

**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ROME DIVISION**

**TRAVELERS PROPERTY)
CASUALTY COMPANY OF)
AMERICA,)
))
Plaintiff,)
))
v.)
))
NATIONWIDE AGRIBUSINESS)
INSURANCE COMPANY;)
CONTINENTAL CASUALTY)
COMPANY; THE CONTINENTAL)
INSURANCE COMPANY; and)
THE NORTH RIVER)
INSURANCE COMPANY,)
))
Defendants.)**

**CIVIL ACTION FILE
NO. _____**

COMPLAINT

COMES NOW Plaintiff Travelers Property Casualty Company of America (“Travelers”), and files the following Complaint and alleges as follows.

PARTIES

1. Plaintiff Travelers is a corporation incorporated and organized under the laws of the State of Connecticut, with its principal place of business in Connecticut.

2. Defendant Nationwide Agribusiness Insurance Company (“Nationwide”) is a corporation organized and existing under the law of the State of Iowa, with its principal place of business in Iowa.

3. Defendant Continental Casualty Company (“Continental Casualty”) is a corporation organized and existing under the law of the State of Illinois, with its principal place of business in Illinois.

4. Defendant The Continental Insurance Company (“Continental Insurance”) is a corporation organized and existing under the law of the State of Pennsylvania, with its principal place of business in Illinois.

5. Defendant The North River Insurance Company (“North River”) is a corporation organized and existing under the law of the State of New Jersey, with its principal place of business in New Jersey.

JURISDICTION AND VENUE

6. Travelers invokes this Court’s jurisdiction based on diversity of citizenship pursuant to 28 U.S.C. § 1332.

7. Travelers is diverse from each Defendant, and the amount in controversy exceeds \$75,000.

8. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b)(2) as a substantial part of the events, acts, or omissions giving rise to the asserted claims took place in this District.

FACTUAL ALLEGATIONS

A. THE POLICIES

9. For the policy period of April 1, 2015 to April 1, 2016, Grain Craft, Inc. (“Grain Craft”) purchased the following policies of insurance (the “2015 Tower of Insurance”):

Layer	Insurer	Limits
Primary CGL Policy	Nationwide	\$1,000,000
Lead Umbrella Policy	Nationwide	\$10,000,000
1 st Excess Policy	Continental Casualty	\$10,000,000
2 nd Excess Policy	Travelers	\$15,000,000
3 rd Excess Policy	North River	\$15,000,000

10. For the policy period of April 1, 2016 to November 1, 2016, Grain Craft purchased the following policies of insurance (the “2016 Tower of Insurance”):

Layer	Insurer	Limits
Primary Policy	Nationwide	\$1,000,000
Lead Umbrella Policy	Nationwide	\$10,000,000

1 st Excess Policy	Continental Insurance	\$10,000,000
2 nd Excess Policy	Travelers	\$15,000,000
3 rd Excess Policy	North River	\$15,000,000

Nationwide Primary Policies

11. Nationwide issued a Commercial General Liability policy to Southeastern Mills, Inc. for the policy period April 1, 2015 to April 1, 2016 (“2015 CGL Policy”).

12. Nationwide also issued a Commercial General Liability policy to Southeastern Mills, Inc. for the policy period of April 1, 2016 to November 1, 2016 (“2016 CGL Policy”).

13. The 2015 CGL Policy and the 2016 CGL Policy (collectively, “Nationwide Primary Policies”) each provide coverage for damages because of “property damage” caused by an “occurrence,” but only if that “property damage” occurs during the policy period.

14. The Nationwide Primary Policies each contain an Each Occurrence Limit of \$1,000,000; a General Aggregate Limit of \$2,000,000; and a Products/Completed Operations Aggregate Limit of \$2,000,000.

15. Grain Craft is a named insured under the Nationwide Primary Policies.

Nationwide Umbrella Policies

16. Nationwide issued a Commercial Liability Umbrella policy to Southeastern Mills, Inc. for the policy period April 1, 2015 to April 1, 2016 (“2015 Umbrella Policy”).

17. Nationwide also issued a Commercial Liability Umbrella policy to Southeastern Mills, Inc. for the policy period April 1, 2016 to November 1, 2016 (“2016 Umbrella Policy”).

18. The 2015 Umbrella Policy and the 2016 Umbrella Policy (collectively, “Nationwide Umbrella Policies”) each provide coverage for damages because of “property damage” caused by an “occurrence,” but only if that “property damage” occurs during the policy period.

19. The Nationwide Umbrella Policies each contain an Each Occurrence Limit of \$10,000,000 and an Aggregate Limit of \$10,000,000.

20. Grain Craft is an insured under the Nationwide Umbrella Policies.

CNA Excess Policies

21. Continental Casualty issued an Excess Third Party Liability Policy to Southeastern Mills, Inc. for the policy period April 1, 2015 to April 1, 2016 (“CNA 2015 Excess Policy”).

22. The CNA 2015 Excess Policy is immediately excess to the Nationwide 2015 Umbrella Policy.

23. Continental Insurance issued a CNA Paramount Excess Liability Policy to Grain Craft, the first named insured, for policy period April 1, 2016 to November 1, 2016 (“CNA 2016 Excess Policy”). (Continental Casualty and Continental Insurance are hereinafter collectively referred to as “CNA”).

24. The CNA 2016 Excess Policy is immediately excess to the Nationwide 2016 Umbrella Policy.

25. The CNA 2015 Excess Policy and the CNA 2016 Excess Policies (collectively, the “CNA Excess Policies”) each provide coverage for damages because of “property damage” caused by an “occurrence,” but only if that “property damage” occurs during the policy period.

26. The CNA Excess Policies each contain an Each Occurrence Limit of \$10,000,000 and an Aggregate Limit of \$10,000,000.

27. Grain Craft is an insured under the CNA Excess Policies.

Travelers Excess Following Form Policies

28. Travelers issued an Excess (Following Form) Liability Insurance Policy to Southeastern Mills, Inc. for the policy period April 1, 2015 to April 1, 2016 (the “Travelers 2015 Excess Policy”).

29. Travelers issued an Excess (Following Form) Liability Insurance Policy to Southeastern Mills, Inc. for the policy period April 1, 2016 to November 1, 2016 (the “Travelers 2016 Excess Policy”).

30. The Travelers 2015 and 2016 Excess Policies (collectively, the “Travelers Excess Policies”) each provide coverage for damages because of “property damage” caused by an “occurrence,” but only if that “property damage” occurs during the policy period.

31. The Travelers Excess Policies each contain an Excess (Following Form) Liability Coverage limit of \$15,000,000, and an Aggregate Limit of Liability of \$15,000,000.

32. Grain Craft is an insured under the Travelers Excess Policies.

North River Excess Policies

33. North River issued an Excess Liability Policy to Southeastern Mills, Inc. for the policy period April 1, 2015 to April 1, 2016 (“North River 2015 Excess Policy”).

34. North River issued an Excess Liability Policy to Southeastern Mills, Inc. for the policy period April 1, 2016 to November 1, 2016 (“North River 2016 Excess Policy”).

35. The North River 2015 Excess Policy and the North River 2016 Excess Policy (collectively, the “North River Excess Policies”) each provide coverage for damages because of “property damage” caused by an “occurrence,” but only if that “property damage” occurs during the policy period.

36. The North River Excess Policies each contain an Each Occurrence Limit of \$15,000,000, and an Aggregate Limit of Liability of \$15,000,000.

37. Grain Craft is an insured under the North River Excess Policies.

B. THE UNDERLYING FLOUR CLAIMS

38. On or about May 24, 2016, Grain Craft initiated a voluntary recall of certain lots of Soft Red Winter Wheat flour due to the presence of peanut protein.

39. Customers of Grain Craft instituted a voluntary recall of products that incorporated Grain Craft flour that allegedly contained trace amounts of peanut protein.

40. Grain Craft shipped the contaminated flour to customers between March of 2016 and April of 2016.

41. Grain Craft customers incorporated the contaminated flour into their products over a period of time between March 14, 2016 and April 30, 2016.

42. Grain Craft customers submitted claims to Grain Craft and its insurers seeking damages because of “property damage” as a result of the incorporation of

the contaminated flour into their products that occurred on various dates from March 14, 2016 to April 30, 2016 (the “Flour Claims”).

43. On behalf of Grain Craft, Nationwide paid a total of \$11,000,000 to resolve various Flour Claims.

44. Upon making this payment, Nationwide purported to tender all remaining Flour Claims to CNA.

45. CNA accepted Nationwide’s tender and paid a total of \$10,000,000 to resolve various Flour Claims.

46. Upon making this payment, CNA tendered the remaining Flour Claims to Travelers.

47. Travelers received CNA’s tender and paid \$15,000,000 under the Travelers Excess Policies to resolve various Flour Claims.

48. Travelers’ payments were made under a complete reservation of rights, including the right to seek reallocation and/or recovery of some or all of Travelers’ payments from Nationwide, CNA and North River.

49. Upon making this payment, Travelers tendered the remaining Flour Claims to North River.

50. North River accepted Travelers’ tender and made payments to resolve various Flour Claims.

C. NORTH RIVER SUIT

51. North River filed suit before this court seeking recovery from Nationwide, CNA and Travelers for the amounts it paid to resolve the Flour Claims on behalf of Grain Craft. [Case No. 4:19-CV-185-MHC] (the “North River Suit”).

52. North River’s theory of recovery was premised on the alleged failure of Nationwide, CNA and Travelers to properly exhaust the limits of their 2015 and 2016 policies.

53. After unsuccessful settlement negotiations with Travelers and other parties, North River filed an amended complaint that dropped Travelers from the North River Suit entirely. Upon information and belief, North River, CNA and Nationwide reached a settlement.

54. The North River Suit was dismissed.

D. RELEVANT POLICY PROVISIONS

55. The Nationwide Primary Policies provide coverage for damages because of “property damage” caused by an “occurrence.”

56. Coverage under the Nationwide Umbrella Policies for the Flour Claims was conditioned upon proper exhaustion of the applicable limits of the Nationwide Primary Policies.

57. Coverage under the CNA Excess Policies for the Flour Claims was conditioned upon proper exhaustion of the applicable limits of the Nationwide Primary and Umbrella Policies.

58. Coverage under the Travelers Excess Policies for the Flour Claims was conditioned upon proper exhaustion of the applicable limits of the Nationwide Primary, Nationwide Umbrella and CNA Excess Policies.

59. The Travelers Excess Policies include the following insuring agreement, as amended:

**SECTION I - EXCESS (FOLLOWING FORM) LIABILITY
COVERAGE**

1. INSURING AGREEMENT

- a.** We will pay on behalf of the insured those sums, in excess of the “applicable underlying limit”, that the insured becomes legally obligated to pay as damages to which this insurance applies, provided that the “controlling underlying insurance” would apply to such damages but for the exhaustion of its applicable limits of insurance. If a sublimit is specified in any “underlying insurance”, this insurance does not apply to damages that are in excess of that sublimit unless such sublimit is shown for that “underlying insurance” in the Schedule of Underlying Insurance of the Schedule Of Controlling Underlying Insurance in the Declarations.

- b.** This insurance is subject to:
 - (1)** The same terms, conditions, agreements, exclusions and definitions as the “controlling underlying

insurance”, except with respect to any provisions to the contrary contained in this insurance; and

- (2) If any “underlying insurance” is excess of the “controlling underlying insurance”, any additional exclusions not contained in the “controlling underlying insurance” that are contained in such other “underlying insurance.”

c. For the purposes of Paragraph a. above, the applicable limit of insurance stated for the policies of “underlying insurance” in the Schedule of Underlying Insurance or the Schedule Of Controlling Underlying Insurance in the Declarations can only be reduced or exhausted by the following payments:

- (1) Payments of judgments or settlements for damages that are covered by such “underlying insurance.” However, if such “underlying insurance” has a policy period which differs from the policy period of this Excess (Following Form) Liability Insurance Policy, none of such payments can be for damages that would not be covered by this Excess (Following Form) Liability Insurance Policy because of its different policy period; or
- (2) “Medical expenses” incurred for bodily injury caused by an accident that takes place during the policy period of this Excess (Following Form) Liability Insurance Policy.

If the applicable limit of insurance stated for the policies of “underlying insurance” in the Schedule Of Underlying Insurance or the Schedule Of Controlling Underlying Insurance in the Declarations are reduced or exhausted by other payments, this insurance is not invalidated. However, in the event of a loss, we

will pay only to the extent that we would have paid had such limit not been reduced or exhausted by such other payments.

60. The Travelers Excess Policies contain the following provision reading limits of insurance:

SECTION III - LIMITS OF INSURANCE

1. The Limits of Insurance shown in the Declarations and the rules below fix the most we will pay regardless of the number of:
 - a. Insureds;
 - b. Claims made or “suits” brought or
 - c. Persons or organizations making claims or bringing “suits”.

2. The Aggregate Limit is the most we will pay for all damages covered under this policy except:
 - a. Damages because of injury or damage included in the “auto hazard”; or
 - b. Damages because of injury or damage for which insurance is provided under any Aircraft Liability coverage included as “controlling underlying insurance” to which no aggregate limit applies.

If a policy of “underlying insurance” that is immediately underlying this policy applies a separate products-completed operations aggregate limit in that same policy, a separate Aggregate Limit will apply to all damages covered under this policy that would have been subject to such products-completed operations aggregate limit in that policy of “underlying insurance”.

3. Subject to Paragraph 2. above, the Occurrence Limit is the most we will pay for all damages covered under this policy arising out of any one “event” to which the applicable “controlling underlying insurance” applies a limit of insurance that is separate from the aggregate limit of insurance under that insurance.
4. The limits of this insurance apply separately to each consecutive annual period and to any remaining period of less than 12 months. The policy period begins with the effective date shown in the Declarations. If the policy period is extended after issuance for an additional period of less than 12 months, the additional period will be deemed part of the last preceding period.

61. The Travelers Excess Policies contain the following “Other Insurance” provision:

This insurance is excess over any valid and collectible other insurance whether such other insurance is stated to be primary, contributing, excess, contingent or otherwise. This provision does not apply to a policy bought specifically to apply as excess of this insurance or as quota share with this insurance.

As used anywhere in this policy, other insurance:

- a. Means insurance, or the funding of losses, that is provided by, through or on behalf of:
 - (1) Another insurance company;
 - (2) Us or any of our affiliated insurance companies;
 - (3) Any risk retention group;

- (4) Any self-insurance method or program, including any failure to buy insurance, or decision to not buy insurance, for any reason, in which case the insured will be deemed to be the provider of other insurance; or
- (5) Any similar risk transfer or risk management method.

b. Does not include any “underlying insurance”.

62. The Travelers Excess Policies condition payments on the following language:

If the applicable limit of insurance stated for the policies of “underlying insurance” in the Schedule Of Underlying Insurance or the Schedule Of Controlling Underlying Insurance in the Declarations are reduced or exhausted by other payments, this insurance is not invalidated. However, in the event of a loss, we will pay only to the extent that we would have paid had such limit not been reduced or exhausted by such other payments.

63. The Travelers Excess Policies contain the following definitions:

- 1. “Applicable limit of insurance” means the maximum amount we will pay as damages in accordance with Section III - Limits of Insurance.
- 2. “Applicable underlying limit” means sum of:
 - a. The applicable limit of insurance stated for the policies of “underlying insurance” in the Schedule of Underlying Insurance or the Schedule Of Controlling Underlying Insurance in the Declarations less the amount by which that limit has been reduced solely by payments as permitted in

paragraph **1.c.** of Section **I** - Excess Liability Coverage; and

- b.** The applicable limit of insurance of any other insurance that applies.

The limits of insurance in any policy of “underlying insurance” will apply even if:

- c.** The “underlying insurer” claims the insured failed to comply with any condition of the policy; or
- d.** The “underlying insurer” becomes bankrupt or insolvent.

...

4. “Controlling underlying insurance”:

- a.** Means the policy or policies of insurance listed in the Schedule Of Controlling Underling Insurance in the Declarations.
- b.** Includes any renewal or replacement of such policies if such renewal or replacement is during the policy period of this Excess (Following Form) Liability Insurance Policy.
- c.** Does not include any part of the policy period of any of the policies described in Paragraphs a. or b. above that began before, or that continues after, the policy period of this Excess (Following Form) Liability Insurance Policy.

5. “Event” means an occurrence, offense, accident, act, error or omission or other unit.

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8. “Underlying insurance”:

- a. Means the policy or policies of insurance listed in the Schedule Of Underlying Insurance or the Schedule of Controlling Underlying Insurance in the Declarations.
 - b. Includes any renewal or replacement of such policies if such renewal or replacement is during the policy period of this Excess (Following Form) Liability Insurance Policy.
 - c. Does not include any part of the policy period of any of the policies described in Paragraphs a. or b. above that began before, or that continues after, the policy period of this Excess (Following Form) Liability Insurance Policy.
9. “Underlying insurer” means any insurer which provides a policy of insurance listed in the Schedule of Underlying Insurance or the Schedule of Controlling Underlying Insurance in the Declarations.

COUNT I
REIMBURSEMENT AND CONTRIBUTION
(NATIONWIDE AND CNA)

64. Travelers realleges Paragraphs 1 through 66 as if set forth fully herein.

65. Travelers paid \$15,000,000 to settle certain Flour Claims under a complete reservation of rights (the “Travelers Payment”), including the right to seek recovery of some or all of that payment if Nationwide and CNA did not properly exhaust the limits of the Nationwide Primary, Nationwide Umbrella and CNA Excess Policies.

66. The Nationwide Primary, Nationwide Umbrella and CNA Excess Policies were not properly exhausted and some or all of the Travelers Payment represents sums that should have been paid by Nationwide and/CNA.

67. Nationwide and CNA have been unjustly enriched by the Travelers Payment.

68. Nationwide and CNA have a legal and contractual obligation to reimburse the Travelers Payment, in whole or in part, under the terms of their respective insurance policies and under the doctrines of equitable subrogation and contribution.

69. Travelers is therefore entitled to recover some of all or the Travelers Payment from Nationwide and CNA.

COUNT II
EQUITABLE CONTRIBUTION
(NORTH RIVER)

70. Travelers realleges Paragraphs 1 through 66 as if set forth fully herein.

71. Travelers paid \$15,000,000 to settle certain Flour Claims under a complete reservation of rights (the “Travelers Payment”), including the right to seek recovery of some or all of that payment from, North River.

72. North River has been unjustly enriched by the Travelers Payment.

73. To the extent Travelers cannot recover some or all of the Travelers Payment from Nationwide and CNA, Travelers is entitled to recover some or all of the Travelers Payment from the indemnity and/or settlement proceeds North River received or will receive from Nationwide and/or CNA in connection with the settlement of the North River Suit.

WHEREFORE, PREMISES CONSIDERED IN COUNTS I and II ABOVE, Travelers respectfully requests that this Honorable Court:

(a) issue judgement in the form of a declaration that the Nationwide Primary, Nationwide Umbrella and CNA Excess Policies have not been properly exhausted by the payments made by Nationwide and CNA as respect the Flour Claims;

(b) issue judgment in the form of a declaration that Travelers is entitled to recover some or all of the Travelers Payment from Nationwide and CNA, with interest, in an amount to be determined by the Court;

(c) alternatively issue judgment in the form of a declaration that Travelers is entitled to recover some or all of the Travelers Payment, with interest, from North River, in an amount to be determined by the Court;

(d) issue judgment in the form of a monetary award in favor of Travelers for all amounts the Court determines are owed to Travelers by Nationwide, CNA and/or North River, with interest; and

(e) award such other, further relief as the Court deems just and proper.

Respectfully submitted,

s/Joel S. Isenberg

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