

COMMONWEALTH OF MASSACHUSETTS  
SUPERIOR COURT

SUFFOLK, SS.

CASE NO 22-1291

EVEREST PREMIER INSURANCE  
COMPANY, EVEREST NATIONAL  
INSURANCE COMPANY,

Plaintiffs,

v.

GULF OIL LIMITED PARTNERSHIP,

Defendant.

**COMPLAINT FOR  
DECLARATORY  
RELIEF**

SUFFOLK SUPERIOR COURT  
CIVIL CLERK'S OFFICE  
2022 JUN -9 P 3:19  
MICHAEL JOSEPH DONOVAN  
CLERK / MAGISTRATE

**INTRODUCTION**

This is an action for relief under the Massachusetts Declaratory Judgment Act, G.L. ch. 231A, to determine the parties' rights, obligations, and liabilities under certain policies of primary and excess general liability insurance.

The primary policies in question were issued by Everest Premier Insurance Company. The excess policies in question were issued by Everest National Insurance Company. In this complaint, Everest seeks a declaration that none of the Policies obligate Everest to defend or indemnify Gulf Oil Limited Partnership ("Gulf Oil") with respect to a lawsuit alleging that Gulf Oil has not properly prepared its petroleum fuel terminal for the potential impacts of global warming and climate-change related weather events.

**PARTIES**

1. Everest Premier Insurance Company ("Everest Premier") is an insurance company, incorporated in Delaware, with its principal place of business in Liberty Corner, New Jersey. It issued various policies of primary insurance, including Primary Policy No. EN4GL00241181 (eff.

10/1/18 – 10/1/19), Primary Policy No. EN4GL00241191 (eff. 10/1/19 – 10/1/20), and Primary Policy No. EN4GL00241201 (eff. 10/1/20 – 10/1/21) (the “Everest Primary Policies,” or the “Primary Policies”) to Gulf Finance Holdings II, LLC, in Massachusetts, as First Named Insured. Gulf Oil is also an insured on the Primary Policies.

2. Everest National Insurance Company (“Everest National”) is an insurance company, incorporated in Delaware, with its principal place of business in Liberty Corner, New Jersey. It issued various policies of excess insurance, including Excess Policy No. EN4EX00064-181 (eff. 10/1/18 – 10/1/19), Excess Policy No. EN4EX00064-191 (eff. 10/1/19 – 10/1/20), and Excess Policy No. EN4EX00064-201 (eff. 10/1/20 – 10/1/21) (the “Everest Excess Policies” or the “Excess Policies”) to Gulf Finance Holdings II, LLC, in Massachusetts, as First Named Insured. Gulf Oil also an insured on the Excess Policies.

3. For purposes of this proceeding, Everest Primary and Everest National will be referred to, collectively, as “Everest.” For purposes of this proceeding, the Primary Policies and the Excess Policies will be referred to, collectively, as the “Policies.”

4. Gulf Oil is a limited partnership headquartered in Wellesley Hills, Massachusetts. On information and belief, Gulf’s general partner is Chelsea Petroleum Products II, LLC, a Delaware limited liability company with a principal place of business in Massachusetts. Gulf Oil is seeking coverage from Everest under the Policies with respect to a civil suit brought against it by Conservation Law Foundation, Inc. (“CLF”).

**JURISDICTION**  
**AND VENUE**

5. This court has personal jurisdiction over Gulf Oil because Gulf Oil maintains its headquarters and principal place of business in Wellesley Hills, Massachusetts; and because Gulf

Oil transacted relevant business in this Commonwealth: specifically, by securing and pursuing insurance coverage here to cover its operations in Connecticut and elsewhere.

6. Venue is proper in Suffolk Superior Court, Business Litigation Session, to the extent provided by Superior Court Administrative Directive 17-1 (March 1, 2017).

### **BACKGROUND**

7. On information and belief, Defendant Gulf Oil is in the business of storing, supplying, and distributing refined petroleum products, which it does through a series of proprietary terminals in Massachusetts, Connecticut, and other states.

8. On information and belief, Gulf Oil owns and operates a bulk petroleum terminal is a at 500 Waterfront Street, New Haven, Connecticut (the “Terminal”).

9. On information and belief, the Terminal is immediately adjacent to the New Haven Harbor and houses multiple multi-million-gallon petroleum storage tanks at or below sea level.

10. On information and belief, CLF is a 501(c)(3) nonprofit organization dedicated to the conservation and protection of New England’s public health, environment, and natural resources.

11. On or around July 7, 2021, CLF filed a civil suit in the U.S. District Court for the District of Connecticut against Gulf Oil under the citizen suit enforcement provisions of the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251, et seq., and the Solid Waste Disposal Act, 42 U.S.C. §§ 6901, et seq., captioned *Conservation Law Foundation, Inc. v. Gulf Oil Limited Partnership*, Case No. 3:21-cv-00932 (the “Lawsuit”).

12. CLF initiated its Lawsuit by filing a detailed 88-page complaint that details various studies, reports, and data relating to the ongoing and future risks of global warming and climate-change (the “Complaint”).

13. The Lawsuit alleges (in pertinent part) that global warming and its associated impacts – including climate-change induced severe weather events – are occurring or will occur around Gulf Oil’s Terminal and that Gulf Oil has not adequately prepared the Terminal for the impacts of such events.

14. The Lawsuit further alleges that Gulf Oil has not designed, maintained, modified, and/or operated its Terminal to account for the numerous effects of climate change, and that such failure puts CLF, its members, and the New Haven community at great risk.

15. The Lawsuit seeks declaratory and injunctive relief, civil penalties, and such other relief that the Court deems proper to remedy Gulf Oil’s alleged violations of federal law.

16. Specifically, the Lawsuit seeks redress for (1) Gulf Oil’s past and ongoing failures to comply with Connecticut Industrial Stormwater Permit No. GSI001571 (the “Permit”), and the Clean Water Act; (2) Gulf Oil’s facility’s location in a floodplain with improperly managed susceptibility to washout of solid waste that poses a hazard to human life, wildlife, and land and water resources; (3) Gulf Oil’s past and present contribution to handling, storage, treatment, transportation, or disposal of solid and hazardous wastes that may present an imminent and substantial endangerment to health or the environment in violation of RCRA; (4) Gulf Oil’s failure to operate and maintain its facility to minimize the possibility of a fire, explosion, or any unplanned release of hazardous waste or hazardous waste constituents to air, soil, or surface water which could threaten human health or the environment.

17. The Lawsuit does not seek redress for any property damage that has occurred for which Gulf Oil is responsible.

18. The Lawsuit does not allege that Gulf Oil has caused or contributed to climate change, and it does not seek redress from Gulf on those grounds.

19. Instead, the Lawsuit alleges that Gulf Oil has failed to eliminate the risk of discharge or release of pollutants from the Terminal into the New Haven Harbor, the Quinnipiac River, and the Mill River, as well as nearby communities and ecosystems, exacerbated by global warming and climate-change.

20. By way of example, CLF's Complaint alleges that Gulf Oil's "failure to prepare its Terminal for the impacts of climate change leave the Mill River and the community benefits it provides at risk, putting the burden and cost of a climate-disaster at the Terminal on the New Haven community."

21. By way of further example, the Complaint alleges that Gulf Oil's "failure to plan and prepare the Terminal for the impacts of climate change endangers the Harbor and all its economic and community resources."

22. By way of further example, the Complaint alleges that Gulf Oil's Terminal "is at severe risk of flooding from (a) storm surge, (b) sea level rise, and (c) increasing ocean temperatures" all of which are consequences of global climate-change.

23. According to the Complaint, these global climate-changes "exacerbate the risk of pollutant discharges and/or flooding" at the Terminal.

24. The Complaint alleges that "despite having understood climate change and its effects for decades, [Gulf Oil] has not taken action to address the threat of sea level rise ... or the threats associated with increasing sea surface temperatures ... or sever precipitation events at the Terminal."

25. The Complaint alleges that Gulf Oil, in designing, constructing, and operating the terminal, has not used information known to it regarding global warming and climate-change.

26. The Complaint alleges that Gulf Oil’s “disregard of the reasonably foreseeable substantial and imminent risks to the Terminal and its continuing failure to protect the Terminal against such risks make [Gulf Oil] liable for violations of the Clean Water Act and RCRA[.]”

27. The CLF Lawsuit, in short, is squarely focused on Gulf Oil’s failure to prepare for the *potential* impact of climate-change and the *potential* dangers posed to the community if some kind of future climate-related event were to befall the Terminal, and says Gulf “has failed to take sufficient steps to minimize the *potential* for pollution from the Terminal” from such events.

### **The Primary Policies**

28. Everest Premier issued Primary Policy No. EN4GL00241181 (eff. 10/1/18 – 10/1/19), Primary Policy No. EN4GL00241191 (eff. 10/1/19 – 10/1/20), and Primary Policy No. EN4GL00241201 (eff. 10/1/20 – 10/1/21) to Gulf Finance Holdings II, LLC, as First Named Insured. The Primary Policies also cover Gulf Oil as an Insured.

29. Each of the Primary Policies are comprised of the same general coverage forms.

30. Each of the Primary Policies contain the following insuring agreement:

#### **1. Insuring Agreement**

**a.** We will pay those sums that the insured becomes legally obligated to pay as damages because of “bodily injury” or “property damage” to which this insurance applies. We will have the right and duty to defend the insured against any “suit” seeking those damages. However, we will have no duty to defend the insured against any “suit” seeking damages for “bodily injury” or “property damage” to which this insurance does not apply. We may, at our discretion, investigate any “occurrence” and settle any claim or “suit” that may result. But:

- (1)** The amount we will pay for damages is limited as described in Section **III** – Limits Of Insurance; and
- (2)** Our right and duty to defend ends when we have used up the applicable limit of insurance in the payment of judgments or settlements under Coverages **A** or **B** or medical expenses under Coverage **C**.

No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under Supplementary Payments – Coverages A and B.

- b.** This insurance applies to “bodily injury” and “property damage” only if:
- (1) The “bodily injury” or “property damage” is caused by an “occurrence” that takes place in the “coverage territory”;
  - (2) The “bodily injury” or “property damage” occurs during the policy period; and
  - (3) Prior to the policy period, no insured listed under Paragraph 1. Of Section II – Who Is An Insured and no “employee” authorized by you to give or receive notice of an “occurrence” or claim, knew that the “bodily injury” or “property damage” had occurred, in whole or in part. If such a listed insured or authorized “employee” knew, prior to the policy period, that the “bodily injury” or “property damage” occurred, then any continuation, change or resumption of such “bodily injury” or “property damage” during or after the policy period will be deemed to have been known prior to the policy period.
- c.** “Bodily injury” or “property damage” which occurs during the policy period and was not, prior to the policy period, known to have occurred by any insured listed under Paragraph 1. Of Section II – Who Is An Insured or any “employee” authorized by you to give or receive notice of an “occurrence” or claim, includes any continuation, change or resumption of that “bodily injury” or “property damage” after the end of the policy period.
- d.** “Bodily injury” or “property damage” will be deemed to have been known to have occurred at the earliest time when any insured listed under Paragraph 1. Of Section II – Who Is An Insured or any “employee” authorized by you to give or receive notice of an “occurrence” or claim;
- (1) Reports all, or any part, of the “bodily injury” or “property damage” to us or any other insurer;
  - (2) Receives a written or verbal demand or claim for damages because of the “bodily injury” or “property damage”, or
  - (3) Becomes aware by any other means that “bodily injury” or “property damage” has occurred or has begun to occur.
- e.** Damages because of “bodily injury” include damages claimed by any person or organization for care, loss of services or death resulting at any time from the “bodily injury.”

31. Each of the Primary Policies define “bodily injury,” in relevant part, as “bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time.”

32. Each of the Primary Policies define “property damage,” in relevant part, as physical injury to tangible property, including all resulting loss of use of that property or loss of use of tangible property that is not physically injured.

33. Each of the Primary Policies define “Occurrence” as “an accident, including continuous or repeated exposure to substantially the same general harmful conditions.”

34. Each of the Primary Policies states that property damage “manifests” on “the earlier of when such damage is known to an insured or is first discovered by any person or organization whose property suffered such damage.”

35. The Lawsuit that CLF has brought against Gulf Oil does not allege “bodily injury” or existing “property damage” caused by an “occurrence,” i.e., an accident, that first manifested during the period of the Everest Primary Policies.

36. Rather, the CLF Lawsuit alleges a risk of potential property damage from ongoing and future weather events related to global warming and climate-change.

37. To the extent the Lawsuit can be read to allege any property damage -- which is denied -- those allegations consist of passing references in CLF’s Complaint to Gulf Oil’s releases of pollutants into the environment as part of its regular operations. There is no suggestion that such releases were accidental or that that they caused “property damage” to first manifest during the period of the Everest Policies.

38. Even if there were allegations of accidental property damage caused by an occurrence first manifesting during the period of the Primary Policies, coverage would be



precluded by the Policies' Pollution Exclusion, which says that the Primary Policies do not apply to:

1. "Bodily Injury" or "property damage" arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of "pollutants";
  - (a) At or from any premises, site or location which is or was at any time owned or occupied by, or rented, or loaned to, any insured. However, this subparagraph does not apply to:
    - (i) "Bodily injury" if sustained within a building and caused by smoke, fumes, vapor or soot produced by or originating from equipment that is used to heat, cool or dehumidify the building, or equipment that is used to heat water for personal use, by the building's occupants or their guests;
    - (ii) "Bodily injury" or "property damage" for which you may be held liable, if you are a contractor and the owner or lessee of such premises, site or location has been added to your policy as an additional insured with respect to your ongoing operations performed for that additional insured at that premises, site or location and such premises, site or location is not and never was owned or occupied by, or rented or loaned to, any insured, other than that additional insured; or
    - (iii) "Bodily Injury" or "property damage" arising out of heat, smoke or fumes from a "hostile fire";
  - (b) At or from any premises, site or location which is or was at any time used by or for any insured or others for the handling, storage, disposal, processing or treatment of waste;
  - (c) Which are or were at any time transported, handled, stored, treated, disposed of, or processed as waste by or for:
    - (i) Any insured; or
    - (ii) Any person or organization for whom you may be legally responsible; or
  - (d) At or from any premises, site or location on which any insured or any contractors or subcontractors working

directly or indirectly on any insured's behalf are performing operations if the "pollutants" are brought on or to the premises, site or location in connection with such operations by such insured, contractor or subcontractor. However, this subparagraph does not apply to:

- (i) "Bodily injury" or "property damage" arising out of the escape of fuels, lubricants or other operating fluids which are needed to perform the normal electrical, hydraulic or mechanical functions necessary for the operation of "mobile equipment" or its parts, if such fuels, lubricants or other operating fluids escape from a vehicle part designed to hold, store or receive them. This exception does not apply if the "bodily injury" or "property damage" arises out of the intentional discharge, dispersal or release of the fuels, lubricants or other operating fluids, or if such fuels, lubricants or other operating fluids are brought on or to the premises, site or location with the intent that they be discharged, dispersed or released as part of the operations being performed by such insured, contractor or subcontractor.
  - (ii) "Bodily injury" or "property damage" sustained within a building and caused by the release of gases, fumes or vapors from materials brought into that building in connection with operations being performed by you or on your behalf by a contractor or subcontractor; or
  - (iii) "Bodily injury" or "property damage" arising out of heat, smoke or fumes from a "hostile fire".
- (e) At or from any premises, site or location on which any insured or any contractors or subcontractors working directly or indirectly on any insured's behalf are performing operations if the operations are to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of, "pollutants".
- (2) Any loss, cost or expense arising out of any:
- (a) Request, demand, order or statutory or regulatory requirement that any insured or others test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of, "pollutants"; or

- (b) Claim or suit by or on behalf of a governmental authority for damages because of testing for, monitoring, cleaning up, removing, containing, treating, detoxifying or neutralizing, or in any way responding to, or assessing the effects of, “pollutants”.

However, this paragraph does not apply to liability for damages because of “property damage” that the insured would have in the absence of such request, demand, order or statutory or regulatory requirement, or such claim or “suit” by or on behalf of a governmental authority.

To the extent the Lawsuit can be read to seek “damages” arising out of some alleged or actual “property damage” -- which is denied -- that “property damage” arose out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of “pollutants” i.e., gasoline and other fuels leaking into the soil and water surrounding the Terminal. Such damage falls squarely within the Primary Policies’ Pollution Exclusions.

39. The Primary Policies also contain other exclusions potentially relevant to this claim. For example, the Primary Policies’ MTBE Exclusion, Form ECG 22 551 03 17, provides, in part, that:

This insurance does not apply to any “bodily injury”, “property damage” or “personal and advertising injury” arising out of exposure to, or the presence of, gasoline or any additive to gasoline in any form. This exclusion applies regardless of whether:

- (1) Such “pollutants” are alone or combined with any other substances or factors;
- (2) Such “pollutants” are included in a product or otherwise;
- (3) Such exposure occurs within or outside a building; or
- (4) Such “pollutants” have any function in your business, operations, premises, site or location.

For the purposes of this endorsement, the definition of “pollutants” includes, but is not limited to, gasoline and any additives to gasoline, including, but not

limited to, Methyl Tertiary Butyl Ether (MTBE) or any other fuel oxygenates, such as:

- (1) Ether oxygenates, such as tertiary amyl methyl ether (TAME), tertiary amyl ethyl ether (TAEE), or ethyl tertiary butyl ether (ETBE), disopropyl ether (DIPE), or dimethyl ether (DME), or any other aliphatic ether; or
- (2) Alcohol oxygenates, such as tertiary butyl alcohol (TBA), or ethanol (ethyl alcohol) or methanol (methylalcohol).

Even if the Lawsuit were seeking covered “damages,” and even if the Lawsuit alleged some past or ongoing “property damage” -- which is denied -- there would be no coverage under the MBTE Exclusion, to the extent the damage arose out of gasoline or any additive to gasoline alone or combined with any other substances or factors.

40. Exclusion (j)(1) of the Primary Policies bars coverage for:

“Property damage” to:

Property you own, rent, or occupy, including any costs or expenses incurred by you, or any other person, organization or entity, for repair, replacement, enhancement, restoration or maintenance of such property for any reason, including prevention of injury to a person or damage to another’s property.

Exclusion (j)(1) applies to this claim, and Gulf Oil is not entitled to coverage, insofar as CLF is asserting that property damage occurred at the Terminal or involved repair, replacement, enhancement, restoration or maintenance of the Terminal for any reason, including prevention of injury to the surrounding environment.

41. Exclusion 2 a. provides:

This insurance does not apply to ... “Bodily injury” or “property damage” expected or intended from the standpoint of the insured. This exclusion does not apply to “bodily injury” resulting from the use of reasonable force to protect persons or property.

Even if the Lawsuit were seeking covered “damages,” and even if the Lawsuit alleged some past or ongoing “property damage,” there would be no coverage to the extent the damage was expected or intended from the standpoint of Gulf Oil.

42. Finally, the Primary Policies contain the following relevant conditions, setting out Gulf Oil's duties in the event of an "occurrence":

- a.** You must see to it that we are notified as soon as practicable of an "occurrence" or an offense which may result in a claim. To the extent possible, notice should include:

  - (1) How, when and where the "occurrence" or offense took place;
  - (2) The names and addresses of any injured persons and witnesses; and
  - (3) The nature and location of any injury or damage arising out of the "occurrence" or offense.
  
- b.** If a claim is made or "suit" is brought against any insured, you must:

  - (1) Immediately record the specifics of the claim or "suit" and the date received; and
  - (2) Notify us as soon as practicable.

You must see to it that we receive written notice of the claim or "suit" as soon as practicable.
  
- c.** You and any other involved insured must:

  - (1) Immediately send us copies of any demands, notices, summonses or legal papers received in connection with the claim or "suit";
  - (2) Authorize us to obtain records and other information;
  - (3) Cooperate with us in the investigation or settlement of the claim or defense against the "suit"; and
  - (4) Assist us, upon our request, in the enforcement of any right against any person or organization which may be liable to the insured because of injury or damage to which this insurance may also apply.
  
- d.** No insured will, except at that insured's own cost, voluntarily make a payment, assume any obligation, or incur any expense, other than for first aid, without our consent.

Gulf Oil has breached the foregoing conditions, and is not entitled to coverage, insofar as it has failed to provide notice of an “occurrence” or claim as soon as practicable and/or and admitted liability and/or assumed obligations without Everest’s prior written consent.

### **The Excess Policies**

43. Everest National issued Excess Policy No. EN4EX00064-181 (eff. 10/1/18 – 10/1/19), Excess Policy No. EN4EX00064-191 (eff. 10/1/19 – 10/1/20), and Excess Policy No. EN4EX00064-201 (eff. 10/1/20 – 10/1/21) to Gulf Finance Holdings II, LLC, in Massachusetts, as First Named Insured. Gulf Oil also an insured on the Excess Policies.

44. Each of the Excess Policies contain the same general coverage forms.

45. Each of the Primary Policies contain substantially similar insuring agreements.

46. The Insuring Agreements of the Excess Policies each provide, in pertinent part, that Everest National will " pay on behalf of the insured the amount of the "ultimate net loss" in excess of the "underlying limits of insurance" to which this insurance applies."

47. The Excess Policies' Insuring Agreements provide, in pertinent part, that the coverage provided by each Excess Policy will "[a] [f]ollow the terms, definitions, conditions and exclusions that are contained in the "first underlying insurance", unless otherwise directed by this policy, including any attached endorsements; and [b] [n]ot be broader than that provided by the "first underlying insurance".

48. Applying these provisions, if there is no coverage under the Primary Policies, there is no coverage under the Excess Policies.

49. The Excess Policies further provide that Everest National “will have the right, but not the duty to defend or associate in the defense of the insured.”

50. Further, the Excess Policies’ "Other Insurance" provisions, say coverage “is excess over, and will not contribute with any “other insurance”, whether primary, excess, contingent or

on any other basis. This condition will not apply to insurance specifically written as excess over this insurance."

51. "Other Insurance" is defined as: "[I]nsurance which is available to any insured and covers injury or damage to which this insurance applies, other than: [a] "[u]nderlying insurance"; or [b] [i]nsurance which is specifically purchased by you to be excess of the insurance afforded by this insurance." In other words, to the extent any such "Other Insurance" exists, the Excess Policies are also excess of any such "Other Insurance."

### **COUNT I**

#### **DECLARATORY JUDGMENT** **PRIMARY POLICIES**

52. Everest Premier re-alleges and incorporates by reference paragraphs 1 through 51 as if fully set forth herein.

53. For the reasons set forth herein, Everest Premier is entitled to a declaration that the terms of the applicable Policies do not obligate it to defend or indemnify Gulf Oil with respect to CLF's Lawsuit.

54. There exists an actual and justiciable controversy between Everest Premier and Gulf Oil as to these matters, as to which Everest Premier has no adequate remedy at law.

### **COUNT II**

#### **DECLARATORY JUDGMENT** **EXCESS POLICIES**

55. Everest National re-alleges and incorporates by reference paragraphs 1 through 51 as if fully set forth herein.

56. For the reasons set forth herein, Everest National is entitled to a declaration that the terms of the applicable Excess Policies do not obligate it to defend or indemnify Gulf Oil with respect to CLF's Lawsuit.

57. There exists an actual and justiciable controversy between Everest National and Gulf Oil as to these matters, as to which Everest National has no adequate remedy at law.

**PRAYER FOR RELIEF**

WHEREFORE, Everest prays for:

A. A declaration that Everest Premier has no duty to defend or indemnify Gulf Oil with respect to CLF's Lawsuit;

B. A declaration that Everest National has no duty to defend or indemnify Gulf Oil with respect to CLF's Lawsuit; and

C. such other and further relief as is just and proper.

Respectfully submitted,

EVEREST PREMIER INSURANCE  
COMPANY

EVEREST NATIONAL INSURANCE  
COMPANY

By counsel,

/s/ Eric B. Hermanson

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Dated: June 9, 2022