**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE**

| | | |
|---|---|---|
| MINE SAFETY APPLIANCES COMPANY, | ) | |
| Plaintiff, | ) | |
| | ) | C.A. No. N10C-07-241 MMJ CCLD |
| v. | ) | |
| AIU INSURANCE COMPANY, *et al.*, | ) | **FILED UNDER SEAL** |
| Defendants. | ) | |

Submitted: August 14, 2017
Decided: October 11, 2017

## OPINION

Robert A. Nicholas, Esq., Brian T. Himmel, Esq. (Argued), Anne E. Rollins, Esq., Reed Smith LLP, Mark A. Packman, Esq. (Argued), Jenna A. Hudson, Esq., Michael B. Rush, Esq., Gilbert LLP, Jennifer C. Wasson, Esq., Jesse L. Noa, Esq., Carla M. Jones, Esq., Potter Anderson & Corroon LLP, Attorneys for Plaintiff Mine Safety Appliances Company

Christopher R. Carroll, Esq., Ralph J. Luongo, Esq. (Argued), Heather E. Simpson, Esq., Francis X. Simpson, Esq., Tara E. McCormack, Esq., Kennedys CMK LLP, Dennis O. Brown, Esq., Joseph Blyskal, Esq., Gordon & Rees Scully Mansukhani, Peter B. Ladig, Esq., David J. Soldo, Esq., Meghan A. Adams, Esq., Morris James LLP, Attorneys for Defendant The North River Insurance Company

Timothy Martin (Argued), White and Williams LLP, Attorney for Defendants Zurich American Insurance Company and American Insurance Company

**JOHNSTON, J.**

## PROCEDURAL CONTEXT

This is an insurance coverage case. The descriptively named Plaintiff, Mine Safety Appliances Company ("MSA"), manufactured and sold mine safety

equipment, including asbestos clothing and respirators designed to protect miners from inhaling asbestos, silica, and coal dust. When MSA faced tort liability for its manufacture and sale of those products, it filed for declaratory judgment against the Defendant insurers. Three of those Defendants, The North River Insurance Company ("North River"), Zurich American Insurance ("Zurich"), and American Insurance Company ("AIC"), now seek partial summary judgment on four issues. MSA seeks partial summary judgment on two issues.

North River requests (1) enforcement of a non-cumulation clause; (2) a determination of the number of occurrences; and (3) a determination of whether North River must pay MSA's defense costs. Zurich and AIC ask the Court to find that (4) MSA's claims are not justiciable under the Delaware Declaratory Judgment Act. MSA seeks partial summary judgment in regard to the first two issues.

These motions are only the latest in a dispute that has seen dozens, the majority of which concerned the parties' various obligations under the insurance policies. On August 10, 2015, the Court decided thirteen Phase I summary judgment motions.[1] On January 22, 2016, the Court decided thirteen more Phase II summary judgment motions.[2] The parties argued the motions addressed here on August 14, 2017. They are the only remaining unsettled legal questions in this case. The trial,

[1] *Mine Safety Appliances Co. v. AIU Ins. Co.*, 2015 WL 5829461 (Del. Super.).
[2] *Mine Safety Appliances Co. v. AIU Ins. Co.*, 2016 WL 498848 (Del. Super.).

scheduled to begin on April 24, 2017, is no longer necessary.

## SUMMARY JUDGMENT STANDARD

Summary judgment is granted only if the moving party establishes that there are no genuine issues of material fact in dispute and judgment may be granted as a matter of law.[3] All facts are viewed in a light most favorable to the non-moving party.[4] Summary judgment may not be granted if the record indicates that a material fact is in dispute, or if there is a need to clarify the application of law to the specific circumstances.[5] When the facts permit a reasonable person to draw only one inference, the question becomes one for decision as a matter of law.[6] If the non-moving party bears the burden of proof at trial, yet "fails to make a showing sufficient to establish the existence of an element essential to that party's case," then summary judgment may be granted against that party.[7]

The parties agree that Pennsylvania law governs the disputes that are the subject of these motions.

---

[3] Super. Ct. Civ. R. 56(c).
[4] *Burkhart v. Davies*, 602 A.2d 56, 58–59 (Del. 1991).
[5] Super. Ct. Civ. R. 56(c).
[6] *Wooten v. Kiger*, 226 A.2d 238, 239 (Del. 1967).
[7] *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

## ANALYSIS

### *North River's Motion for Enforcement of the Non-Cumulation Clause in the North River Policies and Mine Safety's Motion for Partial Summary Judgment on the Non-Cumulation Issue*

A non-cumulation clause prevents an insurer from making excessive payments for a single loss. It allows an insurer to apply prior payments for a loss toward a reduction of its liability limit for later payments paid out for the same loss.[8] The non-cumulation clause included in the North River policy at issue here reads:

> 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 Insured prior to the inception date hereof the limit of liability hereon as stated in Item 2 of Declarations shall be reduced by any amounts due to the Insured on account of such loss under such prior insurance.

This Court previously has held an identical non-cumulation clause "unambiguous and enforceable."[9] But that prior decision does not resolve the dispute at issue here—the meaning of "loss" in the context of the clause. North River contends that "loss" refers to the total loss induced by any single occurrence, an interpretation that would reduce the limits of North River's policies as applied to MSA's losses. MSA argues that "loss" refers to the total loss per claimant, regardless of whether each claimant's loss arose from the same occurrence. A close

---

[8] *Mine Safety Appliances Co. v. AIU Ins. Co.*, 2016 WL 498848, at *10 (Del. Super.).

[9] *Id.* This opinion also dispenses with North River's contention that the Court should prevent MSA from reallocating or "re-tendering" its losses. As this Court stated, though it "comprehends why MSA's reallocation practice is problematic for insurers . . . the Court is unable to find that MSA's course of conduct in reallocation is, in and of itself, in breach of any policy provision." *Id.* at *9. The Court holds once again that MSA may retender.

reading of the policy's language and Pennsylvania case law supports MSA's position.

"[T]he interpretation of an insurance contract is a question of law."[10] Most pertinent here, courts must read an insurance policy "as a whole, and not 'in discrete units'"[11] and therefore must "choose the interpretation which . . . give[s] effect to all of the policy's language."[12]

The North River policy does not define loss. However, reading the policy as a whole demonstrates that the parties did not, as North River argues, intend to define loss synonymously with occurrence. The Loss Payable Clause of the policy provides, in part:

> If any subsequent payments shall be made by the Insured on account of the same occurrence, additional claims shall be made similarly from time to time. Such losses shall be due and payable within thirty (30) days after they are respectively claimed and proven in conformity with this policy.

By stating when multiple losses "on account of the same occurrence" are payable, this clause makes it untenable to interpret "loss" interchangeably with occurrence.

Judge Wettick of the Pennsylvania Court of Common Pleas determined a

---

[10] *Donegal Mutual Ins. Co. v. Baumhammers*, 938 A.2d 286, 290 (Pa. 2007).
[11] *Clarke v. MMG Ins. Co.*, 100 A.3d 271, 276 (Pa. Super. Ct. 2014) (quoting *Luko v. Lloyd's London*, 573 A.2d 1139, 1142 (Pa. Super. Ct. 1990)).
[12] *Id.* (quoting *Millers Capital Ins. Co. v. Gambone Bros. Dev. Co.*, 941 A.2d 706, 716 (Pa. Super. 2007)).

more internally consistent interpretation of loss when he addressed a similar policy.[13] In the Pennsylvania case, MSA was the plaintiff and North River a third party defendant. The defendant, Century Indemnity Company ("Century"), and MSA filed motions for partial summary judgment to determine the meaning of the undefined term "loss" within a non-cumulation clause. The parties' positions in that case mirror those taken in the Delaware litigation. Century argued that "loss" encompassed all losses from the same occurrence, while MSA maintained "loss" referred only to losses per claimant.[14]

Judge Wettick found for MSA, defining loss as "the full amount paid to a claimant."[15] He reasoned that absent a definition or other limiting language, "loss" retains its common, plain meaning. In the safety product insurance context, "loss is understood to be the money the insured paid to the user of its product."[16] In other words, loss is measured on a user-by-user basis. Separate claimants create separate losses. Claims by different users of products cannot constitute a single loss, even if those losses arose from the same occurrence.[17]

The Court finds Judge Wettick's opinion controlling and well-reasoned. As in the Pennsylvania case, there is no language in this North River policy to suggest

---

[13] *Mine Safety Appliances Co. v. Century Indem. Co.*, No. GD06-013611 (Pa. Com. Pl. Sept. 14, 2009).
[14] *Id.* at 3.
[15] *Id.* at 5.
[16] *Id.*
[17] *Id.*

that the Court should ascribe "loss" anything other than its most natural reading. The non-cumulation clause at issue therefore applies only where payment to a single claimant is in excess of policy limits.

**North River's motion is denied. MSA's motion is granted. The undefined term "loss" as used in the North River policies, including its non-cumulation provisions, refers solely and exclusively to the total amount paid in settlement or satisfaction of an individual's claims.**

***North River's Motion to Determine the Number of Occurrences and MSA's Motion for Partial Summary Judgment on the Number of Occurrences Issue***

The North River policies define an occurrence as:

> [A]n accident or happening or event or a continuous or repeated exposure to conditions which unexpectedly and unintentionally results in personal injury, property damage or advertising liability during the policy period. All such exposure to substantially the same general conditions existing at or emanating from one premises location shall be deemed one occurrence.

The policies include a limit on the amount of coverage they provide both per occurrence and per year. If liability for a single occurrence spans more than one year, the coverage will not extend beyond the cap for one occurrence, even if the aggregate limit for multiple years would be higher. Multiple occurrences, however, could raise that coverage limit to the maximum permitted by the total of the annual caps. The number of occurrences therefore determines a significant portion of the

scope of coverage.

Pennsylvania law employs the "cause test" to determine the number of occurrences.[18] The cause test requires an examination of "whether there was 'but one proximate, uninterrupted, and continuing cause which resulted in all of the injuries and damage.'"[19]

In *Donegal Mutual Ins. Co. v. Baumhammers*,[20] the estates of the victims of a string of murders brought a negligence suit against the parents of the murderer. The parents' home insurance company sought a declaratory judgment that the attacks were outside the scope of its coverage. Though the plaintiffs advanced three theories of negligence, the court found that the six distinct attacks on six different victims constituted only one occurrence. Applying the cause test and relying on the Nevada Supreme Court's rationale that "as long as the injuries stemmed from one proximate cause there is a single occurrence," the court held "that Parents' alleged single act of negligence constitutes one accident and one occurrence."[21]

Here, MSA's production and sale of two product lines—asbestos-containing clothing and respirators—are the two potential sources of occurrences within the

---

[18] *See Donegal Mutual Ins. Co. v. Baumhammers*, 938 A.2d 286, 294 (Pa. 2007) (agreeing "with the Superior Court's adoption of the 'cause' approach for determining what constitutes an 'occurrence' pursuant to an insurance policy.").
[19] *General Accident Ins. Co. of America v. Allen*, 708 A.2d 828, 833 (Pa. Super. Ct. 1998) (quoting *D'Auria v. Zurich Ins. Co.*, 507 A.2d 857, 860 (Pa. Super. Ct. 1986)).
[20] 938 A.2d 286, 294 (Pa. 2007).
[21] *Id.* at 295.

policy definition. North River correctly acknowledges that the two product lines represent, at minimum, two occurrences. In Pennsylvania, the sale of two similarly disparate product lines has been determined to be two occurrences.[22] MSA concedes that its manufacture and sale of asbestos-containing clothing constitutes no more than one occurrence. The decision to include asbestos in a product is a common, single occurrence, consistent with Pennsylvania law.[23]

The remaining question then, is how many occurrences arose from the production and sale of MSA's respirators. Though both sides agree that the sale of asbestos clothing was one occurrence, the Court must determine whether MSA's manufacture and sale of different types of respirators was also a single occurrence or, instead, a series of discrete occurrences.

MSA argues that the Court should consider the respirator claims as the result of many occurrences. MSA distinguishes the respirator claims from the asbestos clothing claims on the basis that respirators lack "intrinsic harmfulness." Relying on an Ohio court's ruling, MSA argues that this distinction matters, because the decision to include asbestos—an intrinsically harmful material—in its products was

---

[22] *Air Prods. and Chemicals, Inc. v. Hartford Accident and Indem. Co.*, 707 F. Supp. 762, 773 (E.D. Pa. 1989) (finding one occurrence each for claims arising from asbestos products and claims arising from welding products), *aff'd in part, vacated in part*, 25 F.3d 177 (3d Cir. 1994).

[23] *Liberty Mutual Ins. Co. v. Treesdale, Inc.*, 418 F.3d 330, 335 (3d Cir. 2005) (approving the district court's conclusion that "the asbestos claimants' 'injuries stem from a common source, that is, the manufacture and sale of the asbestos-containing products.'").

but one decision, while no such single decision underlies the respirator claims.[24] Pointing to the multitude of designs, modifications, and forms of government approval behind the respirators' manufacture, MSA argues that each of these different decisions must constitute an independent occurrence because they are not united by the common decision of including an intrinsically-harmful material in the product.

North River urges the Court to find a more general cause for the respirator claims. North River points to a characterization that MSA—inadvertently or not—laid out in its opening brief. "[T]he Respirator Claims," MSA wrote in its memorandum of law on this issue, "result from the respiratory protection products' alleged failure to work as intended." It also described its predicament in more detail, but not more specificity, by noting that it "is sued by individuals alleging personal injury caused by the alleged failure of its respiratory protection products to filter out harmful dusts or other toxins." In other words, North River asks the Court to adopt the perspective that there is a single underlying cause of all of the respirator claims against MSA: the respirators failed to perform their common intended purpose.

Though MSA makes a reasonable (and tempting) distinction between

[24] *Cincinnati Ins. Co. v. ACE INA Holdings, Inc.*, 886 N.E.2d 876, 887 (Ohio Ct. App. 2007) (finding the sale of defective masks constituted multiple occurrences, because the "masks were not intrinsically harmful; they failed to protect, and that failure to protect led to a multitude of physically and temporally distinct injuries under a multitude of differing factual scenarios . . . .").

products with intrinsic harmfulness and those without, Pennsylvania law makes no such distinction. Instead, Pennsylvania courts have defined the cause test broadly, "focus[ing] on the act of the insured that gave rise to their liability."[25] This focus has led courts to find a causative action as broad and generally stated as "negligence" to constitute one occurrence.[26]

Considering Pennsylvania law and the facts underlying the toxic tort claims in this case, this Court is unable to find any reason to rule that the alleged negligence underlying the asbestos clothing claims is one occurrence, while the alleged negligence underlying the respirator claims constitutes multiple occurrences. For that reason, the Court concludes the two claims arising under the two product lines spring from one occurrence each: the asbestos clothing claims arise from one occurrence and the respirator claims arise from one occurrence.

**North River's motion is granted. MSA's motion is denied. All of the underlying claims arising from MSA's manufacture and/or sale of asbestos products are a single occurrence, and all claims arising from MSA's manufacture and/or sale of respirators are a separate single occurrence.**

---

[25] *Donegal*, 936 A.2d at 295.

[26] *See id.* ("[W]e are compelled to conclude that Parents' alleged negligence constituted but a single 'occurrence' for purposes of coverage under the Donegal insurance policy.").

### *North River's Motion on Payment of Defense Costs*

North River asks the Court to find that two of its policies, JU 1319 and JU 1225, do not require North River to cover MSA's defense costs. Both policies' Coverage Grants state that North River indemnifies MSA "for all sums which [MSA] shall be obligated to pay by reason of the liability . . . more fully defined in the Underlying Umbrella Policies." The underlying policies provide a fuller definition by defining yet another term, "ultimate net loss." This Court previously has held that "[w]hen policies define 'ultimate net loss' to exclude costs, there is no obligation for Insurers to pay defense costs."[27] The two policies' definition of "ultimate net loss" differs in inconsequential ways, but, critically, neither explicitly includes or excludes defense costs.

JU 1319 defines ultimate net loss as "the amount of the principal sum, award, or verdict, actually paid or payable in cash in the settlement or satisfaction of claims for which the insured is liable." JU 1225 defines the same term as "all sums which the Insured and his or her insurers shall become legally obligated to pay as damages . . . ." It then defines "damages" as including various harms resulting from "bodily injury." Additionally, both policies include an Assistance and Cooperation Conditions clause, which states that North River, "shall not be called upon to assume charge of the settlement or defense of any claim made or suit brought or proceeding

[27] *Mine Safety Appliances Co. v. AIU Ins. Co.*, 2016 WL 498848, at *7 (Del. Super.).

instituted against the Insured . . . ."

The question in this case is whether the Court should read these policies as ambiguous regarding North River's obligation to pay MSA's defense costs. If so, the Court must find in favor of MSA, because "[w]here the language of a contract is ambiguous, the insured receives the benefit of the doubt, and the language at issue is interpreted in his favor."[28]

North River argues that the lack of an explicit provision on defense costs is not an ambiguity. Instead, it is a failure to provide for a contingency. This difference is crucial. In Pennsylvania, "when a contract does not provide for a contingency, it is not ambiguous; rather, it is silent, and the court may not 'read into the contract something it does not contain and thus make a new contract for the parties.'"[29]

The Court finds that consistent with its prior rulings and Pennsylvania precedent, a plain reading of the insurance contracts compels a finding that "Ultimate Net Loss" in these two policies does not include defense costs. The payment of defense costs is a contingency the policies do not address. There is no ambiguity. The policies are silent on the subject and the Court declines to insert an otherwise absent obligation.

---

[28] *Koenig v. Progressive Ins. Co.*, 599 A.2d 690, 692 (Pa. Super. Ct. 1991) (citing *Standard Venetian Blind v. American Empire Ins. Co.*, A.2d 563, 566 (Pa. 1983); *D'Allessandro v. Durham Life Ins. Co.*, 467 A.2d 1303, 1307 (Pa. 1983); *Winters v. Erie Ins. Group*, 532 A.2d 885, 887 (Pa. Super. Ct. 1987)).

[29] *Banks Engineering Co. v. Polons*, 697 A.2d 1020, 1023–24 (Pa. Super. Ct. 1997) (quoting *Snellenberg Clothing Co. v.* Levitt, 127 A. 309, 210 (Pa. 1925)).

**North River's motion is granted. North River has no duty under Policies JU 1319 or JU 1225 to indemnify MSA for defense costs.**

***Zurich's and AIC's Renewed Motion for Summary Judgment that Claims are not Justiciable under the Delaware Declaratory Judgment Act***

Delaware's Declaratory Judgment Act empowers Delaware courts to exercise judicial discretion in rendering declaratory relief.[30] As this Court previously has held:

> "Lack of an actual controversy acts as a bar to a party proceeding with a case requesting only declaratory judgment as a remedy." An actual controversy must satisfy four requirements:
>
> > (1) It must be a controversy involving the rights or other legal relations of the party seeking declaratory relief; (2) it must be a controversy in which the claim of right or other legal interest is asserted against one who has an interest in contesting the claim; (3) the controversy must be between parties whose interests are real and adverse; (4) the issue involved in the controversy must be ripe for judicial determination.[31]

This Court previously denied a Zurich and AIC motion for summary judgment on justiciability grounds. The Court found that "MSA had demonstrated a significant likelihood that at least some of the higher level excess coverage will be

---

[30] *See* 10 *Del. C.* §§ 6506, 6512; *Schnick Inc. v. Amalgated Clothing & Textile Workers Union,* 533 A.2d 1235, 1238 (Del. Ch. 1987).

[31] *Mine Safety Appliances Co. v. AIU Ins. Co.*, 2014 WL 605753, at *2 (Del. Super.) (quoting *Stroud v. Milliken Enter., Inc.*, 552 A.2d 476, 479–80 (Del. 1989); *WMI Liquidating Trust v. XL Specialty Ins. Co.*, 2013 WL 4046600, at *6 (Del. Super.)).

triggered by the underlying claims," making MSA's claims ripe for adjudication.[32]

Three years later, MSA argues that there is no reason to reach a different result now. Though it admits that it has yet to ask AIC or Zurich to pay any claims, MSA contends that the resolution of the remaining legal issues informs how soon it *will* ask AIC and Zurich to pay. According to MSA, if the Court dismisses Zurich and AIC, it will eventually have to relitigate these pending issues.

In response, AIC and Zurich assert that the fact that MSA has yet to tender any claims against them is by itself dispositive. Further, the pending legal issues—namely, the non-cumulation clause and number of occurrences issues—are issues between North River and MSA. Asking the Court to keep AIC and Zurich in the case for the resolution of these issues simply because they may involve future litigation, is nothing more than a request for an advisory opinion. This is not a proper use of the Declaratory Judgment statute.[33]

The Court agrees with AIC and Zurich. MSA's claims are not ripe for judicial determination. Although MSA previously "demonstrated a significant likelihood that at least some of the higher level excess coverage will be triggered by the underlying claims," time has proven that this is not the case. Three years later, MSA

---

[32] *Id.* at *7.

[33] *Stroud v. Milliken Enter., Inc.*, 552 A.2d 476, 479–80 (Del. 1989) ("[T]he statute 'is not to be used as a means of eliciting advisory opinions from the courts.'") (quoting *Ackerman v. Stemerman*, 201 A.2d 173, 175 (Del. Super. 1964)).

has not demanded payment from Zurich and AIC and does not claim that it will imminently do so. The resolution of the pending legal issues would provide, at best, an advisory opinion for these two defendants.

**Therefore, Zurich and AIC's motion is granted. All claims against Zurich and AIC are dismissed without prejudice upon the conclusion of all appeals, if any from this decision.**

## CONCLUSION

North River's Motion for Enforcement of the Non-Cumulation Clause in the North River Policies is hereby **DENIED**. Mine Safety's Motion for Partial Summary Judgment on the Non-Cumulation Issue is hereby **GRANTED**. The undefined term "loss" as used in the North River policies, including its non-cumulation provisions, refers solely and exclusively to the total amount paid in settlement or satisfaction of an individual's claims.

North River's Motion to Determine Number of Occurrences is hereby **GRANTED**. MSA's Motion for Partial Summary Judgment on the Number of Occurrences Issue is hereby **DENIED**. All of the underlying claims arising from MSA's manufacture and/or sale of asbestos products are a single occurrence, and all claims arising from MSA's manufacture and/or sale of respirators are a separate single occurrence.

North River's Motion on Payment of Defense Costs is hereby **GRANTED**.

North River has no duty under Policies JU 1319 or JU 1225 to indemnify MSA for defense costs.

Zurich's and AIC's Renewed Motion for Summary Judgment that Claims are not Justiciable under the Delaware Declaratory Judgment Act is hereby **GRANTED**. All claims against Zurich and AIC are dismissed without prejudice upon the conclusion of all appeals, if any from this decision.

**IT IS SO ORDERED.**

The Honorable Mary M. Johnston