IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

CHEMTURA CORPORATION,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. N14C-12-210 MMJ (CCLD)
	)	
CERTAIN UNDERWRITERS AT LLOYD'S, *et al.*,	)	
	)	
	)	
Defendants.	)	

Submitted: February 22, 2016
Decided: April 27, 2016

Upon Plaintiff's Motion to Determine Applicable Law Regarding Allocation
GRANTED

Upon Defendants' Cross-Motion for Choice of Law Determination
DENIED

OPINION

David J. Baldwin, Esq., Michael B. Rush, Esq., Potter Anderson & Corroon LLP, Helen K. Michael, Esq. (Argued), Gregory M. Jacobs, Esq., Tyechia L. White, Esq., Kilpatrick Townsend & Stockton LLP, Attorneys for Plaintiff Chemtura Corporation

John S. Spadaro, Esq., John Sheehan Spadaro, LLC, Stephen T. Roberts, Esq. (Argued), Thomas J. Quinn, Esq., Alexander Mueller, Esq., Mendes & Mount, LLP, Attorneys for Defendants Certain Underwriters at Lloyd's London and Various London Market Insurance Companies

JOHNSTON, J.

PROCEDURAL AND FACTUAL CONTEXT

This dispute's genesis is environmental contamination allegedly caused by Plaintiff Chemtura Corporation's predecessor, Uniroyal Chemical Company. Chemtura seeks coverage for losses caused by Uniroyal's operations at two specific sites—the Vertac Site in Jacksonville, Arkansas and the Dartron Site in Painesville, Ohio.[1] Chemtura seeks declarations that Defendants have breached their contracts by refusing to cover past and future defense costs and damages.

Defendants (collectively "Insurers") fall into two groups: Certain Underwriters at Lloyd's London ("Underwriters") and Certain London Market Insurance Companies ("Companies"). Each Underwriter and Company subscribed a percentage of the policies' limits that provided insurance for specified risks to Uniroyal.

The parties have litigated Insurers' obligations for approximately twenty years.[2] Insurers and Chemtura have been in settlement discussions for several years in an attempt to resolve liability coverage. The parties have settled claims arising in states other than Arkansas and Ohio.

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[1] Other sites not part of this case include: Connecticut, Mississippi, New Jersey, South Carolina, Italy, and Mexico.

[2] The policies at issue provide property damage liability coverage May 1, 1952–February 1, 1965 and September 8, 1975–April 8, 1986. Uniroyal's principal place of business was New York 1952–1965 and Connecticut 1975–1986.

Chemtura filed suit in Delaware on December 22, 2014. Insurers filed a similar suit in New York on January 15, 2015. Insurers also filed a motion in Delaware to dismiss or, alternatively, stay Plaintiff's Delaware action in favor of New York. On August 26, 2015, this Court denied Defendants' Motion to Dismiss and Alternative Motion to Stay, holding that Delaware is this dispute's proper venue.[3]

This Court ruled:

> This Delaware action is entitled to plaintiff's choice of forum as the first-filed case. Defendants' subsequently-filed New York actions are reactive. Even if the New York actions were deemed to have been contemporaneously-filed under the circumstances of this case, Insurers have failed to meet the "overwhelming hardship" standard necessary to justify dismissal of the Delaware case.
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> [T]he Court finds that neither dismissal nor stay is warranted on *forum non conveniens* grounds.[4]

The parties disagree about which jurisdiction's law applies. Chemtura contends that, in this environmental coverage dispute, the Court must apply Restatement (Second) of Conflict of Laws Section 193—the law of the site. Chemtura argues that Section 193 presumes the law of the site applies, unless another state has a more important relationship. Chemtura asserts that Arkansas and Ohio have the most significant interest in having their laws apply to litigation

[3] *Chemtura Corp. v. Certain Underwriters at Lloyd's*, 2015 WL 5340475 (Del. Super.).
[4] *Id.* at *6.

relating to those sites, and that no other state has a more important relationship to the case. Under Section 193, Chemtura argues this Court should apply Arkansas and Ohio law to the underlying suits.

Insurers contend that Delaware courts examine Restatement (Second) of Conflict of Laws Section 188—the most significant relationship test—to determine applicable law. Insurers argue New York has the most significant relationship. Insurers allege all necessary parties to the insurance contract negotiation were based in New York. Chemtura's predecessor, Uniroyal, was incorporated in New York, Uniroyal had many New York contacts, and the parties negotiated a large percentage of the policies in New York. Under Section 188, Insurers argue this Court should apply New York law.

The choice-of-law determination is essentially case dispositive. Arkansas and Ohio both use "all sums" allocation, meaning each insurer is liable for the entire risk, within policy limits.[5] New York follows a "pro-rata" approach, meaning each insurer is liable only for its proportionate share of the risk.[6]

[5] *See Pa. Gen. Ins. Co. v. Park-Ohio Indus.*, 930 N.E.2d 800, 805 (Ohio 2010); *Murphy Oil USA, Inc. v. U.S. Fid. & Guar. Co.*, 9 *Mealey's Litig. Reports: Insurance,* No. 19 (Ark. Cir. Ct. Feb. 21, 1995).

[6] *Consol. Edison Co. of N.Y. v. Allstate Ins. Co.*, 774 N.E.2d 687, 693–95 (N.Y. 2002).

STANDARD OF REVIEW

Choice-of-Law

Insurers' policies do not specify which state law applies to disputes under the contracts. Delaware applies its own choice-of-law rules as the forum state.[7] The Court must consider facts in accordance with the most significant relationship test. That test is set forth in the Restatement (Second) of Conflict of Laws Section 188.[8]

Section 188 provides:

> (1) The rights and duties of the parties with respect to an issue in contract are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the transaction and the parties under the principles stated in [Restatement (Second) of Conflict of Laws] § 6.
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> (2) In the absence of an effective choice of law by the parties (see § 187), the contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:
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> (a) the place of contracting,
> (b) the place of negotiation of the contract,
> (c) the place of performance,
> (d) the location of the subject matter of the contract, and
> (e) the domicil[e], residence, nationality, place of incorporation and place of business of the parties.
>
> These contacts are to be evaluated according to their relative importance with respect to the particular issue.

Section 188, comment e states the location of the contract's subject matter is an important factor when the contract deals with a specific physical thing, such as

[7] *Shook & Fletcher Asbestos Settlement Trust v. Safety Nat'l Cas. Corp*., 2005 WL 2436193, at *2 (Del. Super.), *aff'd,* 909 A.2d 125 (Del. 2006).
[8] *Oliver B. Cannon and Son, Inc. v. Dorr-Oliver, Inc.*, 397 A.2d 1160, 1166 (Del. 1978).

land or a chattel, or affords protection against a localized risk. "The state where the thing or the risk is located will have a natural interest in transactions affecting it."[9]

Section 6 of the Restatement (Second) of Conflict of Laws enumerates the following factors:

> (2) . . . the factors relevant to the choice of the applicable rule of law include
>
> (a) the needs of the interstate and international systems,
> (b) the relevant policies of the forum,
> (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
> (d) the protection of justified expectations,
> (e) the basic policies underlying the particular field of law,
> (f) certainty, predictability and uniformity of result, and
> (g) ease in the determination and application of the law to be applied.

Courts also have compared Section 188 with Restatement (Second) of Conflict of Laws Section 193 in environmental contamination disputes. Section 193 provides:

> The validity of a contract of fire, surety or casualty insurance and the rights created thereby are determined by the local law of the state which the parties understood was to be the principal location of the insured risk during the term of the policy, unless with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the transaction and the parties, in which event the local law of the other state will be applied.

[9] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188 cmt. e (1971).

Section 193, comment b states that an insured risk's principal location is "in the state where it will be during at least the major portion of the insurance period."[10] Further, comment f states that in situations with multiple risk policies insuring risks located in several states, "courts would be inclined to treat such a case, at least with respect to most issues, as if it involved [multiple] policies, each insuring an individual risk."[11]

ANALYSIS

Restatement Section 193—Principal Location of Insured Risk

Section 193 provides that the law of the state of the principal location of the insured risk applies, unless some other state has a more significant relationship. Delaware Courts have interpreted Section 193.

In *Burlington Northern Railroad Company v. Allianz Underwriters Insurance Company, et al,*[12] this Court held that the law of the site applied to an action involving eighty sites in eighteen different states. In *Burlington*, the plaintiff was the ultimate successor of a series of railroad mergers and acquisitions.[13] Plaintiff sought coverage for underlying environmental damage claims.[14] Several defendants

[10] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 193 cmt. b (1971).
[11] *Id.* cmt. f (1971).
[12] 1994 WL 637011 (Del. Super).
[13] *Id.* at *1–2.
[14] *Id.* at *1.

urged the Court to apply Minnesota law.[15] Nineteen sites were in Minnesota, several of plaintiff's predecessors were incorporated and headquartered in Minnesota, and plaintiff's insurance department and broker were located in Minnesota.[16] The *Burlington* Court disagreed, holding that Section 193 gives paramount importance to the risk's location, particularly in environmental damages claims.[17] That importance outweighed Minnesota's significant, yet not exclusive, contacts.[18]

Similarly, in *Clark Equipment Company v. Liberty Mutual Insurance Company*,[19] this Court held that Section 193 governed the case's environmental contamination dispute, even with the sites scattered among four states. The *Clark* Court first analyzed the dispute under Section 188, focusing on comment e.[20] The *Clark* Court found that the parties' states of incorporation and headquarters all differed, and contracting and negotiation occurred in at least two states.[21] Additionally, it was difficult to determine where the contracts were to be performed.[22] Thus, under Sections 188(2)(a), (b), (c), and (e), no one state had a

[15] *Id.* at *5–6.
[16] *Id.* at *6.
[17] *Id.* at *7.
[18] *Id.*
[19] 1994 WL 466325 (Del. Super.).
[20] *Id.* at *2.
[21] *Id.* at *3.
[22] *Id.* at *2.

more important relationship than any other.[23] The *Clark* Court found that the only comparatively significant contact present was the subject matter locations under Section 188(2)(d).[24] The *Clark* Court held that each site's law governed because no state had a more significant relationship under Section 6 and Section 188 to overcome the Section 193 presumption.[25]

In *Chesapeake Utilities Corporation v. American Home Assurance Company, et al.*,[26] the United States District Court for the District of Delaware held that, under either Section 188 or Section 193, Maryland and Delaware law applied to environmental clean-up litigation in those states. Plaintiff's predecessor-in-interest built coal gas manufacturing plants in Salisbury, Maryland and Dover, Delaware.[27] The sites became contaminated over time.[28] Private and governmental entities sued plaintiff.[29] The *Chesapeake* Court held that Maryland and Delaware had the most significant interest in those sites.[30] Further, the Court held that analysis of the Section 193 factors yielded the same result.[31]

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[23] *See id.* at *2–3.
[24] *Id.* at *6.
[25] *Id.* at *7.
[26] 704 F.Supp. 551 (D. Del. 1989).
[27] *Id.* at 553–554.
[28] *Id.*
[29] *Id.*
[30] *Id.* at 556.
[31] *Id.* at 556–57.

Restatement Section 188—Nationwide Products Liability Claims

In *Liggett Group Inc., et al. v. Affiliated FM Insurance Company, et al.*,[32] plaintiffs sought defense costs and indemnity from insurer defendants for more than one-thousand nationwide tobacco health-related lawsuits filed against plaintiffs. Plaintiff Liggett had numerous headquarters throughout the relevant policy periods.[33] The *Liggett* Court applied North Carolina law under Section 188.[34] The *Liggett* Court reasoned that tobacco manufacturing—the underlying lawsuits' cause—was solely in North Carolina, regardless of corporate headquarters' location.[35] The *Liggett* Court also noted that nationwide product liability claims precluded finding a risk's principal location under Section 193.[36]

Similarly, in *Shook & Fletcher Asbestos Settlement Trust v. Safety National Casualty Corporation*,[37] plaintiff, an asbestos-manufacturer's settlement trust, sought coverage for nationwide asbestos bodily injury claims. The *Shook* Court applied Alabama law under Section 188.[38] Plaintiff's principal place of business was Alabama, a majority of the job sites were in Alabama, four of the eight

[32] 788 A.2d 134 (Del. Super. 2001).
[33] *Id.* at 136.
[34] *Id.* at 145.
[35] *Id.* at 136.
[36] *Id.* at 137–38 ("The potentially 'insured risks' . . . are the tobacco-related . . . underlying claims, which span 49 states and the District of Columbia.").
[37] 2005 WL 2436193 (Del. Super.), *aff'd* 909 A.2d 125 (Del. 2006).
[38] *Id.* at *3.

properties Shook owned were in Alabama, and the insured workers were in Alabama.[39]

In *Hoechst Celanese Corporation, et al. v. National Union Fire Insurance Company of Pittsburgh, Pennsylvania, et al.*,[40] plaintiffs (two chemical companies) manufactured Celcon, a failed plumbing copolymer. The failure resulted in nationwide lawsuits.[41] Plaintiffs sought coverage from defendant insurers.[42] The *Hoechst* Court held New York law applied under Section 188.[43] Plaintiff's principal place of business was New York for all but two of the relevant policy years and the contracts were negotiated in New York, giving New York the most significant relationship.[44]

These three cases involve nationwide bodily injury claims resulting from placement of a product in the stream of commerce. They do not involve environmental contamination and remediation. Chemtura seeks coverage for environmental contamination and remediation at two sites. It is not seeking coverage for nationwide products liability claims.

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[39] *Id.* at *3–4.
[40] 1994 WL 721651 (Del. Super.).
[41] *Id.* at *1.
[42] *Id.*
[43] *Id.* at *4.
[44] *Id.* at *5–6.

Sections 188 and 193—Overwhelming Corporate Nexus

Insurers also cite to environmental claims cases in support of application of New York law to this dispute. Each of these cases involves an overwhelming corporate nexus sufficient to overcome the Section 193 law of the site presumption.

In *Sequa Corporation, et al. v. Aetna Casualty and Surety Company, et al.*,[45] plaintiffs sought a declaration on insurance coverage for environmental clean-up at nine sites in eight states. The policies were issued from 1940 through 1988.[46] Plaintiffs argued that Section 193 required the Court to apply each state's law.[47] The *Sequa* Court disagreed. It held that New York had the most significant relationship under Section 188.[48] The insured had been headquartered in New York since 1963, the insured's insurance department was located in New York for all but six months, New York brokers negotiated the policies, eight of the nine defendants had offices in New York, and one of the sites at issue was in New York.[49] The *Sequa* Court disfavored Section 193 because New York had such an overwhelming relationship to the litigation.[50]

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[45] 1995 WL 465192 (Del. Super.).
[46] *Sequa Corp. v. Aetna Cas. & Sur. Co.*, 1990 WL 123006 at *1 (Del. Super.).
[47] *Sequa Corp. v. Aetna Cas. & Sur. Co.*, 1995 WL 465192 at *3 (Del. Super.).
[48] *Id.* at *4–5.
[49] *Id.* at *3.
[50] *Id.* at *3–4.

In *E.I. DuPont de Nemours & Company v. Admiral Insurance Company, et al.*,[51] plaintiff sought coverage for environmental clean-up at fourteen sites in eight states. Plaintiff argued for Delaware law.[52] Several defendant insurers urged application of the law of the site under Section 193.[53] The *DuPont* Court held that Delaware law applied because it had the most significant relationship under Sections 188(2)(a), (b), (c), and (e).[54] DuPont was incorporated and headquartered in Delaware, most of the insurers were incorporated in Delaware, and DuPont's contractual obligations were performed in Delaware.[55] Delaware's overwhelming corporate nexus overcame the Section 193 law of the site presumption.[56]

In *Monsanto Company v. Aetna Casualty and Surety Company, et al.*,[57] plaintiff Monsanto sought coverage for environmental clean-up at approximately eighty sites nationwide. Monsanto argued for Delaware law as the state of incorporation.[58] Defendants asserted Missouri had the most contacts.[59] The *Monsanto* Court held that Missouri had the most significant relationship to the

[51] 1991 WL 236943 (Del. Super.).
[52] *Id.* at *1.
[53] *Id.* at *5.
[54] *Id.* at *2.
[55] *Id.*
[56] *Id.* at *2–3.
[57] 1991 WL 236936 (Del. Super.).
[58] *Id.* at *3-4.
[59] *Id.* at *1.

dispute under Section 188.[60] Monsanto's corporate headquarters and Insurance Department personnel were located in Missouri.[61] These contacts were "in stark contrast to the scattered locations of various parties involved in some aspects of the policies."[62] The *Monsanto* Court held, "In sum, the pace of contracting, negotiation and performance of the contracts all had the predominant, substantial contacts and 'most significant relationship' with Missouri."[63]

In *North American Philips Corporation v. Aetna Casualty and Surety Company, et al.*,[64] plaintiff sought coverage for clean-up at twenty-five sites in sixteen states. The Court found a sufficient New York nexus, even though the Section 188 contacts were scattered.[65] Many contracts were executed in different states, but a majority took place in New York.[66] Plaintiff's principal place of business was New York and plaintiff performed most of its contractual duties there.[67] New York was one of the insured sites.[68] The *Philips* Court found no other state had a more significant relationship than New York.[69]

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[60] *Id.*
[61] *Id.* at *2.
[62] *Id.* at *3.
[63] *Id.*
[64] 1994 WL 555399 (Del. Super.).
[65] *Id.* at *7.
[66] *Id.* at *2.
[67] *Id.* at *3.
[68] *Id.*
[69] *Id.* at *8.

Significant Relationships

Both Arkansas and Ohio have a vested interest in having their laws apply to these policies. Lawsuits have been filed and may continue to arise out of the sites' usage and clean-up.

The United States Environmental Protection Agency took over the Arkansas Vertac site in 1987. Remediation ended in 1998, costing in excess of $150 million and spurred litigation over cost allocation. The EPA will monitor the site's groundwater for contamination indefinitely.

Uniroyal operated the Ohio Dartron site from 1949 until approximately 1975. The Dartron site still is undergoing remediation and monitoring. Although there is no suggestion of a human threat at this time, future litigation is possible if monitoring shows contamination at the Dartron site.

New York does not have any current contacts. The principal place of business of Uniroyal, Chemtura's predecessor, was New York from 1952 through 1965, and Connecticut from 1975 through 1986. Several Uniroyal subsidiaries were incorporated in New Jersey. Chemtura is incorporated in Delaware. Its principal places of business are in Connecticut and Pennsylvania. Uniroyal paid certain premiums in Canada, and several insurance brokers were located in Canada. Insurers are a syndicate of underwriters associated with Lloyd's of London, a

London headquartered company. There is no overwhelming corporate nexus in this case to overcome the Section 193 law of the site presumption.

* * * *

There are two locations at issue in this case: Arkansas and Ohio. The risk in question is the responsibility for environmental remediation costs. Arkansas and Ohio have the most significant relationships to the environmental contamination and remediation. No other state has a more significant relationship under Section 193.

Insurers' reliance on case precedent involving nationwide products liability claims, and overwhelming corporate nexus, is misplaced. This case is an environmental dispute stemming from contamination at two locations. It is not a nationwide products liability case. Further, no state has such an overwhelming corporate nexus to overcome the law of the site presumption.

Therefore, the Court finds that Restatement (Second) of Conflict of Laws Section 193—the law of the site—applies. Additionally, considering the Section 188 and Section 6 factors, the Court finds that Arkansas and Ohio, the states with environmental contamination sites, have the most significant relationships.

Collateral Estoppel

Collateral estoppel precludes re-litigating issues in a subsequent suit. Collateral estoppel applies if: (1) the issue previously decided is identical to the present issue; (2) the issue was fully adjudicated on the merits; (3) the parties against whom the doctrine is invoked were parties to the litigation or in privity with a party to the prior litigation; and (4) the parties against whom the doctrine is raised had a full and fair opportunity to litigate the issue.[70]

Insurers argue that Chemtura is collaterally estopped from litigating the law of the site in Delaware because Chemtura already has attempted to do so in New York. Insurers argue several courts have held New York law controls the decades of litigation among the parties and Chemtura. As a party in privity with prior litigants, Insurers contend Chemtura cannot avoid these holdings.

Insurers cite three prior cases involving the parties: a New York Agent Orange bodily injury case, a New Jersey asbestos case, and a Connecticut environmental action. In both bodily injury actions, Uniroyal sought coverage for nationwide bodily injury claims. Uniroyal's primary insurer, The Home Insurance Company ("Home"), was involved. Home's principal place of business was New York.

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[70] *Betts v. Townsends, Inc.*, 765 A.2d 531, 535 (Del. 2000).

In the Agent Orange action, the parties stipulated to the applicable law regarding claims. No disputed issue was adjudicated. In the New Jersey asbestos action, New York's "most significant relationship" test applied under Section 188 because New York had overwhelming contacts. Importantly, coverage was not sought for environmental clean-up at the Arkansas and Ohio sites.

In the Connecticut action, Home filed an action for declaratory judgment seeking a declaration that New York law controlled its primary policies with Uniroyal regarding underlying environmental actions. Uniroyal never argued for the law of the site. The Connecticut Court applied New York law under Connecticut's stringent *lex loci contractus* test. It did not examine Section 193.

These cases did not address questions of the law of the site of contaminated environmental clean-up. Section 193 was neither raised nor resolved in the prior litigation among the parties. The Court finds that the issues were neither identical nor fully adjudicated on the merits.

Having concluded that the law of the site applies under the most significant relationship test and Section 193, the Court need not reach the issue of whether collateral estoppel applies. However, in the interest of judicial economy, the Court finds that Chemtura is not collaterally estopped from opposing the application of New York law in this dispute.

CONCLUSION

The Court holds that Restatement (Second) of Conflicts of Law Section 193—the law of the site—applies to this dispute. Additionally, Arkansas and Ohio have the most significant relationships. Further, Chemtura is not collaterally estopped from opposing the application of New York law to this dispute.

THEREFORE, Plaintiff's Motion to Determine Applicable Law Regarding Allocation is hereby **GRANTED.** Defendants' Cross-Motion for Choice of Law Determination is hereby **DENIED**.

IT IS SO ORDERED.

The Honorable Mary M. Johnston