

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

STARR SURPLUS LINES INSURANCE COMPANY,

Plaintiff,

-against-

CRF FROZEN FOODS, LLC, and HOUSTON  
CASUALTY COMPANY,

Defendants.

Civil Action:

**COMPLAINT FOR RESCISSION OR, ALTERNATIVELY,  
FOR DECLARATORY JUDGMENT AND OTHER RELIEF**

Plaintiff, Starr Surplus Lines Insurance Company (“Starr”), for its Complaint against Defendants, CRF Frozen Foods, LLC (“CRF”) and Houston Casualty Company (“HCC”), states as follows:

**NATURE OF ACTION**

1. This matter arises out of a large-scale recall of frozen vegetables by CRF in 2016, due to contamination of CRF’s products with *Listeria monocytogenes* (“LM”) over a period of several years, starting no later than 2013. CRF made a claim related to the recall under its product contamination insurance policy (“the Policy”) with Starr. Starr responded by investigating the claim, subject to a full reservation of rights. Starr’s investigation revealed that CRF had been aware, prior to submitting its application for the Policy, of circumstances likely to give rise to this incident and claim. By this action, Starr seeks rescission of the Policy (Count I). Alternatively, Starr seeks declaratory judgments that it owes no coverage to CRF due to misrepresentations in its applications (Count II), because CRF’s loss was not fortuitous as a matter of law (Count III), because the Policy is not triggered (Count IV), and because Exclusion 4.9 of the Policy precludes coverage (Counts V). HCC issued an insurance policy providing

excess product contamination coverage (the “HCC Follow Form Excess Policy”), which follows form to all of the Starr Policy’s terms, conditions, and exclusions pertinent to CRF’s claim, and HCC thus has a substantial interest in the matters to be adjudicated in this comprehensive action.

### **PARTIES**

2. Plaintiff Starr is an insurance company organized under the laws of the State of Illinois, which has its principal place of business in New York, New York.

3. On information and belief, Defendant CRF is a limited liability company organized under the laws of the State of Delaware and having its principal place of business in Pasco, Washington. The Washington Secretary of State’s office lists the governors (as defined in RCW 23.95.105(12)) of CRF as Allan F. Knoll, Martin Myers, Keith McGovern, Tyler Falk, and Ronald Offutt. Information previously available on the website of the Washington Secretary of State’s office stated Mr. Knoll was from Fargo, North Dakota, Mr. Myers was from Boardman, Oregon, Mr. McGovern was from Fargo, North Dakota, Mr. Falk was from Fargo, North Dakota, and Ronald Offutt was from Fargo, North Dakota. On information and belief, none of the members or governors of CRF is a citizen of the State of New York or the State of Illinois.

4. On information and belief, Defendant HCC is an insurance company organized under the laws of the State of Texas, which has its principal place of business in Houston, Texas.

### **JURISDICTION AND VENUE**

5. This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1332(a), based on complete diversity of citizenship between the parties and an amount in controversy excess of \$75,000, exclusive of interest and costs.

6. The Policy (and thus the HCC Follow Form Excess Policy) is subject to Condition 5.10 (“Choice of Law and Forum”):

The construction, validity and performance of this Policy will be governed by the laws of the State of New York. The Insurer and the Insured hereby expressly agree that all claims and disputes will be litigated in the Supreme Court of the State of New York in and for the County of New York or in U.S. District Court for the Southern District of New York.

7. This Court therefore has personal jurisdiction over CRF pursuant to the Policy and under N.Y. General Obligations Law § 5-1402(1).

8. Venue is proper in this District under N.Y. General Obligations Law § 5-1402(1) and the Policy’s Section 5.10.

#### **THE POLICIES**

9. In reliance upon the truth of the information contained in CRF’s applications for coverage, Starr issued the Policy, a Product Contamination Insurance policy, to CRF, policy number SLSLCRM82040215, effective May 1, 2015 to May 1, 2016, subject to policy limits of \$10,000,000 per Insured Event, and to a \$500,000 self-insured retention per Insured Event. A true and correct copy of the Policy is attached hereto as Exhibit A.

10. Upon information and belief, HCC issued the HCC Follow Form Excess Policy to CRF, policy number H715-75013, effective October 16, 2015 to May 1, 2016, subject to policy limits of \$10,000,000 each Insured Event.

#### **FACTUAL ALLEGATIONS**

11. CRF processes, freezes, packages and distributes individually quick frozen (“IQF”) frozen vegetables and fruits from a single 65,000 sq. foot production facility in Pasco, Washington, which was built in 2006. Its products are distributed throughout the United States and Canada.

12. CRF took over operation of the Pasco, Washington facility from Bybee Foods LLC in or around May 2013.

13. On August 7, 2013, CRF signed its first application for product contamination insurance with Starr. The application included the following question:

31. Does the company have any knowledge or information of any specific facts, which may give rise to an incident and/or claim or know of any incident that would result in a claim if insurance had been in place?

If yes, please explain.

14. CRF answered, "No" to this question.

15. In reliance upon that application and other information submitted by CRF, Starr issued a product contamination insurance policy to CRF, effective September 13, 2013 to September 13, 2014.

16. On March 2, 2014, CRF's Director of Quality Systems signed CRF's second application for product contamination insurance with Starr. The application was not submitted to Starr until months later, as discussed further below.

17. The application again included the following question:

31. Does the company have any knowledge or information of any specific facts, which may give rise to an incident and/or claim or know of any incident that would result in a claim if insurance had been in place?

If yes, please explain.

18. CRF again answered, "No" to this question.

19. On October 15, 2014, CRF's Director of Quality Systems again signed the application for product contamination insurance with Starr it had previously signed on March 2, 2014. The "No" answer to the same Question No. 31 was left unchanged.

20. In reliance on the application and other information submitted by CRF, Starr issued another product contamination insurance policy to CRF, effective September 13, 2014 to May 1, 2015.

21. On December 15 and 16, 2014, the Washington State Department of Agriculture (“WSDA”) conducted an inspection at the CRF facility in Pasco, Washington. The inspection report noted “[r]epeat violations,” “a critical violation,” and [s]ignificant violations.” The violations were discussed with CRF’s Director of Quality Systems who “promised immediate correction for all violations.” <http://www.fda.gov/ucm/groups/fdagov-public/@fdagov-afda-orgs/documents/document/ucm505530.pdf>

22. On March 9, 2015, CRF’s Director of Quality Systems signed an application for renewal of its product contamination insurance with Starr. The application again included the following question:

31. Does the company have any knowledge or information of any specific facts, which may give rise to an incident and/or claim or know of any incident that would result in a claim if insurance had been in place?

If yes, please explain.

CRF again answered Question No. 31, “No.”

23. In reliance on the application and other information submitted by CRF, Starr issued to CRF the Policy, effective May 1, 2015 to May 1, 2016, which is the period during which CRF has provided notice to Starr of facts giving rise to the claim at issue in this Complaint.

24. On September 1, 2015, the Pasco, Washington facility was inspected again by the WSDA. In the inspection reports for both the December 2014 and the September 2015 inspections, the WSDA stated, “No refusals were encountered during the inspection.” See

<http://www.fda.gov/ucm/groups/fdagov-public/@fdagov-afda-orgs/documents/document/ucm505518.pdf>.

25. In October 2015, CRF purchased the HCC Follow Form Excess Policy, which increased its insurance limits for its product contamination exposure by \$10 million.

26. While for prior inspections in December 2014 and September 2015, the WSDA reports stated, “No refusals were encountered,” during an inspection by the FDA from March 14 to 17, 2016, CRF refused to allow the inspectors to take photographs, refused to allow them to review microbiological test results, and refused to provide other requested documents. CRF continued to refuse, even after the FDA inspectors cited court cases to CRF’s President, requiring such cooperation. See <http://www.fda.gov/ucm/groups/fdagov-public/@fdagov-afda-orgs/documents/document/ucm505545.pdf>. The FDA inspectors followed up on the WSDA’s findings during the September 1, 2015 inspection. Some of the observations from the previous inspection were found to be corrected, but some of the observations could not be verified as corrected because part of the plant’s operations had been shut down for the season. In addition, the FDA’s inspection found new deficiencies.

27. A “Form 483” was issued by the FDA in connection with its March 2016 inspection. According to the FDA, a Form 483 is issued at the conclusion of an inspection to notify the company’s management of objectionable conditions. The form is issued pursuant to Section 704(b) of the Federal Food, Drug and Cosmetic Act which provides, “Upon completion of any such inspection of a factory, warehouse, consulting laboratory, or other establishment, and prior to leaving the premises, the officer or employee making the inspection shall give to the owner, operator, or agent in charge a report in writing setting forth any conditions or practices observed by him which, in his judgment, indicate that any food, drug, device, tobacco product, or

cosmetic in such establishment (1) consists in whole or in part of any filthy, putrid, or decomposed substance, or (2) has been prepared, packed, or held under insanitary conditions whereby it may have become contaminated with filth, or whereby it may have been rendered injurious to health.” 21 U.S.C. § 374(b).

28. The Form 483 issued by the FDA in connection with its March 2016 inspection cited numerous deficiencies, including food contact areas throughout several processing lines being found with chipped and cracked plastic and areas that are not easily cleanable, areas of exposed aggregate throughout the firm, areas of forklift damage throughout the firm walls and doorframes, black plastic used as shielding torn and difficult to clean, blue bags to be used for food product were used to store waste instead of red bags which were designated for waste, workers were observed walking into restrooms wearing vests that were also worn during production, and the handwash sink near the onion line was not functioning properly. See <http://www.fda.gov/ucm/groups/fdagov-public/@fdagov-afda-orgs/documents/document/ucm505545.pdf>.

29. By letter dated April 20, 2016, CRF made a claim under the Policy, notifying Starr that a CRF customer reported that the Ohio Department of Agriculture had received a positive test for LM on CRF frozen organic white sweet corn and frozen organic petite green peas.

30. CRF reported to Starr that it made an initial, voluntary recall of eleven of its products manufactured during a six-month period, from September 13, 2015 to March 16, 2016.

31. CRF advised Starr that it had shut down its plant for analysis and testing.

32. By correspondence dated April 28, 2016, Starr advised CRF, among other things, that it would be conducting an investigation of the claim and the circumstances of the loss,

requested CRF's cooperation, and advised that all its rights, as well as CRF's, would be mutually reserved.

33. On May 2, 2016, CRF expanded the voluntary recall to include all (358) frozen vegetables and fruits processed at the plant for a two-year period, from May 1, 2014 through May 1, 2016 (the entire recall in April and May 2016, and any subsequent related recall, are referred to herein as the "2016 product recall").

34. The plant remains closed.

35. On August 23, 2016, Starr advised CRF that Starr's investigation was continuing and that it continued to reserve all rights.

36. On December 9, 2016, Starr issued correspondence to CRF supplementing its initial reservation of rights.

37. On December 28, 2016, Starr advised CRF that Starr continued to reserve all of its rights.

38. Contemporaneous with the filing of this action, Starr has issued correspondence advising CRF of Starr's positions as to CRF's claim and advising CRF that it was tendering to CRF the premium it paid for the Policy.

39. Upon information and belief, HCC has asserted positions as to CRF's claim which are substantially consistent with the positions Starr asserts.

#### COUNT I – RESCISSION

40. For Paragraph 40 of Count I, Starr re-alleges and incorporates as if fully set forth herein Paragraphs 1 through 39 above.

41. The Policy states that it was issued "in reliance on the warranties and representations made by the **Insured** in the Application for this insurance, its attachments and all

underwriting information submitted which is incorporated into and forms a part of this insurance.”

42. Condition 5.1 of the Policy states:

5.1 Representation

In granting cover to the **Insured**, the Insurer has relied upon material statements and particulars in the Application for this Policy together with its attachments and other information supplied. These statements, attachments and information are the basis of the coverage afforded under this Policy and are incorporated into and constitute a part of this Policy.

43. Condition 5.12 of the Policy states:

5.12 Concealment, Misrepresentation, Non-Disclosure and Fraud

Without prejudice to the Insurers' other rights, howsoever arising, this Policy by any is null and void in case of concealment, misrepresentation or non-disclosure **Insured**, whether or not fraudulent, of a material fact concerning:

- (i) this Policy or the procurement thereof; or
- (ii) the **Insured Product(s)**, or the **Insured's** interest in the **Insured Product(s)**; or
- (iii) any **Insured Event** or any **Loss** or claim under this Policy.

44. Endorsement No. 5 provides as follows:

**RELIANCE ENDORSEMENT  
(other applications)**

In granting coverage under this policy, it is understood and agreed that the Insurer has relied upon the statements, representations and warranties contained in all applications, warranty statements, together with attachments and any other materials submitted for this policy (including all such previous policy applications, and their attachments and materials, for which this policy is a renewal or succeeds in time), as being accurate and complete. It is further understood and agreed that the **Insured** warrant and represent to the Insurer that the statements, representations and warranties

made in such application(s) were accurate on the date such statements and representations were so given. All such statements and representations in such application(s) are the basis of this policy and are to be considered as incorporated into this policy.

All other terms, conditions and exclusions remain unchanged.

45. As set forth in the Reliance Endorsement to the Policy, Starr has issued the Policy in reliance, not only on the application for the Policy, but also on prior applications for prior policies.

46. The applications signed by CRF representatives each contained the following acknowledgment:

The applicant represents that the above statements and facts are true and that no material facts have been suppressed or misstated. Completion of this form does not bind coverage. Applicant's acceptance of the Company's quotation and Company's written agreement to be bound is required to bind coverage and to issue policy. It is agreed that this form shall be the basis of the contract should a policy be issued, and will be attached to the policy. All written statements and materials furnished to the Company in conjunction with this application are hereby incorporated by reference into this application and made a part hereof. If an order is received, the application is attached to the policy so it is necessary that all questions be answered in detail.

47. CRF was aware, as of August 7, 2013, when it signed its first application with Starr, of specific facts which may give rise to an incident and/or claim under the Policy, but CRF failed to so inform Starr.

48. CRF was aware, as of October 15, 2014, when it re-signed its second application with Starr, of specific facts which may give rise to an incident and/or claim under the Policy, but CRF failed to so inform Starr.

49. CRF was aware, as of March 9, 2015, when it signed its third application with Starr, of specific facts which may give rise to an incident and/or claim under the Policy, but CRF failed to so inform Starr.

50. Despite CRF's knowledge that its answers were false, CRF answered Question 31 in the application "No" in August 2013, October 2014, and March 2015.

51. Had CRF answered Question 31 correctly, Starr would not have issued the Policy.

52. CRF's answers to Question 31 were material to Starr's evaluation of the risk CRF presented in its applications, and to Starr's decision to accept the risk and issue a policy for the premium charged, and with the coverages, terms, conditions, exclusions, limits of liability, and the amount of the self-insured retentions contained in the Policy. Starr issued the Policy in reliance upon the information provided by CRF and was dependent upon CRF to provide complete and accurate information. CRF failed to provide such information to Starr.

53. CRF's material misrepresentations in its applications for coverage also constituted a breach of its obligations under the Policy Conditions, the reliance endorsement, and the applications. Under the terms of the Policy, CRF's false answers, omissions, and concealment of material facts which formed the basis of the contract of insurance rendered the Policy null and void.

54. Starr issued the Policy in reliance on the truth of CRF's representations in its applications for coverage.

55. By reason of CRF's false answers, omissions, and concealments and its aforesaid breaches of the Policy, the Policy is null and void and the Policy should be adjudicated rescinded.

56. Starr has no adequate remedy at law.

#### **COUNT II – MISREPRESENTATION**

57. For Paragraph 57 of Count II, Starr re-alleges and incorporates as if fully set forth herein Paragraphs 1 through 56 above.

58. This count is pled in the alternative to Count I.

59. There is an actual justiciable controversy, within the meaning of 28 U.S.C. § 2201, between Starr, HCC, and CRF with respect to their respective rights and obligations under the Policy, under the HCC Follow Form Excess Policy, and under the law.

60. Starr contends that due to CRF's false answers, omissions, and concealments and its aforesaid breaches of the Policy, Starr is entitled to a judicial declaration that it owes no coverage to CRF for its 2016 product recall.

### **COUNT III – KNOWN LOSS/FORTUITY**

61. For Paragraph 61 of Count III, Starr re-alleges and incorporates as if fully set forth herein Paragraphs 1 through 60 above.

62. This count is pled in the alternative to Count I.

63. Under New York law, an insurance contract is defined as “any agreement ... whereby one party, the ‘insurer,’ is obligated to confer benefit of pecuniary value upon another party, the ‘insured,’ ... dependent upon the happening of a fortuitous event ....” Insurance Law § 1101(a)(1).

64. A “fortuitous event” is defined as: “[A]ny occurrence or failure to occur which is, or is assumed by the parties to be, to a substantial extent beyond the control of either party.” Insurance Law § 1101(a)(2).

65. Under New York law, fortuity is a requirement of all insurance policies. Consolidated Edison Co. of New York, Inc. v. Allstate Ins. Co., 98 N.Y.2d 208, 220 (2002).

66. Any loss arising out of CRF's 2016 product recall was not fortuitous and therefore is not covered under the Policy.

67. There is an actual justiciable controversy, within the meaning of 28 U.S.C. § 2201, between Starr, HCC, and CRF with respect to their respective rights and obligations under the Policy, under the HCC Follow Form Excess Policy, and under the law.

68. Because any loss arising out of CRF's 2016 product recall was not fortuitous, Starr is entitled to a judicial declaration that it owes no coverage to CRF for its 2016 product recall.

#### **COUNT IV – THE POLICY IS NOT TRIGGERED**

69. For Paragraph 69 of Count IV, Starr re-alleges and incorporates as if fully set forth herein Paragraphs 1 through 68 above.

70. This count is pled in the alternative to Count I.

71. The Policy contains the following insuring agreement applicable to Accidental Contamination:

##### **Product Contamination Insurance**

In consideration of the premium paid and in reliance on the warranties and representations made by the **Insured** in the Application for this insurance, its attachments and all underwriting information submitted which is incorporated into and forms a part of this insurance, the Insurers agree as follows:

##### **1. Insured Events**

The Insurer will reimburse the **Insured** for its **Loss** excess of the applicable Self-Insured Retention, but not exceeding the limits of liability stated on the Declaration Page, caused by or resulting from any of the following **Insured Events** first discovered during the **Policy Period** and reported to the Insurers in writing in accordance with Condition 5.22 Notice of Loss, during the **Policy Period** or up to thirty (30) days after non-renewal of the Policy, provided that as of inception of this insurance the **Insured** were not aware and could not reasonably have been aware of circumstances which could produce **Loss** under this Policy.

##### **1.1 Accidental Contamination**

Any accidental or unintentional contamination, impairment or mislabeling of an **Insured Product(s)**, which occurs during or as a result of its

production, preparation, processing, manufacture, labeling (including instructions for use), processing [sic], packaging, mixing, blending, compounding or distribution, or **Adverse Publicity** implying such; provided that the use or consumption of such **Insured Product(s)**:

- (i) has resulted in or would result in clear, identifiable, internal or external visible physical symptoms of **Bodily Injury** within three hundred and sixty five days (365) days following such consumption or use or
- (ii) has caused or would cause **Property Damage** other than damage to or destruction of **Insured Product(s)**.

72. The Policy also contains the following definition:

3.2 **Bodily Injury** means

- (i) death; or
- (ii) clear, identifiable, internal or external visible physical symptoms of injury, sickness or disease sustained by a person.

**Bodily Injury** does not include emotional distress or mental anguish unless due to physical injury, sickness or disease.

73. The Policy defines “Loss” as certain “reasonable and necessary expenses listed below that are incurred by the Insured directly and solely in connection with a covered Insured Event.”

74. CRF first discovered the “Insured Event” of “Accidental Contamination” prior to the inception of the Policy on May 1, 2015. Accordingly, under the insuring agreement, Starr owes no coverage to CRF under the Policy with respect to its 2016 product recall, because the “Insured Event” was not first discovered during the Policy period.

75. Prior to the inception of the Policy, CRF was aware and/or could reasonably have been aware of circumstances which could produce “Loss” under the Policy. Accordingly, under the insuring agreement, Starr owes no coverage to CRF under the Policy with respect to its 2016 product recall because, as of Policy inception, CRF was aware and could reasonably have been aware of circumstances which could produce “Loss” under the Policy.

76. There is an actual justiciable controversy, within the meaning of 28 U.S.C. § 2201, between Starr, HCC, and CRF with respect to their respective rights and obligations under the Policy, under the HCC Follow Form Excess Policy, and under the law.

77. Because the “Insured Event” was not first discovered during the Policy period and because, as of Policy inception, CRF was aware and could reasonably have been aware of circumstances which could produce “Loss” under the Policy, Starr is entitled to a judicial declaration that it owes no coverage to CRF under the Policy for its 2016 product recall.

**COUNT V – EXCLUSION 4.9 PRECLUDES COVERAGE**

78. For Paragraph 78 of Count V, Starr re-alleges and incorporates as if fully set forth herein Paragraphs 1 through 77 above.

79. This Count is pled in the alternative to Count I.

80. The Policy is subject to the following exclusion:

4. Exclusions

This Policy does not apply to any Loss arising out of, based upon, attributable to or involving, directly or indirectly any:

\* \* \*

4.9 circumstance(s) or matter(s):

- (i) which an officer or director of the **Insured** had actual or constructive knowledge prior to the policy inception date; or
- (ii) that take place on or after the **Insured**, employee, officer or director of the **Insured** has actual or constructive knowledge of a defect or deviation in the production, preparation or manufacture of **Insured Product(s)**; or
- (iii) has or is reasonably likely to result in such defect or deviation in the production, preparation or manufacture of **Insured Product(s)**, and the

**Insured** has failed to take reasonable corrective action;

81. Because CRF's claim arises out of circumstances or matters of which an officer or director of CRF had actual or constructive knowledge prior to the Policy inception date of May 1, 2015, Exclusion 4.9(i) applies to preclude coverage under the Policy for CRF's claim.

82. Because CRF's claim arises out of circumstances or matters that took place on or after CRF, employee, officer or director of CRF had actual or constructive knowledge of a defect or deviation in the production, preparation or manufacture of Insured Product(s), Exclusion 4.9(ii) applies to preclude coverage under the Policy for CRF's claim.

83. Because CRF's claim arises out of circumstances or matters which had resulted in or were reasonably likely to result in a defect or deviation in the production, preparation or manufacture of Insured Product(s), and CRF failed to take reasonable corrective action, Exclusion 4.9(iii) applies to preclude coverage under the Policy for CRF's claim.

84. There is an actual justiciable controversy, within the meaning of 28 U.S.C. § 2201, between Starr, HCC, and CRF with respect to their respective rights and obligations under the Policy, under the HCC Follow Form Excess Policy, and under the law.

85. Because Exclusion 4.9 applies to preclude coverage, Starr is entitled to a judicial declaration that it owes no coverage to CRF under the Policy for its 2016 product recall.

**PRAYER FOR RELIEF**

WHEREFORE, Starr respectfully prays that this Court enter an Order:

- (1) rescinding the Policy and ruling it void *ab initio* (Count I);
- (2) in the alternative to Count I, finding and declaring that Starr has no obligations under the Policy with respect to CRF's claim arising out of its 2016

product recall because of false answers, concealments, misrepresentations, and breaches of the Policy (Count II);

(3) in the alternative to Count I, finding and declaring that Starr has no obligations under the Policy with respect to CRF's claim arising out of its 2016 product recall because any loss arising out of CRF's product recall was not fortuitous (Count III);

(4) in the alternative to Count I, finding and declaring that Starr has no obligations under the Policy with respect to CRF's claim arising out of its 2016 product recall because any "Insured Event" was not first discovered during the Policy period and because, as of Policy inception, CRF was aware or could reasonably have been aware of circumstances that may give rise to a "Loss" (Count IV);

(5) in the alternative to Count I, finding and declaring that Starr has no obligations under the Policy with respect to CRF's claim arising out of its 2016 product recall because Exclusion 4.9 applies to bar coverage (Count V); and

(6) make findings and declarations as to the HCC Follow Form Excess Policy consistent with the findings and declarations as to the Policy, to which the HCC policy follows form;

(7) granting to Starr such other and further relief as the Court deems appropriate in light of the law, facts, and circumstances.

Dated: February 10, 2017

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STARR SURPLUS LINES INSURANCE  
COMPANY

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