

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

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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.

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).

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

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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

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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

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.

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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 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,

³ *duPont*, 879 A.2d at 941.

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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 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:

⁴ *Id.* at 941 n.18.

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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 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

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

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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 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

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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

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would first deduct, consistent with its prior rulings, the approximately \$111.7 million⁶ 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 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

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.

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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

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.").

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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

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

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))).

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.*

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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 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

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.).

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).

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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 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

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.

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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, 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

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 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.

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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 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

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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 million¹⁶ of excess coverage in its year of highest liabilities, 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

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

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.

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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.

/s/ James T. Vaughn, Jr.

oc: Prothonotary
cc: Order Distribution
File

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.