in whole or in part, but for the actual . . . ingestion of, contact with, exposure to . . . or presence of psychotropic substances." A copy of this endorsement is attached as **Exhibit 5**.

30. In particular, the Psychotropic Substances exclusion states categorically that United Specialty "shall have no duty to defend or indemnify any claim, demand, 'suit' action, litigation, arbitration . . . or other judicial or administrative proceeding seeking damages . . . where any actual or alleged injury arises out of a chain of events which includes any . . . psychotropic substance whether the psychotropic substance is the initial precipitating event or a substantial cause of injury."

31. The Psychotropic Substances Exclusion defines a psychotropic drug to mean "any legal or illegal drug or substance that (1) affects the mind, mood or other mental process; (2) impacts the brain or central nervous system; or (3) is hallucinogenic."

32. The Psychotropic Substances exclusion includes a (non-exclusive) list of psychotropic drugs. Included in the list are "marijuana" and "cannabinoids."

33. THC or tetrahydrocannabinol, the active ingredient in marijuana, is a cannabinoid.

34. It is alleged at paragraph 20 of the Amended Complaint that the marijuana edible that Richard Kirk consumed prior to killing his wife contained more than 100 milligrams of THC. Amended Complaint ¶ 20.

35. The entire thrust of the Lawsuit is that Gaia's is responsible for the death of Kristine Kirk because Richard Kirk ingested a THC-infused marijuana edible product manufactured by Gaia's. *See, e.g.*, Amended Complaint ¶¶ 56, 58, 65, 70, 73, 76. This is precisely the kind of occurrence that the Psychotropic Substances exclusion was intended to exclude from coverage.

36. Therefore, Kristine Kirk's death, alleged to have been a result of the ingestion by her husband of a marijuana edible manufactured by Gaia's, is not a risk or hazard covered by the Policy.

37. In addition to the above, by not timely informing United Specialty of the Lawsuit as soon as practicable after it was filed, Gaia's breached the notice condition of the Policy and United Specialty was likely prejudiced as a result. For example, United Specialty has just learned that Nutritional Elements has reached a settlement with Plaintiffs. United Specialty, by contrast, has just begun to investigate this claim and does not know, for example, whether Gaia's may be an insured under Nutritional Elements' own insurance policy, or whether some contractual indemnification runs in Gaia's favor.

CLAIM FOR RELIEF

**(Declaratory Judgment that United Specialty has no Obligation
to Defend Gaia's in the Lawsuit or to Pay For Gaia's Claimed Loss)**

38. United Specialty incorporates the above paragraphs as if set forth in full herein.
39. There is a real, substantial, and justifiable issue in controversy among the Parties hereto with respect to whether the Policy covers the occurrence alleged in the Lawsuit and whether United Specialty owes Gaia's a duty to defend the Lawsuit.
40. A judicial determination and a declaration of the rights and obligations of the parties are necessary and appropriate at this time, as there are questions in actual controversy between or among the parties.
41. United Specialty requests this Court determine that the damages sought from Kristine Kirk's murder are specifically excluded from coverage under the terms of the Policy, and that United Specialty has no obligation to either defend Gaia's in the Lawsuit or to indemnify Gaia's for any adverse judgment.

PRAYER

United Specialty respectfully asks the Court to enter a declaratory judgment in favor of United Specialty and against Defendants, declaring that United Specialty has no duty to defend or indemnify, as outlined above, and awarding United Specialty such other relief, including costs, as the Court may award.

Dated: May 4, 2017.

Respectfully submitted,

*Below-signed counsel certifies that he is a
member in good standing of the bar of this court.*

s/ N. Reid Neureiter

Terence M. Ridley
N. Reid Neureiter
Wheeler Trigg O'Donnell LLP
370 Seventeenth Street, Suite 4500
Denver, CO 80202-5647
Telephone No.: 303-244-1800
Facsimile No.: 303-244-1879
Email: ridley@wtotrial.com
neureiter@wtotrial.com

*Attorneys for Plaintiff
United Specialty Insurance Company*