IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

MINE SAFETY APPLIANCES COMPANY, Plaintiff, v. AIU INSURANCE COMPANY, et al. Defendants.	)	C.A. No. N10C-07-241 MMJ

Submitted: November 16, 2015
Decided: January 22, 2016

Cross Motions on Trigger of Coverage
Insurers' Motion Denied
MSA's Motion Granted

Reasonable Expectations
Insurers' Motion Granted

Pollution Exclusions
Insurers' Motion Denied

Consent-to-Settle Condition
Insurers' Motion Granted
Subject to Exception

Notice and Cooperation
Insurers' Motion Granted
Subject to Exception

Defense Costs
Insurers' Motion Granted

Pro-Rata Allocation & Allocation to Post-1986 Policies
Insurers' Motion Denied

Right to Reallocate
Insurers' Motion Denied

Knowledge-Based Defenses
North River's Motion Denied
as Not Ripe for Determination

Non-Cumulation Clauses
AIG's Motion Granted

Multi-Year Policies and Number of Occurrences
AIG's Motion Granted in Part and Denied in Part

Follow Form Motion
MSA's Motion Denied

Miscellaneous Defenses
MSA's Motion Granted in Part and Denied in Part

MEMORANDUM OPINION
PHASE II SUMMARY JUDGMENTMOTIONS

Jennifer C. Wasson, Esq., Michael B. Rush, Esq., Potter Anderson & Corroon LLP, Mark A. Packman, Esq. (Argued), Jenna A. Hudson, Esq. (Argued), Gabriel Le Chevallier, Esq. (Argued), João Santa-Rita, Esq., Todd T. Itami, Esq., Ivan J. Snyder, Esq., Gilbert LLP, Attorneys for Plaintiff Mine Safety Appliances Company

Megan T. Mantzavinos, Esq., Emily K. Silverstein, Esq., Marks, O'Neill, O'Brien, Doherty & Kelly, P.C., Ellen G. Margolis, Esq, Pamela Minetto, Esq. (Argued), Mound Cotton Wollan & Greengrass, Attorneys for Defendants American Home Assurance Company, Granite State Insurance Company, Insurance Company of the State of Pennsylvania, Lexington Insurance Company, National Union Fire Insurance Company of Pittsburgh, PA, AIU Insurance Company, Chartis Property

Casualty Co f/k/a Birmingham Fire Insurance Co.

Peter B. Ladig, Esq., David J. Soldo, Esq., Meghan A. Adams, Esq., Morris James LLP, Alan S. Miller, Esq. (Argued), Henry M. Sneath, Esq., Bridget M. Gillespie, Esq., Katherine C. Dempsy, Esq., Picadio Sneath Miller & Norton, PC, Dennis O. Brown, Esq., Gordon & Rees LLP, Attorneys for The North River Insurance Company

Richard M. Beck, Esq., Sean M. Brennecke, Esq., Klehr Harrison Harvey Branzburg LLP, James P. Ruggeri, Esq., Joshua D. Weinberg, Esq. (Argued), Michele L. Backus, Esq., Shipman & Goodwin LLP, Attorneys for Hartford Accident and Indemnity Company, First State Insurance Company, and Twin City Fire insurance Company

Neal J. Levitsky, Esq., Seth A. Niederman, Esq., Fox Rothschild LLP, Daren S. McNally, Esquire (Argued), Barbara M. Almeida, Esquire (Argued) Clyde & Co US LLP, Attorneys for Travelers Casualty and Surety Company

JOHNSTON, J.

This is an insurance coverage case involving several layers of excess coverage. Plaintiff Mine Safety Appliances Company ("MSA") manufactured, distributed and sold products designed to protect miners from inhaling asbestos, silica and coal dust. Mine Safety purchased general liability and excess insurance policies from numerous insurers ("Insurers"). MSA filed this declaratory judgment action seeking coverage for tort actions alleging bodily injuries from the use of MSA products.

The Court decided thirteen Phase I summary judgment motions by Memorandum Opinion decided August 10, 2015. On November 16, 2015, the Court heard argument on thirteen Phase II motions. The analysis involves certain common legal authorities and public policy considerations. The parties agree that Pennsylvania law governs the disputes that are the subject of these motions.

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.[1] All facts are viewed in a light most favorable to the non-moving party.[2] 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

[1] Super. Ct. Civ. R. 56(c).
[2] H*ammond v. Colt Indus. Operating Corp*., 565 A.2d 558, 560 (Del. Super. 1989).

specific circumstances.[3] When the facts permit a reasonable person to draw only one inference, the question becomes one for decision as a matter of law.[4] 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.[5]

Where the parties have filed cross motions for summary judgment, and have not argued that there are genuine issues of material fact, "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."[6] Neither party's motion will be granted unless no genuine issue of material fact exists and one of the parties is entitled to judgment as a matter of law.[7]

ANALYSIS

I. TRIGGER OF COVERAGE

In a decision dated June 10, 2015 ("June 10th Opinion"), the Pennsylvania Court of Common Pleas held that the continuous trigger approach adopted in *J.H. France*[8] applies to coal dust claims. That Court reasoned that "for both coal dust

[3] Super. Ct. Civ. R. 56(c).
[4] *Wootten v. Kiger*, 226 A.2d 238, 239 (Del. 1967).
[5] *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).
[6] Super. Ct. Civ. R. 56(h).
[7] *Emmons v. Hartford Underwriters Ins. Co.*, 697 A.2d 742, 744–45 (Del. 1997).
[8] *J.H. France Refractories Co. v. Allstate Ins. Co.*, 626 A.2d 502 (Pa. 1993).

and asbestos claims, the injuries do not manifest themselves until a considerable time after the initial exposure."[9]

Whether a continuous (or multiple) trigger or a manifestation trigger applies has been a major issue in this case from the outset. This issue has been pending in Pennsylvania in a case involving many of the same parties as are in this Delaware action. All parties requested that this Court refrain from resolving the trigger issue until the Pennsylvania Court ruled. Pennsylvania law governs this dispute.

The Pennsylvania Court now has rendered its opinion. This ruling is in favor of MSA. Had the Pennsylvania Court determined that the manifestation trigger applies, MSA's coverage would have been reduced or eliminated in many instances.

Certain Insurers have urged this Court to disregard the Pennsylvania opinion. They claim that because exposure to coal dust differs from exposure to asbestos, the June 10th Opinion incorrectly followed the holding in *J.H. France.*[10] These Insurers have presented extensive arguments concerning the science underlying coal dust exposure. Additionally, Insurers have argued that *J.H. France* and the June 10th Opinion should not be followed, in part because they are not supported by *St.*

[9]*The North River Ins. Co. v. Mine Safety Appliances Co.*, 2015 WL 4501880, at *2 (Pa. Com. Pl. Civil Div.).
[10]*J.H. France*, 626 A.2d at 507 (exposure to asbestos, as well as all phases of an ensuing disease, independently trigger coverage).

John,[11] a Pennsylvania Supreme Court opinion. These arguments were also made in Pennsylvania.

This Court declines to deviate from the present state of the law in Pennsylvania. Unless and until the Pennsylvania Supreme Court reverses the June 10th Opinion, continuous trigger for coal dust injuries remains the law. There appears no reason to usurp the prerogative of another jurisdiction to establish its governing principles on the basis of its own well-reasoned decisions.

Therefore, Insurers' motions for summary judgment on trigger of coverage for coal dust claims are DENIED. MSA's cross motion is GRANTED.

II. REASONABLE EXPECTATIONS

The doctrine of reasonable expectations is designed to protect non-commercial insureds from: (1) policy terms that are not readily apparent; and (2) deception by insurance agents.[12] The doctrine was developed to enforce the reasonable expectations of the unsophisticated policyholder. Courts have reasoned "that the expectations of the insured are in large measure created by the insurance industry itself."[13] The doctrine is relevant only in very limited circumstances

[11] *Pa. Nat'l Mut. Cas. Ins. Co. v. St. John*, 106 A.3d 1, 22 (Pa. 2014) (establishing injuries resulting from exposure to asbestos and silica as exceptions to the first manifestation trigger).
[12] *Collister v. Nationwide Life Ins. Co.*, 388 A.2d 1346, 1353 (Pa. 1978).
[13] *Id.*

where the policy of a non-commercial insured contains terms that are "not readily apparent."[14] When a commercial insured is represented by a sophisticated insurance broker, the reasonable expectations doctrine is not applicable.[15]

Insurers argue that the doctrine is inapplicable in this case. Insurers contend that MSA is a major corporation, represented by Johnson & Higgins, one of the largest insurance brokers in the world. Additionally, the doctrine does not apply to unambiguous policy language.[16]

MSA agrees that it is a sophisticated commercial policyholder. However, MSA does not concede that all relevant policy language is unambiguous.

In this case, the issue becomes whether a commercial insured may assert the reasonable expectations doctrine in the face of ambiguous policy terms. The Court need not decide this issue as a global matter at this time. In reviewing the issues presented to this point in the litigation, the Court has not found any policy language to be ambiguous.

Therefore, Insurers' motion for summary judgment that reasonable expectations does not apply is GRANTED as to the policy terms reviewed by the Court as of this stage of the proceedings.

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[14] *Madison Constr. Co. v. Harleysville Mut. Ins. Co.*, 735 A.2d 100, 109 n.8 (Pa. 1999).
[15] *JEP Mgmt., Inc. v. Fed. Ins. Co.*, 2006 WL 2372961, at *3 (Pa. Com. Pl. Civil Div.).
[16] *St. Paul Mercury Ins. Co. v. Corbett*, 630 A.2d 28, 30 (Pa. Super. Ct. 1993).

III. POLLUTION EXCLUSION

Certain Insurers seek a summary judgment finding that coverage is barred by the pollution exclusion.

The Travelers' policies state that coverage is not provided for bodily injury arising out of an "emission, discharge, seepage, release [or] escape" of any "pollutant."

The Wasau policies do not apply to bodily injury "directly or indirectly caused by seepage and/or pollution and/or contamination of air, land, water and/or any other property, however caused and whenever occurring."

The North River policies exclude coverage for bodily injury arising out of the "discharge, dispersal, release or escape" of "contaminants or pollutants into . . . the atmosphere . . . ; but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental."

Certain policies follow form to other pollution exclusions with the same or substantially similar language. None of the policies define "pollution," "emission," "discharge," "dispersal," "seepage," "release," "escape," or "atmosphere."

Whether or not a substance is a pollutant depends upon the context. A pollution exclusion must not be interpreted so broadly that "virtually any substance,

including many useful and necessary products, could be said to come within its ambit."[17] Materials that are toxic by nature would not be pollutants when legally used for their intended purposes, in an appropriate confined location, and disposed of properly.[18] Examples include radiation used in medical x-rays, chlorine bleach used for cleaning, petroleum products used for lubrication in automobiles, and acid used in tanning leather.

A toxic substance becomes a pollutant upon discharge, dispersal, release or escape. In a confined residential setting, the flaking of lead paint has been found not to be a released pollutant—even though the flaking lead-based paint could be ingested or inhaled. "[T]he critical question is whether the process by which lead-based paint becomes available for human ingestion/inhalation unambiguously involves a type of motion that can be characterized as a discharge, dispersal, release, or escape."[19] In order to determine whether a pollutant falls within a policy exclusion, the Court must examine the way in which the substance travels from a contained place to the injured person's surroundings.[20]

A related inquiry is whether the injured person happened upon the released pollutant. In *Madison*, a toxic compound was used to cure concrete on a

[17]*Madison*, 735 A.2d at 107.
[18]*See Clarendon America v. Bay*, 10 F.Supp. 2d 736, 743–44 (S.D. Tex. 1998) (substance not a pollutant while in its intended location and not released).
[19]*Lititz Mut. Ins. Co. v. Steely*, 785 A.2d 975, 981 (Pa. 2001).
[20]*Danbury Ins. Co. v. Novella*, 727 A.2d 279, 284 (Conn. Super. Ct. 1998).

construction site.[21] The construction area was enclosed with an envelope of protective sheeting.[22] The injured person was an employee of the property owner, not someone involved with the construction process.[23] While attempting to set up an exhaust fan in response to a reported strong odor, the employee was overcome by fumes, lost consciousness, and fell into an excavation site.[24] The *Madison* Court found that the injuries arose out of the release of the polluting fumes.[25] Therefore, the pollution exclusion precluded coverage for the injuries.[26]

MSA manufactured safety equipment designed to protect miners from inhaling coal dust and other toxic substances that are known to be present in mining operations. The bodily injuries resulted from alleged defects in the respiratory equipment. It is undisputed that neither MSA nor MSA products were the cause of any dispersal or release of any toxic substance. MSA seeks coverage for the claims of miners injured by the toxic substances through exposure reasonably anticipated by their occupation. The miners were not unintentionally exposed to pollutants. Exposure was a necessary part of the job. Obviously, that is why safety equipment was worn.

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[21] *Madison*, 735 A.2d at 102.
[22] *Id.*
[23] *Id.*
[24] *Id.*
[25] *Id.* at 109–10.
[26] *Id.*

Further, there is no injury alleged resulting from the release of any pollutant outside the work area. Because the underlying cause of action is the alleged failure of the respiratory equipment, there are no demands for coverage for any exposure that may have occurred while the injured person was not in a location where safety equipment was worn. Under these circumstances, there is no reasonable interpretation that injury resulted from "discharge, dispersal, release or escape" of "contaminants or pollutants into . . . the atmosphere."

In this context, coal dust is not a pollutant excluded by the policy language. Any other interpretation would render the coverage illusory.[27] To permit the Insurers to deny coverage under these circumstances would mean that there could never be coverage for any alleged failure or defect in the respiratory safety equipment manufactured by MSA. The Insurers could not have been surprised by the fact that the insured, Mine Safety Appliances Company, manufactured mine safety appliances.

The miners were exposed to toxic substances in a place where the dust was reasonably expected to be. The dust was a necessary bi-product of the activity for which MSA's safety equipment was designed to be used. The dust did not result in injury caused by what is commonly understood to be environmental contamination,

[27]*See Ins. Co. Of Evanston v. Bowers*, 758 A.2d 213, 214 (Pa. Super. Ct. 2000) ("endorsement wholly meaningless, illusory, and absurd, as it would exclude any party from ever making a claim").

for which coverage would be excluded. Rather, this is a case about coverage for injuries caused by an allegedly defective product designed to counter the effects of exposure to dangerous materials.

Therefore, the Insurers' motion for summary judgment - that the pollution exclusions apply—is DENIED.

IV. CONSENT-TO-SETTLE CONDITION

Certain policies contain the following provision, or substantially similar terms:

> [T]he company shall have the right and shall be given the opportunity to associate with the insured or its underlying insurers, or both, in the investigation, defense or settlement of any claim or suit which, in the opinion of the company, involves or appears reasonably likely to involve the company . . . . The Insured shall not make or agree to any settlement for an amount in excess of underlying insurance without the approval of the company.

Consent-to-settle clauses have been found to be unambiguous and enforceable.[28]

MSA does not dispute that it did not request the consent of the moving Insurers prior to settlement of certain claims. However, MSA contends that it was not required to seek consent because Insurers consistently had denied coverage following the breakdown of a cost-sharing arrangement.

[28] *In re Am. Capital Equip., LLC*, 688 F.3d 145, 149 (3d Cir. 2012).

Insurers argue that MSA breached the consent-to-settle provisions by: (1) failing to provide relevant information requested by Insurers; (2) tendering claims to Insurers long after the claims had been defended; and (3) tendering claims to Insurers after settlement.

MSA states that it could present evidence that it indeed had complied with the policy provisions. Such evidence would include that MSA provided notice, cooperated with, and requested consent to settle from the Insurers, at least until the point at which Insurers denied coverage.

MSA asserts that Insurers must show that prejudice resulted from MSA's breach of the consent-to-settle provisions. The Court finds that Insurers are not required to show prejudice resulting from MSA's failure to request consent to settle.[29] The cases relied upon by MSA are distinguishable. *Nationwide Mutual Insurance Company v. Lehman,*[30] was a uninsured motorist case. Further, the insurer refused to consent to settlement, and the Court found that the insurer was not justified in withholding consent.[31]

In *Babcock & Wilcox Co. v. American Nuclear Insurers,*[32] the insurer also

[29]*Fisher v. USAA Cas. Ins. Co.*, 973 F.2d 1103, 1106 (3d Cir. 1992).
[30]743. A.2d 933 (Pa. Super. Ct. 1999).
[31]*Id.* at 939–40.
[32]2015 WL 4430352 (Pa.).

was found to have refused to accept a reasonable settlement offer.[33] The *Babcock* Court excused the failure to comply with the consent-to-settle requirement.[34] The insured was released from the duty to obtain consent upon a showing that the settlement was reasonable.[35]

In this case, the consent-to-settle policy terms are clear and unambiguous. MSA must request the consent of Insurers to the settlement in order to be entitled to coverage. If consent has not been sought, Insurers need not provide coverage. Insurers need not demonstrate prejudice caused by MSA's failure to request consent.

However, there is an exception. MSA has stated that it can present evidence that the conduct of the Insurers demonstrated that consent to settle, and coverage, would be denied. In that situation, a request to consent to settlement would have been futile. If MSA can prove that it is clear that Insurers would not have consented to settle the claim, and would have denied coverage regardless of the merits of the claim, the consent-to-settle prerequisite to coverage may not be enforceable.

Therefore, Insurers' motion for summary judgment on the enforceability of consent-to-settle provisions is GRANTED, subject to the foregoing exception.

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[33] *Id*. at *2.
[34] *Id*. at *16.
[35] *Id*.

V. NOTICE AND COOPERATION

An example of a notice and cooperation policy provision provides:

> The company shall not be obligated to assume charge of the investigation, defense or settlement of any claim or suit against the insured, but the company shall have the right and shall be given the opportunity to associate with the insured or its underlying insurers, or both, in the investigation, defense or settlement of any claim or suit which, in the opinion of the company, involves or appears reasonably likely to involve the company. If the company avails itself of such right and opportunity, the insured, its insurers and the company shall cooperate in such matters so as to affect a final determination thereof. The insured shall not make or agree to any settlement for an amount in excess of underlying insurance without the approval of the company.

These clauses are designed to provide Insurers with the opportunity to elect to participate in, and even control the defense of, an insured claim. Prejudice results when lack of notice excludes Insurers from being part of the defense.[36] Insurers need not prove that their participation would have led to a different result. Failure to provide notice results in an inability to thoroughly investigate the claim. That inability is sufficient to establish prejudice.[37]

MSA argues that Insurers bear the burden of making a particularized showing of palpable prejudice. Additionally, MSA contends that excess coverage differs

[36] *Vanderhoff v. Harleysville Ins. Co.*, 78 A.3d 1060, 1066 (Pa. 2013); *Metal Bank of Am., Inc. v. Ins. Co. of N. Am.*, 520 A.2d 493, 500 (Pa. Super. Ct. 1987).
[37] *Vanderhoff*, 78 A.3d at 1066–67.

from primary coverage because excess carriers have no right to control a lawsuit and have less need for early notice. Finally, MSA asserts that settlement without Insurer consent does not prejudice the Insurers' interests because prior to MSA asking for reimbursement of costs, certain Insurers—AIC, AIG, and Zurich—stated that they were not going to cover MSA's tort claims. Therefore, MSA contends that notice to, and cooperation with these Insurers would have been futile.[38]

The authority relied upon by MSA is inconsistent with current Pennsylvania law. These Third Circuit and United States District Court cases[39] were decided before the Pennsylvania Supreme Court issued its opinion in *Vanderhoff* in 2013. Further, the terms of the notice and cooperation clauses are unambiguous and must be enforced.

When MSA has not given timely notice of a potentially covered claim, prejudice will be deemed to have resulted. The question becomes whether an Insurer had a reasonable opportunity to participate in the defense, and to conduct its own investigation. Tendering claims to Insurers after settlement also constitutes a breach of the notice and cooperation clause, without a showing of prejudice by Insurers.

Insurers need not demonstrate prejudice in order to deny coverage on the basis

[38] *Nationwide Mut. Ins. Co. v. Lehman*, 743 A.2d 933, 941 (Pa. Super. Ct. 1999).
[39] *Trs. of the Univ. of Pa. v. Lexington Ins. Co.*, 815 F.2d 890, 899 (3d Cir. 1987); *Brethren Mut. Ins. Co. v. Velez*, 2008 WL 2444505, at *3–4 (M.D. Pa.).

of MSA's breach of the notice and cooperation policy terms. However, as with the consent-to-settlement provisions, there is an exception. If MSA can prove that notice would have been futile because it is clear that Insurers would have denied coverage regardless of the merits of the claim, the notice and cooperation provisions may not be enforceable.

Therefore, Insurers' motion for summary judgment on the issue of notice and cooperation is GRANTED, subject to the foregoing exception, for claims where MSA has failed to provide timely notice to the Insurer.

VI. DEFENSE COSTS

The parties agree that defense costs are paid within policy limits for Coverage A.

Coverage B insures "ultimate net loss" in excess of the retained limit. Defense costs will be paid *in addition to limits* for occurrences ***not covered*** *by underlying insurance.* The issue is whether "not covered" refers to the *fact* of coverage or to the *extent* of available limits.

Some policies define "ultimate net loss" to include defense costs. Payment of included defense costs erodes policy limits. Thus, legal expenses are to be paid within policy limits, not in addition to policy limits.[40] When policies define

[40] *Mine Safety Appliances Co. v. AIU Ins. Co.*, 2015 WL 5829461, at *4 (Del. Super.).

"ultimate net loss" to exclude costs, there is no obligation for Insurers to pay defense costs.[41]

MSA argues that occurrences are "not covered" when underlying insurance is exhausted. Thus, defense costs must be paid in addition to limits. At the least, the undefined term "covered" is ambiguous.

Certain policies contain a defense endorsement that mandates payment of defense costs in addition to limits. Under a defense endorsement, any occurrence **"not covered**" by underlying policies triggers the Insurer's duties to defend, pay all expenses incurred by MSA, and reimburse MSA for all reasonable expenses. Such payments are *in addition to policy limits*. However, the defense endorsement "shall not apply to defense, investigation, settlement or legal expenses covered by underlying insurances."

Limits of liability terms provide that when an occurrence is "covered," the excess policy attaches when the underlying limits have been exhausted. When an occurrence is "not covered," the excess policy attaches when a specific retained limit has been met. The defense endorsement does not apply to covered occurrences. The distinction between "covered" and "not covered" claims depends upon whether the policy insures against a risk. A claim can be "covered," even if the amount of

[41] *Id.* at *9.

liability exceeds policy limits.

The Court finds that the phrase "not covered' in Coverage B policies means that the claim was not covered *ab initio.* "Covered" refers to the fact of coverage, not the extent of policy limits.[42] Any other reading would be inconsistent with the covered/not covered distinction addressed in the defense endorsements. Defense costs erode excess policy limits where claims were covered by underlying insurance, even if underlying liability policy limits have been exceeded.

Therefore, Insurers' motion for summary judgment on the issue of defense costs eroding policy limits is GRANTED.

VII. *PRO-RATA* ALLOCATION & ALLOCATION TO POST-1986 POLICIES

Certain Insurers wish to continue a long-standing course of conduct. For more than twenty-five years, certain Insurers operated pursuant to a modified *pro rata* allocation approach. This allocation methodology was not designated by any written contract. MSA was not a party to the cost-sharing arrangements among Insurers. Insurers nevertheless argue that the arrangement was efficient and did not prejudice MSA. Further, MSA was aware of and supported the approach.

[42] *See Con'l Cas. Co. v. Roper Corp.*, 527 N.E.2d 998, 1003 (Ill. App. 1988); *Accord, Pergament Distribs., Inc. v. Old Republic Ins. Co.*, 128 A.D.2d 760, 761 (N.Y. App. Div. 1987) ("the terms 'covered' and 'not covered' refer to whether the policy insures against a certain risk, not whether the insured can collect on an underlying policy,"); *Mission Nat'l Ins. Co. v. Duke Transp. Co.*, 792 F.2d 550, 552 (5th Cir. 1986) (same); *Wells Fargo Bank, N.A. v. Cal. Ins. Guar. Ass'n.*, 38 Cal. App. 4th 936 (Cal. Ct. App. 1995) (same).

Insurers contend:

> [T]here is no reason to depart from the pro rata allocation model that worked so well for more than two decades. In fact, continuing with the pro rata approach is the most equitable and efficient way to allocate the claims at issue. Among other things, it will serve to streamline the litigation by avoiding a second phase of litigation involving contribution claims by insurers that would be targeted under a joint and several allocation approach and forced to pay more than their equitable share.

However, Insurers were unable to cite to any legal authority in support of their position. Insurers failed to point to any contractual provision requiring MSA to submit to their requested approach.

MSA argues that it should be permitted to assert its rights to allocate claims as it sees fit pursuant to *J.H. France Refractories Company v. Allstate Insurance Company*.[43] The *J.H. France* Court adopted a joint and several allocation methodology.

MSA states that it never was a party to any cost-sharing arrangement. However, MSA admits that at times, MSA facilitated Insurers' negotiations among themselves. MSA consistently has refused to sign any cost-sharing agreement. So long as claims and defense costs were being paid by Insurers, MSA asserts that it left Insurers to apportion costs among themselves. When Insurers disagreed as to how

[43]626 A.2d 502 (Pa. 1993).

to apportion claims, MSA began to tender claims jointly and severally.

MSA contends that *J.H. France* permits allocation to Insurers for which all underlying limits are not yet exhausted and whose policies are triggered.[44] If Insurers cannot agree, MSA can select one or more Insurers to assume responsibility for the claim. Any Insurer who pays for a claim may subsequently seek a share from other Insurers through the "other insurance" clause or contribution.[45]

This Court previously has ruled that:

(1) MSA is permitted to allocate among Insurers at its discretion;

(2) MSA is permitted by unambiguous policy terms to make claims against excess Insurers upon the exhaustion of any directly underlying policy covering the relevant time period; and

(3) Insurers may negotiate with each other as to how to allocate claims, and if negotiations are unsuccessful, Insurers have a right to assert claims against each other for contribution.[46]

It appears to the Court that it indeed may make sense, as a practical matter, to continue the long-standing practice of *pro-rata* allocation. Such allocation to post-1986 policies might be the most fair way to proceed. Nevertheless, Insurers really are seeking equitable relief in the form of a mandatory injunction—directing

[44] *See id.* at 509.
[45] *Id.*
[46] *Mine Safety*, 2015 WL 5829461, at *4, 11.

MSA to do something it is not required to do by contract or common law. There simply is no legal basis for the Court to enter such an order.

J.H. France is the controlling Pennsylvania precedent. MSA may allocate as it chooses, within the established parameters.

Therefore, Insurers' motion for summary judgment on the issue of *pro-rata* allocation must be DENIED.

VIII. RIGHT TO REALLOCATE

Insurers seek summary judgment to prevent MSA from continuously allocating and reallocating MSA's defense and indemnity claims among Insurers. Insurers argue that Insurers' rights under the policies must be respected. Continuous reallocation interferes with Insurers' right to control the defense and to select which Insurer would lead the defense. Additionally, MSA's unlimited reallocation practice is in violation of the exhaustion requirements.

Insurers claim:

> MSA frequently reallocated claims as well as defense and/or indemnity dollars three or more times for a single claim, with shifts occurring often years after a claim has been defended and expenses have been incurred . . . . MSA typically re-tendered these claims to new carriers without any explanation as to why it is receiving a late tender . . . . MSA's re-tenders frequently included, however, a demand for past costs that had already been incurred. In other words, the new insurer was asked to pay for old defense expenses, but given no opportunity to associate in

the defense that those expenses were used to purchase.

This Court already has held that MSA "is permitted to allocate among insurers at its discretion."[47] In *J.H. France*, the Pennsylvania Supreme Court held that a policyholder could choose among triggered primary policies where none of the insurers had agreed to provide a defense.[48] When policy limits of any given insurer are exhausted, the policyholder is entitled to seek indemnification from any of the remaining insurers. "Any policy in effect during the period from exposure through manifestation must indemnify the insured until its coverage is exhausted."[49] The *J.H. France* decision does not explicitly grant policyholders the right to re-tender claims continually and to reallocate expenses and settlements after costs have been incurred. However, there is nothing in the opinion that prohibits such practices, so long as other policy terms are not breached.

This Court comprehends why MSA's reallocation practice is problematic for Insurers. It appears that the apparent repeated reallocation is at least inefficient. At worst, MSA could be perceived as manipulating allocation in order to create exhaustion and to trigger excess coverage.

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. Nevertheless, with regard to any

[47] *Id.*
[48] *J.H. France*, 626 A.2d at 510.
[49] *Id.* at 509.

individual reallocation, MSA may have breached the notice and cooperation policy terms. In sum, there is no legal basis to impose a blanket declaration that reallocation is *per se* in breach of contract.

Therefore, Insurers' motion for summary judgment on right to reallocate is DENIED.

IX. KNOWLEDGE-BASED DEFENSES

MSA has moved for summary judgment on the basis that Insurers have failed to plead any specific material misrepresentations made by MSA. Only North River is maintaining the validity of the material misrepresentation/knowledge-based defenses. North River has not identified any particular misrepresentation made by MSA. North River instead avers that MSA "may have" made knowing or material misrepresentations.

North River does not dispute that MSA informed it about MSA's claims history and pending litigation. The parties disagree about whether North River's alleged failure to seek additional information prevents assertion of the knowledge-based defense.[50] North River contends that the defense may proceed

[50] *See Seneca Ins. Co. v. Lexington & Concord Search & Abstract, LLC*, 2008 WL 2120170, at *5 (E.D. Pa.) ("failure to disclose information into which [the insurer] did not inquire cannot constitute a material misrepresentation."); *but see Rohm & Haas Co. v. Cont'l Cas. Co.*, 781 A.2d 1172, 1180 (Pa. 2001) ("Here, the jury weighed the evidence and, drawing permissible inferences,concluded that the failure to disclose was not merely inadvertent and unrelated to Whitmoyer, but knowing and deliberate. The jury determined that at the times that Whitmoyer was

upon evidence that MSA failed to advise North River of MSA's alleged "concern over the respirator litigation and failure to advise North River of the known defects in the respirators and their effect on unsuspecting users."

This Court already has found that the Insurers' evidence is insufficient as a matter of law to prove the "expected or intended" defenses.[51] Although the elements are different for knowledge-based defenses, both categories of defenses turn on whether MSA deceived Insurers. Such defenses must be pled with particularity. For fraud or misrepresentation to lie, MSA must have known of the loss at the time of the purported misrepresentation.

Discovery is ongoing. Depositions have been noticed on these specific issues. The Court finds that this motion is premature. North River's motion for summary judgment on the issue of knowledge-based defenses must be DENIED at this time as not yet ripe for determination.

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added to existing policies or included in newly purchased policies [the insured] deliberately withheld information it knew would be material to the insurers' decision to provide coverage. We therefore conclude that Superior Court appropriately reversed the entry of JNOV on this issue.").

[51] *Mine Safety Appliances Co. v. AIU Ins. Co.*, 2014 WL 1326536, at *7 (Del. Super.).

X. NON-CUMULATION CLAUSES

The AIG policy provision at issue provides:

> **PRIOR INSURANCE AND NON CUMULATION OF LIABILITY**
>
> 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 the Declarations shall be reduced by any amounts due to the Insured on account of such loss under such prior insurance.

AIG has moved for summary judgment, requesting enforcement of the non-cumulation clause. If enforceable, the prior insurance and non-cumulation condition would reduce the limits available to MSA under the applicable AIG Policies. MSA contends that any interpretation of the non-cumulation clause that eliminates coverage is unenforceable as an improper escape clause. AIG counters that the clause at issue is not an escape clause. Rather, AIG seeks enforcement only as to losses attributable to policies issued by the same insurer. AIG defines the same insurer as each individual issuing company, not other insurers and not other AIG insurers.

Under applicable Pennsylvania law, non-cumulation clauses are enforceable

when they limit, rather than preclude, coverage.[52] Non-cumulation clauses have been found to be clear and unambiguous.[53] Such clauses "permit each [insurer] *individually* . . . to reduce the applicable limits of liability for previous payments attributable to the same 'loss.'"[54] An insurer is not allowed to reduce coverage under a non-cumulation clause, on the basis of a loss paid under a prior policy issued by another insurer. This would constitute an impermissible elimination of coverage, as opposed to a reduction.[55]

The Court finds that the AIG "Prior Insurance and Non Cumulation" clause is unambiguous and enforceable as to policies issued by the same AIG issuing company. Therefore, AIG's Motion for Partial Summary Judgment is GRANTED.

XI. MULTI-YEAR POLICIES AND NUMBER OF OCCURRENCES

AIG requests that summary judgment be granted declaring that the AIG multi-year policies provide one occurrence limit for the entire term of each three-year policy. These policies have varying language. Essentially, the policies

[52]*Air Prods. and Chems., Inc. v. Hartford Accident & Indem. Co.*, 1989 WL 73656, at *2 (E.D. Pa.).
[53]*Liberty Mut. Ins. Co. v. Treesdale, Inc.*, 418 F.3d 330, 341–42 (3d Cir. 2005).
[54]*Air & Liquid Sys. Corp. v. Allianz Underwriters Ins. Co.*, 2013 WL 5436934, at *29 (W.D. Pa.). MSA argues that this Court should disregard the *Air & Liquid* decision because it is being challenged on appeal. This Court will not second-guess what a Pennsylvania appellate court may decide. So long as a Pennsylvania court issues a reasoned decision, the ruling will be deemed controlling precedent on issues controlled by Pennsylvania law.
[55]*Green, Tweed & Co., Inc. v. Hartford Accident & Indem. Co.*, 2006 WL 1050110, at *16-17 (E.D. Pa.).

provide for two limits: (1) a specified cap of liability for any one occurrence; and (2) a specified aggregate amount for all occurrences during each policy year. The plain meaning of these policy terms is that the occurrence limit applies to the entire term of the policy period. The aggregate limit applies annually. This interpretation is consistent with Pennsylvania law.[56]

MSA argues that the per-occurrence limits are moot because there are at least four occurrences under the three-year policies. MSA contends that because there is a separate limit for each occurrence, the per-occurrence limits would function the same way for multiple occurrences as if they were annualized over each of the years covered by the policies.

AIG counters that MSA's conclusion regarding the number of occurrences is "mere speculation" and does not constitute opposition to the legal ruling sought by AIG. Further, MSA has not requested that the Court determine the number of occurrences applicable to the underlying claims.

The Court finds that the multi-year policies limit liability to a specific amount for any one occurrence over the entire term of a single policy. Additionally, all occurrences during any annual period are aggregated and subject to a separate annual limit. All of the referenced multi-year policies refer to "each occurrence."

[56] *Id*. at *9–10 (the single limit applies to each occurrence; annual aggregate limit applies regardless of the number or occurrences during each annual period).

Thus, it is clear that the policies contemplate the potential for more than one covered occurrence under a single policy.

Therefore, AIG's motion for summary judgment is GRANTED IN PART and DENIED IN PART.

XII. RESOLUTION OF FOLLOW FORM MOTION FROM PHASE I

MSA asserts that there are two categories of follow-form provisions. Category A is comprised of excess policies that specify the policy or policies to which the excess policies follow form. Category A is not the subject of this summary judgment motion.

MSA's designated Category B consists of follow-form provisions that provide insufficient "guidance on their faces regarding which of the hundreds of insurance policies issued to MSA they follow." MSA is not requesting that the Court interpret any specific policy provisions. Rather, MSA seeks a ruling that the Category B policies "are ambiguous regarding the underlying policy terms that they incorporate."

There is no single policy term that is at issue. Alleged ambiguities include unspecified renewals, replacements and rewrites, as well as omission of specific policy numbers of periods.

Should the Court issue a blanket ruling finding a group of policies ambiguous,

the parties would be entitled to present extrinsic evidence. The implications of extrinsic evidence are not insignificant. At a minimum, expert witnesses undoubtedly will be offered on the issue of industry practice and custom. The scope of witness testimony might be expanded—perhaps exponentially. MSA explicitly has acknowledged that an ambiguity finding would permit extrinsic evidence, as a prerequisite to resolving such issues as the Insurers' obligation to pay defense costs.

The Court declines to assess ambiguity in a vacuum. Interpretation of contract terms requires review of the actual policy provisions. In resolving other legal issues in this case, the Court has reviewed the policy language. When terms in multiple policies have not been precisely identical, the relevant language has been sufficiently similar for the Court to make an informed ruling.

For example, some policies state that they follow other policies that are "on file." It is possible that when reviewing the specific terms, along with other evidence of what policies are "on file" with the Insurers, there will be no resulting ambiguity. Additionally, the terms "renewal," "replacement," and "rewrite" may or may not be subject to interpretation without extrinsic evidence.

In the absence of specific policy provisions, or substantially similar provisions, the Court cannot and will not make a broad finding of ambiguity. In

other instances in this litigation, the Court has been called upon to examine exemplary contract terms, and to make a ruling that the parties have applied to analogous disputes. There is no compelling reason to deviate from that practice in this instance.

Therefore, MSA's motion for partial summary judgment is DENIED.

XIII. MISCELLANEOUS DEFENSES

Following oral argument, the parties stipulated to withdraw certain defenses, subject to enumerated conditions. The following applies to the remaining defenses.

As a general matter, many defenses are not case-dispositive. Instead, the defenses are asserted to mitigate damages or to shift the burden of proof. Ordinarily, the Court will determine during trial whether sufficient evidence has been offered to present the existence of the defense as a question of fact for the jury. Of course, when a claimed defense involves facts and discovery distinct from other issues in the case, judicial economy may mandate that the Court examine at a pre-trial stage whether a *prima facie* showing has been made.

It does not appear that any of the miscellaneous defenses at issue in the pending summary judgment motion will generate additional discovery. Additionally, it is not clear whether elimination of any defense at this stage of the proceedings will streamline trial preparation or motion practice. Therefore, the

Court declines to parse each of the numerous miscellaneous defenses on the merits at this time.

Some of these defenses may be subject to questions on a verdict sheet for the finder of fact. Other defenses may involve no genuine issues of material fact, and therefore will be ripe for resolution as a matter of law. To the extent the parties are unable to agree whether a party asserting a defense has made a *prima facie* showing, the Court will rule on the viability of the following defenses at the time of trial:

- accord and satisfaction;
- failure to take appropriate precautions to prevent loss;
- violation of the assignment clause;
- liability assumed under contract;
- bad faith;
- breach of warranty;
- employee claims;
- coverage for equitable relief;
- failure to mitigate;
- costs incurred to prevent or mitigate;
- incorporation or reservation of additional defenses;
- insurer has no further obligations;

- maintenance of underlying insurance;
- named insured;
- products liability exclusion;
- punitive damages;
- release;
- *res judicata*;
- self-insured retentions;
- spoliation;
- statutory obligations or protections;
- waiver of defense; and
- workers' compensation.

At this stage of the proceedings, the Court deems the following defenses waived as having not been actively pursued in a timely manner:

- failure to state a cause of action;
- failure to join;
- forum *non conveniens;*
- statute of limitation;
- statute of frauds; and
- stay.

Laches is an equitable defense that is not available in the Superior Court, which is a court of law. The defense of lack of justiciability already has been decided.

Therefore, MSA's motion is GRANTED IN PART and DENIED IN PART.

CONCLUSION

I. TRIGGER OF COVERAGE

The Pennsylvania Supreme Court has applied continuous trigger for coal dust injuries. There appears no reason to usurp the prerogative of another jurisdiction to establish its governing principles on the basis of its own well-reasoned decisions. **Therefore, Insurers' motions for summary judgment on trigger of coverage for coal dust claims are DENIED. MSA's cross motion is GRANTED.**

II. REASONABLE EXPECTATIONS

The Court has not found any policy language to be ambiguous at this point in the litigation. **Therefore, Insurers' motion for summary judgment that reasonable expectations does not apply, is GRANTED as to the policy terms reviewed by the Court as of this stage of the proceedings.**

III. POLLUTION EXCLUSIONS

Under the circumstances presented in the claims at issue, coal dust is not a pollutant under policy terms. **Therefore, the Insurers' motion for summary judgment—that the pollution exclusions apply—is DENIED.**

IV. CONSENT-TO-SETTLE CONDITION

The consent-to-settle policy terms are clear and unambiguous. MSA must request the consent of Insurers to the settlement in order to be entitled to coverage. Insurers need not demonstrate prejudice caused by MSA's failure to request consent. However, if MSA can demonstrate that a request to consent to settlement would have been futile, the consent-to-settle prerequisite to coverage may not be enforceable. **Therefore, Insurers' motion for summary judgment on the enforceability of consent-to-settle provisions is GRANTED, subject to the foregoing exception.**

V. NOTICE AND COOPERATION

Insurers need not demonstrate prejudice in order to deny coverage on the basis of MSA's breach of the notice and cooperation policy terms. However, if MSA can prove that notice would have been futile, the notice and cooperation provisions may not be enforceable. **Therefore, Insurers' motion for summary judgment on the issue of notice and cooperation is GRANTED for claims where MSA has**

failed to provide timely notice to the Insurer, subject to the foregoing exception.

VI. DEFENSE COSTS

"Covered" refers to the fact of coverage, not the extent of policy limits. Defense costs erode excess policy limits where claims were covered by underlying insurance, even if underlying liability policy limits have been exceeded. **Therefore, Insurers' motion for summary judgment on the issue of defense costs eroding policy limits is GRANTED.**

VII. *PRO-RATA* ALLOCATION & ALLOCATION TO POST-1986 POLICIES

MSA may allocate as it chooses, within the established parameters. **Therefore, Insurers' motion for summary judgment on the issue of *pro-rata* allocation must be DENIED.**

VIII. RIGHT TO ALLOCATE

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. Nevertheless, with regard to any individual reallocation, MSA may have breached the notice and cooperation policy terms. In sum, there is no legal basis to impose a blanket declaration that reallocation is *per se* in breach of contract. **Therefore, Insurers' motion for**

summary judgment on right to reallocate is DENIED.

IX. KNOWLEDGE-BASED DEFENSES

Knowledge-based defenses must be pled with particularity. **Discovery is ongoing. Depositions have been noticed on these specific issues. The Court finds that this motion is premature , and must be DENIED at this time.**

X. NON-CUMULATION CLAUSES

Non-cumulation clauses are enforceable when they limit, rather than preclude, coverage. **The Court finds that the AIG "Prior Insurance and Non Cumulation" clause is unambiguous and enforceable as to policies issued by the same AIG issuing company. Therefore, AIG's Motion for Partial Summary Judgment is GRANTED.**

XI. MULTI-YEAR POLICIES AND NUMBER OF OCCURRENCES

The Court finds that the multi-year policies limit liability to a specific amount for any one occurrence over the entire term of a single policy. Additionally, all occurrences during any annual period are aggregated and subject to a separate annual limit. All of the referenced multi-year policies refer to "each occurrence." Thus, it is clear that the policies contemplate the potential for more than one covered occurrence under a single policy. **Therefore, AIG's motion for summary judgment is GRANTED IN PART and DENIED IN PART.**

XII. FOLLOW FORM MOTION FROM PHASE I

In this motion, the Court was not called upon to examine specific "follow form" policy provisions, or substantially similar provisions. The Court cannot and will not make a broad finding of ambiguity. **Therefore, MSA's motion for partial summary judgment is DENIED.**

XIII. MISCELLANEOUS DEFENSES

It does not appear that any of the miscellaneous defenses at issue in the pending summary judgment motion will generate additional discovery. Additionally, it is not clear whether elimination of any defense at this stage of the proceedings will streamline trial preparation or motion practice. Therefore, the Court declines to parse each of the numerous miscellaneous defenses on the merits at this time. The Court will rule on the viability of certain defenses at the time of trial.

The Court deems other defenses waived as having not been actively pursued in a timely manner. Laches is an equitable defense that is not available in the Superior Court, which is a court of law. The defense of lack of justiciability already has been decided. **Therefore, MSA's motion is GRANTED IN PART and DENIED IN PART.**

IT IS SO ORDERED.

/s/ Mary M. Johnston
The Honorable Mary M. Johnston