IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

MOTORS LIQUIDATION COMPANY, DIP LENDERS TRUST	)	
	)	
Plaintiff,	)	
	)	C.A. No: N11C-12-022 FSS
v.	)	CCLD
	)	
ALLIANZ INSURANCE COMPANY, *et al*.	)	
	)	
Defendants.	)	

Submitted: September 17, 2013
Decided: December 31, 2013

***Upon Plaintiff's Motions for Partial Summary Judgment on Occurrences and Allocation* – DENIED**
***Upon Defendants Hartford and First State's Motion for Partial Summary Judgment* – DENIED**

This is a large insurance coverage matter concerning the former General Motors and its asbestos insurance carriers. In some ways, it presents common questions concerning the meaning of "occurrence" and allocation methods, etc. In other ways it is unique or, at least, unusual. For example, Plaintiff is a successor created in an unprecedented bankruptcy and the policy's "occurrence reported" language is unusual. For now, the court is concerned with preliminary procedural disputes centered on conflict of law and whether the record is sufficiently developed.

I.

For over 50 years, General Motors purchased comprehensive products liability insurance from Royal Insurance Company. Through 1971, the insurance was typical "occurrence-based" coverage, which responds to injuries arising from incidents occurring within the time on risk. After 1971, the coverage shifted to better allocate the parties' risks. Thereafter, the policy covered "occurrences which are reported to the Insured or the [insurer], whichever comes first, during the policy period." GM also bought layers of excess insurance towering above the Royal policy.

In 1977, GM was first sued for asbestos-related injuries. Since then, approximately 43,000 cases have been filed against GM. Meanwhile, GM went bankrupt in 2009. Plaintiff is a statutory trust, allegedly the successor to GM's right to its insurance tower. Plaintiff filed this action for declaratory judgment to recover amounts paid by GM for asbestos claims, which allegedly are owed by Defendants, GM's excess insurance carriers. The complaint precipitated earlier motion practice including motions to dismiss by several Defendants.

II.

Now, Plaintiff has filed two, partial summary judgment motions. First, Plaintiff asserts all claims against GM should be considered one occurrence for policy-limits purposes. Second, Plaintiff asserts that "all sums" allocation applies, meaning that each triggered policy is liable, up to its limits, for all sums insured paid regardless of when the specific harm occurred.

Defendants counter that a conflict of law exists, and deciding the dispositive motions before settling on the controlling law is premature. Further, Defendants claim that the factual record has not been developed enough for summary judgment, particularly in light of the unique relationship between Royal and GM. Thus, they assert their right to complete discovery before summary judgment. Lastly, Defendants Hartford Casualty Insurance Company and First State Insurance Company (collectively, "Hartford") have filed a cross-motion for summary judgment alleging Plaintiff has no claim against Hartford.

The court must first determine whether the choice of law issue precludes summary judgment. If it does not, the court must then address the core questions about the number of occurrences and allocation method. But, as explained below, summary judgment is, indeed, premature.

III.

Summary judgment can be granted only when there are no genuine material issues of fact and the moving party is entitled to judgment as a matter of law.[1] "If, however, there are material factual disputes, that is, if the parties are in disagreement concerning the factual predicate for the legal principles they advance, summary judgment is not warranted."[2] Summary judgment should also be denied where "it seems desirable to inquire more thoroughly into the facts ... to clarify the application of law to the circumstances."[3] The court must view the evidence in the light most favorable to the non-moving party.[4] "This means it will accept as established all undisputed factual assertions, made by either party, and accept the non-movant's version of any disputed facts. From those accepted facts the court will draw all rational inferences which favor the non-moving party."[5]

IV.

As mentioned, the first question is whether the choice of law issue precludes summary judgment. Plaintiff relies on Delaware law; Defendants rely on Michigan law, but also argue that other states' laws could apply. Amazingly considering the sums involved, the policies do not specify which state's law controls coverage disputes. Where a contract is silent on the controlling law, Delaware uses

[1] *E.I. du Pont de Nemours & Co. v. Stonewall Ins. Co.*, 2009 WL 1915212 (Del. Super. 2009) *aff'd,* 996 A.2d 1254 (Del. 2010) citing Super. Ct. Civ. R. 56(c); *see also Viking Pump, Inc. v. Century Indem. Co.*, 2 A.3d 76, 86 (Del. Ch. 2009).

[2] *Merrill v. Crothall-Am., Inc.*, 606 A.2d 96, 99 (Del. 1992).

[3] *Gunzl v. Chadwick*, 2 A.3d 74 (Del. 2010).

[4] *Brzoska v. Olson*, 668 A.2D 1355, 1364 (Del. 1995) citing Super. Ct. Civ. R. 56(c).

[5] *Marro v. Gopez*, 1994 WL 45338 (Del. Super. 1994) citing *Merrill*, 606 A.2d at 99-100.

the "most significant relationship test" for choice of law analysis. As to insurance contracts, "disputes are resolved by an analysis of the contacts set forth in Restatement (Second) Conflict of Laws Section 188."[6] Those contacts are:

> 1) the place of contracting,
> 2) the place of negotiation of the contract,
> 3) the place of performance,
> 4) the location of the subject matter of the contract, and
> 5) the domicil, residence, nationality, place of incorporation and place of business of the parties.

A conflict of law analysis should be avoided, however, where a false conflict exists because the jurisdictions' laws would produce the same result.[7] Because Defendants are relying on foreign law, they must establish a true conflict.[8]

V.

As mentioned, Defendants assert that either Michigan or New York law could control depending on what coverage years are triggered, but primarily they argue for Michigan law. Plaintiff relies on Delaware law. There is a false conflict on "occurrence" because both Michigan and Delaware follow the "cause test," which finds similar injuries caused by the continuous manufacture and sale of intrinsically

---

[6] *Mills Ltd. P'ship v. Liberty Mut. Ins. Co.*, 2010 WL 8250837 (Del. Super. 2010); *see also Viking Pump*, 2 A.3d at 87.
[7] *Deuley v. DynCorp Int'l, Inc.*, 8 A.3d 1156, 1161 (Del. 2010).
[8] *Sun-Times Media Grp., Inc. v. Royal & Sunalliance Ins. Co. of Canada*, 2007 WL 1811265 (Del. Super. 2007).

harmful products as one occurrence for policy-limits purposes.[9] Defendants, however, successfully demonstrate a true conflict between the jurisdictions for "allocation."

A.

Beginning with "allocation," Delaware and Michigan differ significantly. Delaware generally applies "all sums," a joint and several liability approach to allocation. *Hercules Inc. v. AIU Insurance Co.*,[10] for example, held pro rata allocation is a limitation of coverage that could not be read into the policy, especially when contrary to "all sums" language.[11] Technically, Michigan law remains unsettled on allocation. The question has never been addressed by its Supreme Court and, technically, its appellate decisions are split.[12] In order to apply Michigan law here, therefore, the court would have to predict how the Michigan Supreme Court would rule.[13]

As to predicting a conflict, *Shook & Fletcher Asbestos Settlement Trust v. Safety National Casualty Corporation* is on point. In *Shook*, when considering whether there was a conflict, the trial court held that Alabama would likely apply an exposure trigger contrary to Delaware's continuous trigger approach. *Shook*,

---

[9] *E.g.*, *Stonewall Ins. Co. v. E.I. du Pont de Nemours & Co.*, 996 A.2d 1254, 1258 (Del. 2010).
[10] 784 A.2d 481 (Del. 2001).
[11] *Id.* at 490-491.
[12] *E.g. Arco Indus. Corp. v. Am. Motorists Ins. Co.*, 594 N.W.2d 61 (Mich. Ct. App. 1998) *aff'd*, 617 N.W.2d 330 (held pro rata "time on the risk" allocation); *Dow Corning Corp. v. Cont'l Cas. Co., Inc.*, 1999 WL 33435067 (Mich. Ct. App. 1999) (held "all sums" allocation).
[13] *See Shook & Fletcher Asbestos Settlement Trust v. Safety Nat'l Cas. Corp.*, 909 A.2d 125, 128 (Del. 2006).

affirming the trial court, relied on decisions from an Alabama trial court and the United States Eleventh Circuit concluding that Alabama would apply an exposure trigger. Because *Shook* found Alabama would likely apply a different trigger standard from the Delaware standard, there was a true conflict there. Essentially, *Shook* turns on the existence of case law, albeit non-dispositive, in the foreign jurisdiction. That authority could not be ignored.

Defendants argue that there is a true conflict here because, based on non-dispositive authority, Delaware's courts can predict that the Michigan Supreme Court will adopt "pro rata" allocation rather than follow Delaware's "all sums" approach. And, Defendants are correct that Michigan courts have addressed the issue squarely, just as the Alabama courts had addressed the issue presented in *Shook*.[14]

Arco Industries Corp. v. American Motorists Insurance Co., the current precedent in Michigan, rejected "all sums" allocation in favor of "time on the risk" proration where continuous property damage was covered by successive insurance policies.[15] After discussing and comparing five allocation methods, *Arco* held, "we must reject any method of allocation that would require ... coverage on a joint and several or 'all sums' basis, since that method would require [indemnification] for

[14] *Compare Shook*, 909 A.2d at 131 (relying on trial court and Eleventh Circuit decisions), *with Mills*, 2010 WL 8250837 at *4 (Defendant offered no "competing law nor explained why Virginia would reject Delaware's law.").
[15] 594 N.W.2d at 69.

damage occurring outside the policy period."[16] *Arco* was affirmed by the Michigan Supreme Court.[17] Moreover, a federal court applying Michigan law also held that the Michigan Supreme Court would adopt pro rata "time on the risk."[18] *Stryker Corp. v. National Union Fire Insurance Co. of Pittsburgh, Pennsylvania* conducted a thorough analysis of lower court decisions, policy language, and earlier Supreme Court rulings. *Stryker* relied on the Michigan Supreme Court's prior approval of pro rata "time on the risk" allocation's simplicity and predictability, especially as paired with an injury-in-fact trigger. The court found, "the Michigan Supreme Court would adopt the pro rata "time on the risk" method of allocation applied in *Arco*."[19]

Plaintiff alleges there is no true conflict, because another Michigan appellate decision, *Dow Corning Co. v. Continental Casualty Company, Inc.*, applied "all sums" allocation. That was after distinguishing *Arco* by relying heavily on policy language explicitly extending coverage outside the policy period.[20] But, *Dow Corning* is an unpublished decision, and in Michigan "an unpublished opinion of the Court of Appeals is of no precedential value."[21] Further, the Michigan Supreme Court affirmed *Arco* after *Dow Corning* was decided.

---

[16] *Id.*
[17] *Arco Indus. Corp. v. Am. Motorists Ins. Co.*, 617 N.W.2d 330 (Mich. 2000).
[18] *Stryker Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 2005 WL 1610663 (W.D. Mich. 2005).
[19] *Id.* at 6.
[20] *Dow Corning,* 1999 WL 33435067.
[21] *Southfield Police Officers Ass'n v. City of Southfield*, 445 N.W.2d 98, 101 (Mich. 1989).

Because the court finds Defendants' position that the Michigan Supreme Court would likely not follow "all sums" persuasive, there is a true conflict of law as to allocation. Determining which state's law will apply, however, is premature, as the choice of law issue was not these motions' subject, nor was it fully briefed. Accordingly, as there is a true conflict, and it is premature to determine which law to apply, the dispositive motion on allocation based on either Michigan or Delaware law must be denied for now.

B.

As to "occurrence," the parties agreed at oral argument, and as presented above, there is no conflict of law. Both Michigan and Delaware agree that similar injuries caused by the continuous manufacture and sale of intrinsically harmful products, such as asbestos, is a single occurrence.[22] This definition is referred to as the "cause test." In Michigan's *Dow II*, pipes used for a large rural electrification program leaked, damaging a lot of property in different places and in different ways. *Dow II* held that the property damage was one occurrence because "[t]he production of defective resin was the proximate, uninterrupted, and continuing cause of damage."[23] In Delaware, *Stonewall* similarly held that producing a product that

[22] *E.g.*, *Associated Indem. Corp v. Dow Chem.*, 814 F. Supp. 613, 623 (E.D. Mich. 1993) ("*Dow II*"); *Stonewall*, 996 A.2d at 1258.
[23] *Dow II*, 814 F. Supp. at 623.

caused plumbing leaks in thousands of homes triggered only one occurrence. *Stonewall* affirmed the holding that the "proper focus is ... on production and dispersal-not on the location of injury or the specific means by which injury occurred."[24]

Plaintiff asserts that the "cause test" followed in both Delaware and Michigan[25] allows the court to grant summary judgment here because the asbestos claims all stem from one occurrence. Defendants claim that despite the false conflict as to the "cause test," a true conflict exists regarding contract interpretation and extrinsic evidence is necessary.

Specifically, Defendants first argue that under Michigan law, "[t]he cardinal rule in the interpretation of contracts is to ascertain the intention of the parties. To this rule all others are subordinate."[26] That, however, is a simple truism. Delaware and Michigan always enforce unambiguous contract language as written, because a clearly written insurance contract is taken as reflecting the parties' intent.[27] There is no conflict about that.

---

[24] *Stonewall Ins. Co.*, 996 A.2d at 1258.

[25] The parties primarily focus on Michigan and Delaware law, but Defendants repeatedly assert other states that reject the "cause test" could be applicable pending further discovery. For example, New York uses the "unfortunate event" standard rather than the "cause test."

[26] *City of Grosse Pointe Park v. Michigan Mun. Liab. & Prop. Pool*, 702 N.W.2d 106, 113 (Mich. 2005).

[27] *E.g., Rhone-Poulenc Basic Chemicals Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192, 1195-1196 (Del. 1992); *City of Grosse Pointe*, 702 N.W.2d at 113.

Defendants also allege that Michigan recognizes the admissibility of extrinsic evidence for interpreting latent ambiguity.[28] This is irrelevant, however, as the forum's law generally governs procedural matters including whether evidence is admissible.[29] And, in Delaware, "if a contract is unambiguous, extrinsic evidence may not be used to interpret the intent of the parties, to vary the terms of the contract or to create an ambiguity."[30] Thus, Delaware and Michigan consider "occurrence" similarly and, as there is no true conflict, the court will consider "occurrence" on the merits under Delaware law.

VI.

Defendants' also argue that summary judgment is at best premature because there are material facts in dispute. First, Defendants allege the policy language is ambiguous. Alternatively, they suggest the course of performance between GM and Royal altered the contract's plain terms. As the limited record suggests further discovery will likely lead to a different result than relying solely on the policy language, summary judgment must be denied.

[28] *Id.*

[29] *Tumlinson v. Advanced Micro Devices, Inc.*, 2013 WL 4399144 (Del. Supr.).

[30] *Eagle Indus., Inc. v. DeVilbiss Health Care, Inc.*, 702 A.2d 1228, 1232 (Del. 1997).

A.

Defendants begin by denying that the policy language is unambiguous. Defendants first argue that the policy's "occurrence reported" language is blatantly ambiguous, despite the established "cause test," because that language differs significantly from the language used in creating the "cause test." In other words, the word "occurrence" cannot be considered outside of the context of its sentence. Defendants tacitly recognize, however, that extrinsic evidence is only considered where there is ambiguity, as discussed above. Accordingly, Defendants also argue that even if the policy is patently unambiguous, there is latent ambiguity.

Latent ambiguity exists where the contract language can reasonably, but not obviously, be interpreted multiple ways. Latent ambiguity arises, not from the policy's face, but from extrinsic circumstances to which the policy language refers.[31] "In other words, latent ambiguity exists when patently unambiguous language becomes ambiguous when applied."[32] "The court may look to extrinsic evidence to reveal a latent ambiguity."[33] Defendants assert "GM and Royal agreed on what 'occurrence reported' meant. They agreed that it meant claims made." This interpretation is reasonable. And, Defendants demonstrate this understanding in both

[31] *N. Am. Philips Corp. v. Aetna Cas. & Sur. Co.*, 1995 WL 628441, *2 (Del. Super. 1995) citing *Lerner v. Lerner*, 508 N.Y.S.2d 191, 194 (1986).
[32] *N. Am. Philips Corp. v. Aetna Cas. & Sur. Co.*, 1995 WL 628441, *2 (Del. Super. 1995).
[33] *Villas by the Sea Owners Ass'n v. Garrity*, 748 A.2d 457, 461 (M.E. 2000)

the negotiation and claims reporting processes. Therefore, the use of extrinsic evidence is necessary to further establish that understanding.

B.

More importantly, from the start, Defendants emphasized that even if the policy language unambiguously disagrees, years of claim handling forms the basis for finding that the contract means other than it says. Although discovery is incomplete, Defendants have already introduced several examples of dealings between GM and Royal reflecting an understanding that multiple asbestos claims were treated as multiple occurrences.

While it is may be difficult to prove the parties established a standard different from the clear policy language, if Defendants are successful, they may be entitled to judgment despite policy language. Both Delaware and Michigan recognize parties' rights to modify any portion of an agreement.[34] Further, course of performance "is given great weight" in contract interpretation."[35] Course of performance is a sequence of conduct where: (1) the agreement of the parties involves repeated occasions for performance by a party; and (2) the other party knowingly

[34] *E.g. Pepsi-Cola Bottling Co. of Asbury Park v. Pepsico, Inc.*, 297 A.2d 28, 33 (Del. 1972) ("any ... provision of a written agreement may be waived or modified"); *Quality Products & Concepts Co. v. Nagel Precision, Inc.*, 666 N.W.2d 251, 253 (2003) ("parties to a contract are free to *mutually* waive or modify their contract ").
[35] Restatement (Second) of Contracts § 202(4) (1981).

accepts the performance or acquiesces in it without objection.[36] "A course of performance ... is relevant in ascertaining the meaning of the parties' agreement, may give particular meaning to specific terms of the agreement, and may supplement or qualify the terms of the agreement."[37] A course of performance can also constitute waiver or modification of a contract.[38] Accordingly, extrinsic evidence regarding the negotiation process and course of performance will likely lead to a different result than merely relying on the policy language. And, summary judgment on "occurrence" must be denied.

C.

Having raised their strongest points opposing the motions, discussed above, Defendants offer several other points in make-weight fashion. For example, Defendants allege a genuine issue of material fact remains as to whether the Royal policy is a "claims made" policy or otherwise, because the "cause test" discussed above has been specifically applied only to occurrence-based insurance policies.[39] Defendants also raise a genuine material dispute as to whether the excess policies follow form to the underlying insurance. Having already decided that summary

[36] 6 Del. Code Ann. § 1-303(a) (West).
[37] 6 Del. Code Ann. § 1-303(d) (West).
[38] 6 Del. Code Ann. § 1-303(f) (West).
[39] *Stonewall*, 996 A.2d at 1258.

judgment is not appropriate yet, the court does not have to refine and decide these less formed arguments.

VII.

In the same vein, Hartford's motion must also be denied. Genuine disputes of material fact remain as to whether these policies follow form and, if so, to what. Defining the controlling law and then further developing the record to establish all relevant evidence is necessary to properly interpret these policies. Further, as the court declines to rule on the occurrence and allocation issues here, Hartford's policies are not excluded simply because they arose after the 1977-78 insurance year. Hartford essentially concedes that.

VIII.

The court makes clear that its denying summary judgment now will not stave-off dispositive motions indefinitely. The May 22, 2013 case management order controls discovery and further motion practice. The court cautions the parties that it is unlikely to modify the order as to discovery.

IX.

For the foregoing reasons, Plaintiff's Motions for Partial Summary Judgment on Occurrences and Allocations and Hartford's Motion for Partial Summary Judgment are **DENIED without prejudice**.

IT IS SO ORDERED.

/s/ Fred S. Silverman
Judge

CC: Prothonotary (Civil Division)
John S. Spadaro, Esquire
Robert J. Katzenstein, Esquire
Francis J. Murphy, Esquire
Neal J. Levitsky, Esquire
Gary H. Kaplan, Esquire
Anthony G. Flynn, Esquire
Thaddeus J. Weaver, Esquire
Carmella P. Keener, Esquire
David S. Eagle, Esquire
William J. Cattie, Esquire
Jennifer C. Wasson, Esquire