IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

E. I. du PONT de NEMOURS & COMPANY,	)	C.A. No. 99C-12-253 JTV
Plaintiff,	)	
v.	)	
STONEWALL INSURANCE COMPANY, et al.	)	
Defendants.	)	

Submitted: August 1, 2008
Decided: August 14, 2008

John E. James, Esq., and Richard L. Horwitz, Esq., Potter, Anderson & Corroon, Wilmington, Delaware for E.I. du Pont de Nemours & Company.

Brian L. Kasprzak, Esq., and Dawn Courtney Doherty, Esq., Marks, O'Neill, O'Brien & Courtney, P. C., Wilmington, Delaware for Defendants Stonewall Insurance Company.

Upon Consideration of Plaintiff DuPont's
Motion for Summary Judgment
GRANTED In Part
DENIED In Part

Stonewall's Motion for Summary Judgment
DENIED

VAUGHN, President Judge

E.I. du Pont de Nemours and Company v. Stonewall Insurance Company, et al.
C.A. No. 99C-12-253 JTV
August 14, 2008

OPINION

The plaintiff, E. I. du Pont de Nemours & Company, seeks declaratory relief and money damages against defendant Stonewall Insurance Company. Stonewall issued DuPont two umbrella excess liability insurance policies in 1985. DuPont alleges that Stonewall is obligated under those policies to indemnify it for liabilities arising from the sale of a product known as Delrin to the extent of the policies' coverage. Delrin was produced by DuPont and used by other companies to make acetal fittings for polybutylene pipe plumbing systems ("PB systems"). As a result of alleged defects in Delrin, DuPont has been subjected to thousands of claims for damages from owners of residential housing units which were equipped with PB systems.

The parties have filed cross-motions for summary judgment which require the Court to decide issues relating to a "Prior Insurance and Non-Cumulation of Liability" clause ("non-cumulation clause"), which appears in Stonewall's two policies. London Market Companies has filed an amicus brief.

FACTS

Facts pertaining to this case have been set forth in two previous opinions issued by the Court.[1] They will be set forth here only as needed to address the non-cumulation clause.

In 1983, DuPont began manufacturing and selling an acetal resin plastic

[1] *E.I. du Pont de Nemours & Co. v. Allstate Ins. Co. et al.*, 2006 WL 2338045, at *1–6 (Del. Super.); *E.I. duPont de Nemours & Co. v. Allstate Ins. Co. et al.*, 879 A.2d 929, 933–36 (Del. Super. 2004).

material known as Delrin. The material was purchased and used by other companies to mold fittings for PB systems. These companies also manufactured pipe fittings made with acetal plastic material rather than polybutylene. The systems were installed in residential housing units. The original manufacturer of acetal plastic material was Hoechst-Celanese Corporation, which called its product Celcon. Between 1978 and 1983, Hoechst-Celanese supplied all of the acetal plastic material for the manufacture of fittings for PB systems. In 1983, DuPont entered the market with its product, Delrin. DuPont manufactured and sold Delrin until 1989.

In 1987, DuPont received service of its first lawsuit filed on behalf of homeowners seeking damages on account of property damage allegedly caused by defective PB systems. This lawsuit alleged that DuPont, along with Hoechst-Celanese and other entities, was liable for damages because PB systems, including their acetal fittings, were inherently defective and caused property damage and loss of use of property. As a result of this lawsuit and others, DuPont stopped selling Delrin to manufacturers of PB system fittings.

In the ensuing years, DuPont was faced with many lawsuits filed on behalf of homeowners with PB systems. The suits sought compensation for the cost of repair and replacement of PB systems, the cost of repairing water damage to homes caused by leaks in PB systems, and damages for other problems which the homeowners allegedly experienced as a result of the failure of PB systems.

When used in PB plumbing applications, the acetal material from which the fittings were made experienced degradation. Both Delrin and Celcon acetal fittings are susceptible to chemical attack by elements found in typical household water

supplies, such as chlorine, unfavorable pH, and soluble metals. Thus, when acetal fittings are placed into service in household PB systems and come into contact with water, they begin to degrade. Ultimately, the fittings lose their strength and can no longer contain the water flowing through them, thereby resulting in pipe bursts and leaks.

Between 1989 and November 30, 2007, DuPont incurred more than $239 million of PB liabilities from the thousands of claims filed. Systems giving rise to these claims were installed in each year from 1983 when Delrin went on the market until 1989 when DuPont took Delrin off the market.

From March 1, 1967 forward until today, DuPont has maintained a comprehensive general liability insurance program. For each policy year, there is a per-occurrence self-insured retention ("SIR") amount and then multiple layers of excess liability insurance providing coverage above the SIR. In many cases, each layer of excess coverage in a given policy year is subscribed to by multiple insurance companies. For example, in the March 1, 1983 to March 1, 1984 policy year, there is a $50 million SIR, followed by four layers of excess insurance totaling $145 million of coverage. Each layer of excess coverage is subscribed to by multiple insurers. The March 1, 1984 to March 1, 1985 policy year also has a $50 million SIR, followed by four layers of excess insurance totaling $145 million of coverage. The March 1, 1985 to March 1, 1986 policy year also has a $50 million SIR, which in that year is followed by six layers of excess insurance totaling $115 million of coverage.

The two policies issued by Stonewall were both issued in 1985. One policy participates in the first layer of excess insurance above the $50 million SIR. The limit

of that layer is $5 million. Stonewall provides $1 million in coverage for that first layer. The other Stonewall policy participates in the next layer up. The limit of that layer is $15 million. Stonewall provides $4 million in coverage for that second layer. Thus, Stonewall participates in the first two layers, with $20 million of excess coverage, after DuPont satisfies its $50 million SIR.

Beginning March 1, 1986 and for the relevant period thereafter, DuPont obtained most of its liability insurance from its Bermuda-based captive insurers, Danube Insurance Ltd. and Wabash Insurance Ltd. (collectively "Danube"), which in turn were 100% reinsured by Bermuda-based insurers, including X.L. Insurance Company ("XL") and A.C.E. Insurance Company ("ACE").

DuPont has entered into settlements with its post-March 1, 1986 insurers, and they have not been parties to this action.[2] The litigation has focused primarily on the 1983, 1984, and 1985 insurers. All of the insurance companies which issued policies to DuPont for the policy years 1983, 1984, and 1985 were initially defendants in the case, but all have settled except for Stonewall.

It is undisputed that with respect to each PB system, damage occurred continuously from the year that each system was placed into service until each system's "End Date." The parties have reserved for determination in a future litigation phase the question of what constitutes the End Date.

In a prior opinion, the Court ruled that where the installation of a system and

[2] The settlements with the post-1986 insurers have no legal effect upon the obligations of the pre-1986 insurers, except that DuPont may not recover more than its total liabilities.

the End Date occur over two or more years, the coverage of those years' excess policies is joint and several for the damage to that system.[3] For example, if a system is installed in 1983 and has an End Date in 1985 (or beyond), the 1983, 1984, and 1985 excess policies provide joint and several coverage for damage to that system (subject to DuPont's SIR and any other relevant terms and conditions of the policies). If a system is installed in 1983 and has an End Date in 1984, the coverage of 1983 and 1984 policies is joint and several for damage to the system, but the 1985 policies do not provide coverage for that system. If a system is installed in 1984 and has an End Date in 1985 (or beyond), the coverage of 1984 and 1985 policies is joint and several for damage to the system, but the 1983 policies do not provide coverage for that system. If a system is installed in 1985, the 1985 policies provide coverage, but the 1983 and 1984 policies do not provide coverage for that system.

According to figures used by Stonewall, DuPont's liability for systems installed in 1983 and/or 1984 is approximately $119 million. Of this sum, approximately $106.3 million is for claims which pertain to both years, such as where a system is installed in 1983 and has an End Date in 1984 or beyond, and approximately $12.7 million is for new installations which occurred in 1984. DuPont's liability for 1985, according to Stonewall's figures, is approximately $137.5 million, which includes the approximately $119 million just mentioned and approximately $18.5 million for new installations in 1985.

DuPont disputes these figures. DuPont contends its total PB liabilities are

[3] *duPont*, 879 A.2d at 941.

more than $239 million as of November 30, 2007. It contends that of that sum, approximately $140.7 million can be allocated to the 1985 year. It also states that if settlements with its post-1985 insurers are credited to its total losses of approximately $239 million, the liabilities remaining are approximately $127.3 million, and that is the amount which should be allocated to the 1985 year policies. DuPont has not presented a per-year breakdown for 1983–1985. It also states that approximately $74.8 million of the approximately $127.3 million is for non-claims-related costs (primarily litigation expenses). The parties seem to agree on the $74.8 million figure, and it is part of Stonewall's figures.

After reviewing the numbers presented by the two parties, I make no findings of fact concerning any specific figures.

In the prior opinion referred to above, the Court did not consider or decide issues relating to the non-cumulation clause, but noted in a footnote that "the policies contain a non-cumulation clause under which the limits of liability in a policy are reduced by the amount of a loss which is also covered under a prior year's policy."[4]

The non-cumulation clause contained in Stonewall's policies reads as follows: It is agreed that if any loss covered hereunder is also covered in whole or in part under any other excess policy issued to the Assured prior to the inception date hereof the limit of liability hereon as stated in Items 5 and 6 of the Declarations shall be reduced by any amounts due to the Assured on account of such loss under such prior

[4] *Id.* at 941 n.18.

insurance.[5]

PARTIES' CONTENTIONS

DuPont contends that the non-cumulation clause is ambiguous. It contends that words in the clause have multiple meanings and applications. It contends that the words and phrases "covered" and "amounts due to the Assured" are ambiguous. It also contends that the clause is ambiguous as to how "limits of liability" are to be "reduced." It contends that ambiguities must be construed in favor of coverage. It contends that experts differ as to the meaning of the clause. It contends that DuPont and the insurers disagree on the application of the clause, that Stonewall and London Market disagree on the application of the clause, and that Stonewall's own witnesses disagree with each other on the application of the clause. It contends that Stonewall seeks to invoke the non-cumulation clause as an exclusion of coverage. It contends that Stonewall takes inconsistent positions on the treatment of SIRs. It contends that Stonewall's proposed application of the non-cumulation clause contravenes prior rulings of the Court and other language in the policy and the language of the non-cumulation clause itself. It also contends that reasonable interpretations of the clause require Stonewall to cover DuPont's PB claims. It also contends that the non-cumulation clause is not applicable in "all sums" jurisdictions, such as Delaware. It contends the clause does not apply because DuPont is not seeking a double recovery. It contends that courts throughout the country have rejected attempts by insurers to

[5] The same clause is contained in every excess policy issued for the 1983, 1984, and 1985 years.

use the non-cumulation clause to defeat a policyholder's recovery. It contends the clause cannot act as an escape clause. It contends there are no "amounts due" under the clause. It contends that SIRs are not excess insurance. It requests a declaratory judgment that the non-cumulation clause does not operate to negate Stonewall's coverage obligations for DuPont's PB liabilities.

Stonewall rejects DuPont's contentions and contends that the correct implementation of the non-cumulation clause results in Stonewall having no obligation to reimburse DuPont for its PB liabilities. It contends that the non-cumulation clause forms a part of every policy in DuPont's uniformly created program of self-insurance and excess insurance covering the 1983 to 1986 period and operates to allocate DuPont's PB liabilities. It contends that application of the non-cumulation clause results in DuPont paying the $50 million SIR for the 1983 policy year, but only that $50 million SIR (noting that this application of the clause is consistent with DuPont's contentions in the litigation that it should bear only one SIR). It contends that the 1983 excess liability insurers are then liable for the remainder of the 1983 liabilities up to the $106.3 million amount of liabilities for that year. It contends that after reducing the limits of the 1984 year policies pursuant to the non-cumulation clause, only those 1984 policies which attach in excess of $106.3 million are available to pay for PB liabilities not otherwise appropriately allocated to the 1983 policy year, up to the $119 million amount of liabilities for the year 1984. It further contends that after reducing the limits of the 1985 policies pursuant to the non-cumulation clause, only those 1985 policies which attach in excess of $119 million are available to pay for PB liabilities not otherwise appropriately allocated to

the 1983 and 1984 policy years, up to the $137.5 million amount of liabilities for 1985. Since Stonewall's policies are at the $50 million to $70 million level, below the $119 million attachment level for the 1985 policies, Stonewall contends that the non-cumulation clause reduces its liability to zero. It contends that DuPont's arguments against application of the non-cumulation provision is inconsistent with its program of self-insurance and insurance.

London Market also rejects DuPont's contentions. It contends that the purpose of the prior insurance clause is to provide an insured with a single limit of coverage, the highest limit available, for each loss. It contends that the clause prevents a policyholder from "stacking," or combining, multiple years' limits for the same loss. It contends that if the assured has a claim that is covered by a policy in a particular year, and by policies in subsequent years, the following year's limits are to be reduced by the amounts due to the assured from the prior years' insurance. The amount that is covered by the prior policy is to be deducted from the limit of the following year's policy. It contends that the proper application of the clause and prior rulings of the Court should result in the non-cumulation clause being applied as follows. The Court would first deduct, consistent with its prior rulings, the approximately $111.7 million[6] received by DuPont from its settlements with the post-1985 insurers from the total amount of outstanding Delrin PB system claims. Next, all claims arising out of

[6] The Court's 2006 opinion used the then-current settlement figure of $109.5 million. *E.I. du Pont de Nemours & Co. v. Allstate Ins. Co. et al.*, 2006 WL 2338045, at *6 (Del. Super.). However, according to DuPont's most recent figures, this amount has increased to $111.7 million.

Delrin PB system claims attributable to installations taking place in the 1983 policy year and with ascertained End Dates in the 1983, 1984, or 1985 policy year (or beyond) would be allocated to the 1983 policy year, along with all general costs and defense expenditures. The SIR in the 1983 policy year would be applied. Any amount in excess of the total coverage in the 1983 policy year would be applied against the 1984 policy year (without an SIR), so that DuPont would get the benefit of an extra $50 million in coverage for the 1984 policy year. Claims would attach at the layer in the 1984 policy year that would correspond to the highest layer in the 1983 policy year which had already responded, minus the $50 million SIR. If there were any amounts in excess of the tower of coverage in that 1984 policy year, this would be applied to the 1985 policy year in the same manner. This is consistent, London Markets contends, with this Court's mandate that only a single $50 million be taken for the same claims allocated to multiple policy years. Next, all claims arising out of installation of Delrin PB systems taking place in the 1984 policy year with End Dates in the 1985 policy year (or beyond) would be allocated to the 1984 policy year, subject to the $50 million SIR applicable to that year. Amounts in excess of this would spill over to the 1985 policy year, as above. Finally, all claims arising out of installation of Delrin PB systems taking place in the 1985 policy year and with End Dates in 1985 (or beyond) would be allocated to the 1985 policy year, subject to the $50 million SIR applicable to that year. There is simply not enough loss, London Markets contends, to ever reach Stonewall's layers on the 1985 policy year, even if no separate SIR is taken in the 1983 and 1984 policy years.

STANDARD OF REVIEW

Summary judgment should be granted when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.[7] Pursuant to Superior Court Civil Rule 56(h), when parties file cross-motions for summary judgment and do not argue that issues of material fact exist, the Court may treat such motions as a stipulation of facts upon which a final decision may be rendered.[8] However, according to the Delaware Supreme Court:

> [T]he existence of cross motions for summary judgment does not act *per se* as a concession that there is an absence of factual issues. Rather, a moving party for summary judgment concedes the absence of a factual issue and the truth of the nonmoving party's allegations only for the purposes of its own motion, and does not waive its right to assert that there are disputed facts that preclude summary judgment in favor of the other party. Thus, the mere filing of a cross motion for summary judgment does not serve as a waiver of the movant's right to assert the existence of a factual dispute as to the other party's motion.[9]

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[7] Super. Ct. Civ. R. 56(c).

[8] *Segovia v. Equities First Holdings, LLC*, 2008 WL 2251218, at *1 (Del. Super.); *see also* Super. Ct. Civ. R. 56(h) ("Where the parties have filed cross motions for summary judgment and have not presented argument to the Court that there is an issue of fact material to the disposition of either motion, the Court shall deem the motions to be the equivalent of a stipulation for decision on the merits based on the record submitted with the motions.").

[9] *JJID, Inc. v. Del. River Indus. Park, LLC*, 2007 WL 2193735, at *3 (Del. Super.) (quoting *Sexton v. State Farm*, 2003 WL 23274849, at *3 (Del. Super.) (citing *United Vanguard Fund, Inc. v. Takecare, Inc.*, 693 A.2d 1076, 1079 (Del. 1997)).

DISCUSSION

I agree with London Markets that the purpose of the non-cumulation clause is to provide the insured with a single limit of coverage, the highest available limit, for each loss. The clause prevents a policyholder from "stacking," or combining, multiple years' limits for the same loss.[10]

After carefully considering the non-cumulation clause in the Stonewall policies, I have concluded that the clause is clear and unambiguous as applied to the facts of this case.[11] The clause reduces the limit of Stonewall's liability for losses which are also covered under a prior year's excess policy to the extent of the amounts due under such prior year's excess policy.

In a prior opinion, the Court ruled that all policy years were liable for the $74.8 million in non-claims-related costs.[12] From this, it would seem to follow that $24.8

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[10] *See Liberty Mut. Ins. Co. v. Treesdale, Inc.*, 418 F.3d 330 (3d Cir. 2005); *Green, Tweed & Co., Inc. v. Hartford Accident & Indem. Co.*, 2006 WL 1050110, at *14 (E.D. Pa.) (holding that a non-cumulation clause with nearly identical language to the one here was an unenforceable escape clause and not a permissible anti-stacking clause); *Hercules Inc. v. Aetna Cas. & Sur. Co.*, 1998 WL 962089, at *2 (Del. Super.) (citing *Uniroyal, Inc. v. Home Ins. Co.*, 707 F. Supp. 1368, 1391 (E.D.N.Y. 1988); *Cheseroni v. Nationwide Mut. Ins. Co.*, 402 A.2d 1215 (Del. Super. 1979), *aff'd*, 410 A.2d 1015 (Del. 1980)).

[11] Other courts have considered nearly identical non-cumulation provisions and held similar language to be not ambiguous. *See, e.g.*, *Westinghouse Elec. Corp. v. Am. Home Assurance Co.*, 2004 WL 1878764, at *19 (N.J. Super.). Similarly, in *Hercules*, although the Delaware Supreme Court did not discuss whether a non-cumulation clause with similar language was ambiguous in its opinion, the Court applied the clause to the facts of the case. *Hercules, Inc. v. AIU Ins. Co.*, 784 A.2d 481, 493–94 (Del. 2001).

[12] *E.I. du Pont de Nemours & Co. v. Allstate Ins. Co. et al.*, 2006 WL 2338045, at *10 (Del. Super.).

million above the 1985 SIR, $20 million of which Stonewall would be obligated to participate in, is also covered under prior years' excess policies. It follows that this reduces Stonewall's limits for losses also covered under prior years' excess policies to zero.

In addition, in an order dated June 2, 2008 concerning a motion for a protective order, the Court ordered as follows, without objection from DuPont:

> IT IS FURTHER ORDERED that the Court will accept as fact, in connection with motions for summary judgment addressing the proper interpretation and application of a Non-Cumulation clause in Stonewall's policies, that the amounts recovered by the plaintiff in settlements with its '83 and '84 insurers exceeds $20,000,000.[13]

Due to DuPont's actual receipt of more than $20 million from its 1983 and 1984 insurers, I need not consider whether the phrase "any amounts due" in the non-cumulation clause applies only to amounts paid to the insured or whether it also applies to amounts unpaid but owed.

It would appear to be beyond any genuine dispute that there are at least $20 million of claims within the coverage of prior years' excess policies which are also within the coverage of Stonewall's policies. Based upon the foregoing, I conclude that Stonewall's limit of liability is reduced to zero for losses covered both by

[13] *E.I. du Pont de Nemours & Co. v. Stonewall Ins. Co. et al.*, Del. Super., C.A. No. 99C-12-253, Vaughn, P.J. (June 2, 2008) (ORDER).

Stonewall's policies and by prior years' excess policies.[14] However, I do not believe that this finding leads to a conclusion that Stonewall is entitled to summary judgment.

The non-cumulation clause reduces Stonewall's limits of liability only for losses also covered by an "excess policy issued to the Assured" in a prior year. Losses falling within an SIR are not losses covered by an "excess policy issued to the Assured." No language from Stonewall's policies has been brought to the Court's attention and no authority has been cited which would define an "excess policy issued to the Assured" to include a self-insured retention. A self-insured retention does not fit the phrase "excess policy issued to the Assured." For these reasons, I conclude that losses represented by an SIR are not losses covered by a prior year's excess policy and are unaffected by the non-cumulation clause. Thus, there are at least $50 million of such claims represented by the 1983 and 1984 SIRs. All such claims with an End Date in 1985 or later can be asserted against the 1985 year.[15] In addition,

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[14] I reject DuPont's contention that no amount is due under the 1983 and 1984 policies because it is "choosing" the 1985 year as the policy year that would be obligated to pay. This contention cannot credibly survive its acceptance of $20 million in settlements from its 1983 and 1984 insurers.

The total amount of the settlements between DuPont and its 1983 and 1984 insurers for more than $20 million is unimportant since its recovery of more than $20 million is sufficient to reduce the limits of the Stonewall policies to zero for claims within the coverages of both Stonewall's policies and prior years' excess policies.

[15] The parties have discussed a ruling which I made in my August 31, 2004 opinion as follows: "Where insurers for two or more policy years are jointly and severally liable for the same claims, each year's SIR must be exhausted with separate claims." *E.I. duPont de Nemours & Co. v. Allstate Ins. Co. et al.*, 879 A.2d 929, 942 (Del. Super. 2004). That ruling was made as part of rejecting DuPont's contention that it must satisfy only one SIR where full litigation to judgment simultaneously against all insurers for all years was assumed. It is limited to that

there are claims from new 1985 installations, which Stonewall contends are approximately $18.5 million. These new claims are not covered by prior years' excess insurance and are unaffected by the non-cumulation clause. It would appear, therefore, that there are sufficient claims remaining, after the non-cumulation clause is given its full effect, to enable DuPont to satisfy its 1985 SIR and reach Stonewall's coverage.

The allocation process which Stonewall urges results in DuPont recovering $87.5 million for 1983–1985, using Stonewall's numbers (approximately $56.3 million from 1983, which is the amount by which the liabilities for that year exceed the SIR; approximately $12.7 million from 1984; and approximately $18.5 million from 1985). Under its allocation process, excess insurers in layers above Stonewall bear the approximately $18.5 million for 1985. The process which Stonewall urges, under which coverage in one year attaches at the same point at which the prior years' coverage ends, does not seem to give due regard for the fact that each subsequent year has new claims not covered by the prior year. Why new claims in 1985, which are unaffected by the non-cumulation clause, would attach at a level high above the SIR has not been adequately explained and does not seem to find support in any language in the Stonewall policies which has been brought to the Court's attention. In addition, the allocation process urged by Stonewall asks the Court to make findings which would assign coverage, in a hypothetical sense, to specific insurers who have

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context. The only parties now before the Court are DuPont and Stonewall and the only policy year before the Court is the 1985 year. DuPont need satisfy only the 1985 SIR to reach Stonewall's layers of excess coverage.

settled their cases, are no longer before the Court, and have not been heard on the effect of the non-cumulation clause. I am not persuaded that the process urged by Stonewall is correct.

The allocation process set forth by London Market would first reduce DuPont's total liabilities of more than $239 million by the settlements with the post-1985 insurers. According to DuPont's figures, the liabilities remaining after deducting its settlements with post-1985 insurers are approximately $127.3 million. It would then allocate the claims for installations in the 1983 year to that year, along with general costs and defense expenditures. According to Stonewall's figure, that sum is approximately $106.3 million. On this approach, after the SIR for 1983 is applied, DuPont recovers approximately $56.3 million from 1983 excess insurers. London Market then allocates claims from installations taking place in 1984 to the 1984 policy year. According to Stonewall's figures, this sum is approximately $12.7 million. London Market's allocation then applies the SIR for 1984, with the result that 1984 installations are consumed by the SIR. London Market then allocates claims from installations taking place in 1985 to the 1985 policy year. According to Stonewall's figures, this sum is approximately $18.5 million. London Market's allocation then applies the SIR for 1985, with the result that 1985 installations are consumed by the SIR. The result is that DuPont recovers a total of approximately $56 million from its excess carriers for 1983–1985. However, DuPont has sufficient limits to reach $87.5 million[16] of excess coverage in its year of highest liabilities,

[16] $137.5 million minus $50 million, using Stonewall's figures.

which is the 1985 policy year, if the 1983 and 1984 installations all have End Dates in 1985 or beyond.[17] I am not persuaded that a process which results in DuPont recovering less than the amount it can recover in its one year of highest claims is correct.

CONCLUSION

In conclusion, my ruling is that (1) the non-cumulation clause is clear and unambiguous as applied to the facts of this case; (2) it reduces the limits of Stonewall's liability to zero for claims which are also covered under prior years' excess policies; (3) the non-cumulation clause does not apply to claims which are required to satisfy SIRs for 1983 or 1984; (4) the non-cumulation clause in Stonewall's policies does not affect claims for new installations in 1985; and (5) on both Stonewall's figures and DuPont's figures, there appears to be sufficient losses to allow DuPont to reach Stonewall's layer(s) of coverage.[18]

Therefore, DuPont's motion for summary judgment is ***granted in part and denied in part***, and Stonewall's motion for summary judgment is ***denied***.

IT IS SO ORDERED.

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[17] Since the non-cumulation clause reduces the amount recoverable in 1985 only by amounts recoverable from excess insurers for the same claims under prior years' policies, it allocates the $87.5 million among excess insurers for 1983–1985, but the sum total for all three years remains the same.

[18] I emphasize that I make no findings of fact with regard to any of the numbers mentioned herein. I have not expressly addressed all of the parties' contentions. However, I have considered all contentions, and to the extent that a contention is inconsistent with the result I reach, I have rejected it.

E.I. du Pont de Nemours and Company v. Stonewall Insurance Company, et al.
C.A. No. 99C-12-253 JTV
June 30, 2009

Upon Consideration of Defendant Stonewall's
Motion For Reargument
DENIED

OPINION

Defendant Stonewall Insurance Company has filed a Motion For Reargument.[19] It contends that I concluded that DuPont's liabilities from 1985 installations are a separate "loss" from its PB liabilities for 1983 and 1984 installations and from its PB litigation expenses. It contends that this issue was not briefed by either party in their cross-motions for summary judgment. It also contends that both DuPont and Stonewall have contended that all of DuPont's PB liabilities are one loss under the terms of Stonewall's excess policies. It contends that the Court's conclusion respecting separation of "loss" by policy years contravenes the parties' aligned position on the issue and overlooks the fact that there is no genuine issue for the Court to decide on separate "loss" by policy years. It further contends that when DuPont's PB liabilities are correctly construed as constituting one "loss," the result is that Stonewall's limits are reduced to zero for that entire loss. It contends that under the non-cumulation clause, the reduction of policy limits by a "loss" covered under prior excess policies reduces those limits that would otherwise have been applicable for the entire "loss." Since DuPont's PB liablities constitute a single, unified loss, it contends, the reduction of the policy limits to zero for liability for 1983 and 1984 installations reduces the limits to zero for the entire loss, including

[19] London Market Companies filed an amicus memo in support of Stonewall's motion for reargument.

1985 installations.

DuPont opposes the motion.

Stonewall cites two cases in support of its contentions. One is *California Insurance Co. v. Stimson Lumber Co.*[20] In that case the insured, Stimson Lumber Co., had manufactured a hardboard siding product known as Forestex from 1986 to 1997. Stimson incurred liabilities for damage caused by defects in the product. Excess insurers, referred to as National Union, had issued policies for the years 1990 through 1993 and 1997 through 2001. National Union sought an order preventing Stimson from stacking successive excess insurance policies to respond for the siding loss. It relied upon a non-cumulation clause identical to the one in this case.

Stimson asserted that the non-cumulation clause was not triggered because each of the excess carriers' policies provided excess coverage of at least $1 million per occurrence, or $2 million aggregate. It contended that no single claim would exceed the limits of any excess policy and, therefore, the clause would not come into play. National Union argued that the provision was triggered not by a single occurrence loss, but by the total loss for which Stimson sought coverage. Stimson argued that the term "loss" as used in the non-cumulation provision referred only to each individual siding claim and that no single claim would trigger application of the clause.

The court concluded that the term "loss" applied to the gross amount Stimson was seeking in its claim under the policy, and that to the extent there was any excess

[20] 2004 WL 1173185 (D. Or. May 26, 2004).

insurance available for the siding loss, the non-cumulation provision applied to reduce National Union's policy limits by the amounts paid in prior policy years or amounts paid by other excess settling insurers. In reaching this conclusion, it reasoned that although the term "loss" was not defined in the policies, it was not limited by any other language. It further reasoned that there was no language in the policy which tied the term "loss" to individual occurrences. It reasoned that the clause should, therefore, be afforded its broadest meaning. It also reasoned that Stimson's interpretation was unreasonable when the policy was read as a whole. It specifically referred to the "ultimate net loss" clause, which was defined as the "the amount payable in settlement of the liability of the insured after making deductions for all recoveries for other valid and collectible insurances, excepting however the policy(ies) of the primary insurer(s) and shall include all costs, which are paid by the Company in addition to the ultimate net loss."[21] The court reasoned that the term "loss" in the non-cumulation clause should be defined more broadly since it had none of the qualifications contained in the ultimate net loss clause, and that under Stimson's proposed definition, the court would be required to disregard other policy provisions, such as the ultimate net loss clause. *California Insurance Co.* was a *pro rata* allocation case.

I have agreed that the purpose of the non-cumulation clause is to prevent an insured from stacking successive excess insurance polices to respond to the same loss. Stacking is not an issue in this case, however, as the entire Delrin loss

[21] *Id.* at *11.

applicable to the 1983, 1984 and 1985 excess polices is less than the limits of total excess coverage in any one of the three years involved. For reasons further discussed below, I am not persuaded that *California Insurance Co.* requires me to treat DuPont's Delrin loss as an indivisible, unified loss in this case.

The other case is *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*[22] It was also a *pro rata* allocation case. In that case the insured's liability arose from the continuous contamination of a body of water from 1953 to 1976. The trial court found that it was impossible to allocate damages for any given year with any degree of certainty.

The trial judge granted an excess carrier's motion for partial summary judgment based on a non-cumulation clause which was identical to the one in this case. The trial judge's ruling applied the non-cumulation clause to reduce the limits of two excess policies. On appeal, the insured sought reversal of the trial judge's ruling. Its argument on appeal included an argument that since contamination occurred in each policy period, the loss in each policy period was different.

The appellate court concluded that the non-cumulation clause was incompatible with *pro rata* allocation and should not be applied at all.[23] It reversed the trial judge's ruling for that reason. It did, however, also address the insured's argument, and rejected it, finding that the "loss" was all of the property damage which had occurred

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[22] 670 N.E.2d 740 (Ill. App. Ct. 1996).

[23] In its opening brief, Stonewall noted that courts which have declined to apply the non-cumulation clause have done so after adopting a *pro rata* allocation.

over the course of 24 years. I have no disagreement with this ruling.

Both of these cases are legally and factually distinguishable. They must be viewed in their context, including the nature of the contentions made by the policy holders and the attendant facts and circumstances. Neither case addresses how the non-cumulation clause might be applied under the circumstances of this case, where stacking is not an issue, where loss is allocated on a joint and several liability basis, and where the loss consists of property damage and associated liabilities which apply, in part, to all policy years and, in part, to some policy years and not others. I am not persuaded that either case requires the result urged by Stonewall in this case.

In this case, I infer from the language of the clause that its effect is to push the first response for a loss which is covered under two or more years' excess policies to the policies for the year in which the loss first exists, then, to the extent the loss remains, to the following year, and so on. I do not construe the provision as causing a reduction in DuPont's available insurance coverage.

DuPont, however, has no obligation to present its Delrin loss first to the 1983 year excess insurers, then to the 1984 insurers, and only then to the 1985 insurers. It could present any Delrin loss covered under the 1985 excess policies first to the 1985 excess insurers. If DuPont did so, the non-cumulation clause would shield the 1985 insurers from responding to the loss to the extent it is covered by amounts due under a prior year excess policy. However, in my view, the clause does not prevent DuPont from recovering any balance of the loss from the 1985 excess insurers, that is, any part which is not covered, in whole or in part, by a prior year policy. In this case, that part is the loss arising from the 1985 installations.

For these reasons, I conclude that the word "loss" in the non-cumulation clause must be construed to take into account the fact, in this case, that some of the loss is multi-year loss and some of the loss is single year loss, and I further conclude that the clause does not apply to that part of loss which is single year loss. If the 1985 excess insurers in the first layer of coverage do not have to respond to loss arising from 1985 installations, a reduction in coverage occurs.[24] I am persuaded that the interpretation of "loss" urged by Stonewall results in an over-broad, misapplication of the non-cumulation clause. For these reasons, Stonewall's single, unified loss theory as it seeks to have that theory applied in this case, is rejected.[25]

In their amicus memo, London Market Companies take issue with footnote 15 of the opinion, which states, ". . . the only policy year before the Court is the 1985 Policy Year." London Market Companies contend that the Court overlooked the fact that, in order to determine the limits responsive to DuPont's loss in the 1985 Policy Year for the purpose of applying the Prior Insurance clause, the 1984 Policy Year's Prior Insurance clause must be applied as well.

While I am mindful that DuPont's insurance is a program of insurance coverage, no contractual relationship or cross-reference between the 1985 policies and the 1984 policies has been suggested which requires that the non-cumulation

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[24] In the opinion, I rejected Stonewall's contention that the 1985 excess insurers' liability attaches at the level where the 1984 excess policies' coverage ends.

[25] I also reject Stonewall's contention that my conclusions regarding the non-cumulation clause should result in each PB claim being defined as a separate loss under the "aggregate cap" addendum. The word "loss" in the non-cumulation clause is qualified by the language and context in which it appears, for the reasons I have set forth herein.

clause in the 1984 policies must be applied before applying the clause in the 1985 policies. In this case, the fact that more than $20 million was due from 1983 and 1984 excess policies is a sufficient fact alone to reduce Stonewall's limits to zero for amounts also covered under the prior year excess policies. Whether the 1984 policies contain or do not contain a non-cumulation clause does not seem particularly relevant in this case. Thus while I do not necessarily disagree that London Market Companies' year-by-year approach may be relevant, or even necessary, in some circumstances, I am not persuaded that it must be applied here where one excess insurer's policies in one year only are at issue.

London Market Companies also take issue with the Court's reasoning on page 18, wherein the Court stated that Stonewall's motion must be denied because "DuPont has sufficient limits to reach $87.5 million of excess coverage [$137.5 million minus the $50 million SIR, according to Stonewall's figures - footnote 16] in its year of highest liabilities. . ." London Market Companies contend that since $74.8 million of this $87.5 million is comprised of defense costs that the Court ruled in its 2006 opinion may be allocated on a joint and several basis among all three policy years, the $74.8 million must be applied first to the 1983 Policy Year. I agree. The non-cumulation clause forces the first response for the $74.8 million in defense costs to the 1983 year. However, the quoted sentence is consistent with my conclusion that the non-cumulation clause allocates the response to a loss to prior years, but does not reduce available coverage where a total loss is less than any single year's limits.

London Market Companies further contend that DuPont cannot, consistent with

Liberty Mutual Insurance Co. v. Treesdale, Inc.,[26] allocate the loss in reverse order so as to assign the loss to the last year of coverage first.

Treesdale was an asbestos case. The insured had relevant excess policies for the period 1975 to 1985. The policies from 1975 to 1982 had limits of $2,000,000 each. The policies from 1983 to 1985 had limits of $5,000,000 each. The non-cumulation clause in the policies applied to "payment made . . . under a previous policy."[27] The insured contended that it could access the policies in reverse chronological order. So doing, the insured argued, precluded there ever being a "payment made . . . under a previous policy." Under this theory, the insured contended that all of the policies were stacked to a total of $26,000,000 of coverage.

The court rejected the insured's theory. It stated that the non-cumulation clause "applies without regard to the order in which the policies are chosen."[28] I agree. DuPont was free to proceed against its excess policies in any order of years that it chose, but regardless of the order in which policies are chosen, the non-cumulation clause reduces the policies' limits for any loss to the extent that the loss is also covered under a prior year policy. Thus, regardless of whether the "loss" is the $74.8 million of defense costs, or "loss" from 1983 and 1984 installations with End Dates in 1985 or later, Stonewall's limits are reduced (to zero) by the amounts due for such "loss" under the 1983 and 1984 excess policies. I do not perceive any inconsistency

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[26] 418 F.3d 330 (3d Cir. 2005).

[27] *Id* at 333.

[28] *Id* at 342.

between *Treesdale* and the result I reach here.

Despite the conflicting interpretations which have been urged upon the Court regarding the application of the non-cumulation clause, I remain persuaded that the clause is not ambiguous. This conclusion is consistent with numerous authorities which have so concluded.[29]

The defendant's Motion For Reargument is ***denied***.

IT IS SO ORDERED.

/s/ James T. Vaughn, Jr.
President Judge

oc: Prothonotary
cc: Order Distribution
File

[29] *See*, *e.g.*, *Treesdale,* 418 F.3d at 341 ("The clause here is clear and unambiguous absent [the insured's] imaginative, but strained and result-oriented interpretation of the plain language of [the insurer's] policies."); *Endicott Johnson Corp. v. Liberty Mut. Ins. Co.*, 928 F. Supp. 176, 181 (N.D.N.Y. 1996) (finding non-cumulation clause unambiguous after "declin[ing] to interpret the provision 'in a manner contrary to the intent of the parties, simply to achieve a result favorable to the insured'") (citing *Stonewall Ins. Co. v. Asbestos Claims Mgmt. Corp.*, 73 F.3d 1178, 1214 (2d Cir. 1995)); *I-O Brockway Glass Container, Inc. v. Liberty Mut. Ins. Co.*, 1994 WL 910935, at *3 (D.N.J. Feb. 10, 1994) ("The Non-Cumulation clause in both content and title clearly states that the insured shall not recover more than the per occurrence limit by invoking coverage under several policies for the same occurrence."); *Mark IV Indus., Inc. v. Lumbermens Mut. Cas. Co.*, 2006 WL 1458245, at *5 (N.Y. Sup. Ct. Apr. 28, 2006) (applying "ordinary language" of non-cumulation provision to reduce insurer's total liability to single limit).