IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

SHOOK & FLETCHER ASBESTOS SETTLEMENT TRUST, as Successor to Certain Assets and Liabilities of Shook & Fletcher Insulation Co., On the Trust's Own Behalf and On Behalf of the Shook Payment Trust,	)	C.A. No. 04C-02-087 MMJ
Plaintiff,	)	
v.	)	
SAFETY NATIONAL CASUALTY CORPORATION,	)	
Defendant.	)	

OPINION

Upon the Parties' Cross-Motions for Partial Summary Judgment

Submitted: August 31, 2005
Decided: September 29, 2005

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JOHNSTON, J.

This is the Court's decision on the following motions:

1. Safety National Casualty Corporation's Motion for Partial Summary Judgment on Choice of Law.

2. Plaintiff's Motion for Partial Summary Judgment Regarding Continuous Trigger of Coverage and All Sums Allocation.

3. Defendant Safety National Corporation's Motion for Partial Summary Judgment that Shook & Fletcher is Precluded from Relitigating the Issues of Choice of Law and "Trigger" Based on Collateral Estoppel.

4. Defendant's Motion for Summary Judgment with Respect to Plaintiff's Breach of Contract Claims and for Declaratory Judgment on Trigger and Exhaustion of Underlying Limits Issues.

PROCEDURAL AND FACTUAL CONTEXT

Plaintiff Shook & Fletcher Asbestos Settlement Trust, as Successor to Certain Assets and Liabilities of Shook & Fletcher Insulation Company ("Shook & Fletcher"), seeks to establish coverage for asbestos bodily injury claims under three excess liability policies issued by Safety National Casualty Company, successor to Safety Mutual Casualty Corporation ("Safety"), for policy years 1983 through 1985.

Shook & Fletcher is a thermal insulation contractor and distributor. Since its establishment in 1949, Shook & Fletcher's principal place of business has been Birmingham, Alabama. Beginning in 1976, Shook & Fletcher received claims for injuries and diseases relating to exposure to asbestos it installed or distributed.

In 1985, Shook & Fletcher entered into an agreement with other asbestos claim defendants and some of their insurers. The purpose of this so-called *Wellington Agreement*, was to jointly handle and defend asbestos cases. A claims facility was established to defend the claims.

In 1993, Shook & Fletcher, together with 19 other asbestos manufacturers and distributors, filed a class action complaint in the Federal District Court for the Eastern District of Pennsylvania in an attempt to settle asbestos claims.[1] Insurers, including Shook & Fletcher's insurers, were joined as third-party defendants. The United States Court of Appeals for the Third Circuit reversed certification of the class, holding that the proposed class failed to meet the requisite requirements of typicality, adequacy of representation, predominance and superiority.[2] In 1977, the United States Supreme Court rejected the class action settlement and no coverage determinations were made as to Shook & Fletcher's insurers.

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[1] *See Georgine v. Amchem Prods., Inc.,* 157 F.R.D 246, 265 (E.D. Pa. 1994), *vacated and remanded*, 83 F.3d 610 (3rd Cir. 1994), *aff'd*, 521 U.S. 591 (1997).

[2] *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 617 (3d Cir. 1996).

Also in 1993, Safety filed suit against Shook & Fletcher in Alabama state court seeking a declaration of no coverage.[3] Shook & Fletcher counterclaimed, alleging entitlement to coverage, and added as third-party defendants its seven other insurers who had not previously settled. The Alabama action was stayed until 1997, in favor of the federal action.

In 1999, after full briefing and argument, the Alabama court held that the "exposure coverage theory" would apply, instead of the "continuous trigger" or "triple trigger" theory. This ruling was not appealed.

Because one of Safety's policies contained an arbitration clause, the Alabama court ordered the parties to arbitrate that policy. The other two policies remained in suit. By a two-to-one decision, the arbitration panel applied an exposure trigger. The panel majority also held that all triggered primary and lower level excess policies must be exhausted before Safety would be obligated. Further, the majority found that Safety was not obligated to "drop down" to cover insolvent insurers' shares and that Shook & Fletcher was responsible for any uninsured periods.

By April 11, 1999, Shook & Fletcher had entered into settlement agreements with all of its remaining solvent insurers, with the sole exception of

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[3] *Safety Nat'l. Cas. Corp. v. Shook & Fletcher Insulation Co.,* No. CV-03-01574.

Safety. On April 12, 1999, Shook & Fletcher agreed to settle the Alabama state court action without prejudice. The Order of Stipulation on Dismissal stated that "nothing in this dismissal or Order shall constitute a prejudicial bar or adjudication on the merits...and either party has the right to maintain a subsequent action with respect to any dispute between them, including but not limited to the issues presently addressed in this litigation...the Parties reserve all rights and defenses...."

Shook & Fletcher filed a lawsuit in the United States District Court for the Eastern District of Missouri, seeking to vacate the arbitration decision on the basis that the panel had exceeded its authority by ruling that the panel's decision was binding. The District Court held that the panel had exceeded its authority under Section 10(a)(4) of the Federal Arbitration Act.[4] The Eighth Circuit Court of Appeals affirmed, holding that the Safety policy "provided for mandatory but non-binding arbitration."[5]

Shook & Fletcher filed for Chapter 11 bankruptcy protection on April 8, 2002. A reorganization plan was confirmed on November 8, 2002. The plan created a settlement trust (the "Trust") to pay certain pending and future asbestos

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[4] *Shook & Fletcher Ins. Co. v. Safety National Cas. Co.,* E.D. Mo., No. 4:99-MC-133, Jackson, J. (Nov. 25, 2002).

[5] *Shook & Fletcher Asbestos Settlement Trust v. Safety National Cas. Corp.,* 8th Cir., No. 03-1092, *Per Curiam* (Oct. 21, 2003), *cert. denied,* U.S. Supr. No. 03-1221 (Apr. 19, 2004).

claims, and left in place a pre-petition trust to pay pre-bankruptcy claims. Shook & Fletcher was obligated to contribute $3.3 million in cash and notes. The remainder of the funding was to be provided by insurance proceeds of approximately $303 million. The plan did not establish any specific amount to be paid to claimants. Instead, the plan established a matrix of payment amounts.

CHOICE OF LAW

The Safety insurance policies do not specify the state law applicable to disputes under the contracts. As the forum state, Delaware applies its own choice-of-law rules.[6] In determining whether the law of Delaware or the law of Alabama governs the controversy, the Court must consider the facts in accordance with the "most significant relationship" test.[7] That test, as articulated by the Delaware Supreme Court,[8] is set forth in Section 188 of the Restatement (Second) Conflict of Laws which provides:

> Law Governing in Absence of Effective Choice by the Parties:
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> (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

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[6] *Allstate Ins. Co. v Hague,* 449 U.S. 302, 307 (1981).

[7] *Oliver B. Cannon & Son, Inc. v. Door-Oliver, Inc.,* 394 A.2d 1160, 1166 (Del. 1978).

[8] *Travelers Indem. Co. v. Lake*, 594 A.2d 38, 46-47 (1991).

respect to that issue, has the most significant relationship to the transaction and the parties under the principles stated in §6.

(2) In the absence of an effective choice of law by the parties, the contacts to be taken into account in applying the principles of §6 to determine the law applicable to an issue include:

(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 domicile, 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.

The Section 188 contacts are evaluated according to their relative importance to the particular issue and in accordance with the following principles listed in Section 6 of the Restatement[9]:

(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,

[9] *Liggett Group Inc. v. Affiliated FM Ins. Co.,* 788 A.2d 134, 138 (Del. Super. 2001).

(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.

The principal place of business of Shook & Fletcher has been Alabama since the company was formed in 1949. Shook & Fletcher styles itself a "small, locally-owned company." The majority of Shook & Fletcher's job sites were in Alabama. Four of eight properties owned by Shook & Fletcher are in Alabama. Shook & Fletcher has done most of its business in Alabama, Tennessee, Georgia and Mississippi.

Originally incorporated in Alabama, Shook & Fletcher now is incorporated in Delaware. The Trust was created under Delaware law. Safety is an insurer registered to do business in Delaware.

In complex coverage cases such as this, the insured's corporate headquarters has most often been found to be the logical situs of the most significant insurance-

related activities.[10] When considering the multiple factors of the "most significant relationship" test, the Court finds that the Alabama-based employees of Shook & Fletcher, as the insured, would have had to have been actively involved in the negotiation (to the extent there was negotiation) and execution of all insurance policies. In contrast, neither the insured's nor the insurer's principal place of business is in Delaware; Delaware was not the location of negotiation or execution of any insurance contract; the place of contract performance is not in Delaware; and Shook & Fletcher Insulation Co. had no facilities in Delaware.

Therefore, balancing the relevant contacts, the Court finds that Alabama has the most significant relationships to the parties and the subject matter in this action. As discussed in the Continuous Trigger or Exposure Trigger section of this opinion, the Restatement Section 6 factors do not alter the Court's conclusion.

COLLATERAL ESTOPPEL

Safety asserts that Shook & Fletcher is collaterally estopped from relitigating the trigger and choice of law issues, arguing that it has been

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[10] *See, e.g., Hoechst Celanese Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh,* 1994 WL 721651, at *3-5 (Del. Super.); *Sequa Corp. v. Aetna Cas. & Sur. Co.,* 1992 WL 147994, at *2-3 (Del. Super.); *E.I. duPont de Nemours & Co. v. Admiral Ins. Co.,* 1991 WL 236943, at *2 (Del. Super.); *Monsanto Co. v. Aetna Cas. & Sur. Co.,* 1991 WL 236936, at *2-4 (Del. Super.).

determined in three different fora that an exposure trigger applies to the Shook & Fletcher insurance policies. Shook & Fletcher responds that the prior proceedings did not fully litigate these issues. According to Shook & Fletcher, Safety's reliance on an "interlocutory ruling in a coverage case" is misplaced, in part because no final judgment was entered. Additionally, Shook & Fletcher asserts that the decision of two out of three arbitrators is not entitled to collateral estoppel effect because it was held to be non-binding. Finally, the action in 1993 resulted in a consent judgment, expressly providing that there was no judicial resolution of any legal issue.

Having concluded that Alabama law applies under the most significant relationship test, the Court need not reach the issue of whether or not collateral estoppel applies.

CONTINUOUS TRIGGER OR EXPOSURE TRIGGER

The Safety insurance policies, Policy UM 12575 for the period December 31, 1983 to May 13, 1984 and Policy UM 12575 for the period of May 13, 1984 to May 13, 1985, cover "ultimate net loss" because of personal injury caused by an occurrence. "Bodily injury" is defined:

> 2. "Bodily Injury" means bodily injury, sickness or disease sustained by any person which occurs during the policy period, including death at any time resulting therefrom.

The third Safety policy, Policy No. UF1490 AL, was issued to Shook & Fletcher covering the term of August 16, 1983 to December 31, 1983. This policy was a second layer excess umbrella policy that applied excess to coverage provided by First State Insurance Company under Policy No. 949880.[11]

Regardless of whether Delaware or Alabama law applies, the language in insurance contracts is interpreted according to its plain meaning. However, insurance policies are adhesion contracts. Thus, to the extent the language is ambiguous, the ambiguity is construed against the insurer, who drafted the policy.[12]

Shook & Fletcher seeks partial summary judgment that as a matter of law, a "continuous trigger of coverage" applies. Shook & Fletcher defines "continuous trigger" as meaning that all policies in effect from a claimant's date of first exposure to asbestos or asbestos-containing products, through the date of the claimant's death (or the date on which the claimant files a claim against Shook & Fletcher or the Trust), are triggered. Safety has moved for partial summary judgment, arguing that the "exposure trigger" applies. According to Safety, the

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[11]A fourth policy contains an asbestos exclusion.

[12]*Allstate Ins. Co. v. Skeleton,* 675 So.2d 377, 379 (Ala. 1996); *Hallowell v. State Farm Mut. Ins. Co.,* 443 A.2d 925, 926 (Del. 1982).

applicable insurance policies are triggered or apply only to claims where the claimant was exposed to asbestos during the policy's term.

In *Hercules , Inc. v. AIU Insurance Company*,[13] the Delaware Supreme Court confirmed that the continuous trigger applies in cases of continuous or repeated exposure to conditions resulting in personal injury.[14] The Supreme Court reasoned:

> The "continuous trigger" involves a presumption that, in cases of long-term gradual damage such as pollution, the damage occurred at a constant rate, relieving the parties from having to quantify the rate and extent of pollution. . . .
>
> The use of the continuous trigger requires the presumption damage occurred at a constant, continuous rate from the inception of the environmental damage. The method of allocation must coincide with that presumption. For this reason, the Court concludes joint and several allocation is inconsistent with the imposition of the continuous trigger.[15]

Shook & Fletcher asserts that Alabama courts have not resolved the issue of which trigger applies. Thus, it argues that there can be no conflict with Delaware law, and that this Court need not address the choice of law question. In the absence of conflicting laws, the law of the forum state applies.

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[13]784 A.2d 481 (Del. 2001).

[14]*Id.* at 489-92.

[15]*Id.* at 492 and n.33.

When deciding whether a state's courts have opined on a legal issue, the forum state's courts may be guided by federal courts' interpretations of state law. Federal court pronouncements or predictions of what a state court might decide, however, are not binding on the court of the forum state.[16]

In *Porter v. American Optical Corp.*,[17] the Fifth Circuit Court of Appeals held that all insurance carriers were responsible under the standard general liability policy for a pro-rata share of the defense costs and judgments incurred as a result of suits against the insured for asbestos-related injury. In *Commercial Union Ins. Corp. v. Sepco Corp.*,[18] the Eleventh Circuit Court of Appeals held that the *Porter* decision controlled all matters pertaining to Alabama. The *Sepco* court adopted the exposure trigger, reasoning:

> We believe that the exposure theory is more accurately analyzed as positing not that each inhalation of asbestos fibers results in bodily injury, but rather than every asbestos-related injury results from inhalation of asbestos fibers. Because such inhalation can occur only upon exposure to asbestos, and because it is impossible practically to determine the point at which the fibers actually embed themselves in the victim's lungs, to equate exposure to asbestos with "bodily

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[16] *See generally Erie R. Co. v. Thompkins,* 304 U.S. 64, 78 (1938); *Booking v. General Star Management Co.,* 254 F.3d 414, 418-26 (2d Cir. 2001).

[17] 641 F.2d 1128 (5th Cir. 1981), *cert. denied sub nom. Aetna Cas. & Sur. Co. v. Porter,* 454 U.S. 1109 (1982).

[18] 765 F.2d 1543 (11th Cir. 1985).

> injury" caused by the inhalation of the asbestos is the "superior interpretation of the contract provisions."[19]

In *Safety National Casualty Corporation v. Shook & Fletcher Insulation Company,* an action in the Circuit Court in and for Jefferson County, Alabama, the Honorable Jack D. Carl considered Safety's argument that:

> The continuous trigger is the trend in the country because the medical evidence as it's developed – since Judge Guin [The Honorable J. Foy Guin, Jr., United States District Count for the Northern District of Alabama] made his decision in *Sepco*, makes clear that the injury, which is the triggering event under these policies, continues from the time of the first inhalation all the way through. And that's what Shook & Fletcher seeks.[20]

Ruling from the bench, after full briefing and argument, Judge Carl found:

> Okay. I'm saying I'm going to follow the SEPCO [sic].[21] I think that states what Alabama law was. I'm going to follow it. So I'm not going with continuous trigger. It has to be a manifest – it has to be an exposure during the policy period. That's what holds them liable. During their policy period there has to be an exposure
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> That's assuming that there's not language in the policy that states otherwise. Now, you can contract for more than that. But based on what I have read – and like I say, it's the Safety National's policy

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[19] *Id.* at 1546, *citing Ins. Co. of N. Am. v. Forty-Eight Insulations, Inc.*, 633 F.2d 1212, 1233 (6th Cir. 1980), *cert. denied*, 454 U.S. 1109 (1981) (The 11th Circuit affirmed that *Sepco* is controlling Alabama law on coverage issues in *Mut. Serv. Ins. Co. v. Frit Industries,* 358 F.3d 1312, 1324 n.12 (11th Cir. 2004)).

[20] *Safety Nat'l. Cas. Co. v. Shook & Fletcher Insulation Co.,* No. CV-93-01574, Carl, J. (Mar. 5, 1999).

[21] *Commercial Union Ins. Co. v. SEPCO Corp.*, 765 F.2d 1543 (11th Cir. 1989).

> language that I had quoted to me that I read directly. That's what I'm going to say on that.
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> * * *
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> As far as Shook & Fletcher's Motion for Partial Summary Judgment on the issue of trigger, et cetera, I'm denying that one.
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> As far as the motion of Home Insurance, and then it's going to be Continental Casualty and St. Paul and National Union, on the trigger – y'all I have got to make this caveat. Unless there is specific policy language to the contrary, then there is no continuous trigger as you all have been using that. I will grant the Motion for Summary Judgment of these companies to the extent that there is coverage only for personal – for the person exposed during the policy period or those who suffered bodily injury, close quote, during the policy period. Now, that's not a complete cover yet. But that's what those are.

By Order dated March 12, 1999, Judge Carl granted several Motions For Partial Summary Judgment That An "Exposure Trigger" Applies To The Asbestos Claims Against Shook & Fletcher Insulation Company, ruling that there was "coverage only for persons who were exposed during the policy period or those who suffered 'bodily injury' during the policy period." Judge Carl also granted Safety's motion for summary judgment "as to the trigger of coverage."

Shook & Fletcher argues that Judge Carl's rulings are not binding on this Court because the decision was not a final judgment and thus not appealable. It asserts that had the decision been appealed, it would have been reversed. Additionally, the decision relied on case law not related to asbestos. Shook &

Fletcher urges that, to the extent Judge Carl referred to *Sepco*, such reliance was misplaced because the then fourteen-year-old *Sepco* decision represented a minority opinion and was obsolete. Finally, Shook & Fletcher contends that the consent order in the Alabama action dismissed the case without prejudice, stating that "nothing in this dismissal or Order shall constitute a prejudicial bar or adjudication on the merits. . .and either party has the right to maintain a subsequent action with respect to any dispute between them including but not limited to the issues presently addressed in this litigation. . .the parties reserve all rights and defenses under the [Safety Policies]."

If the Alabama Supreme Court had specifically addressed the issue of the proper trigger, that Court's ruling clearly would be the law of Alabama and binding on this Court. Obviously, there is a spectrum of precedential value of legal determinations, depending upon many factors; including, the court's jurisdiction, the stage of proceedings, the extent to which an issue was briefed and argued, and the formality of the opinion rendered.

Even assuming that Judge Carl's ruling was an unappealable interlocutory order, it is not correct to say that there is ***no*** Alabama law on the issue of the applicable coverage trigger. From the perspective of a trial court, no Delaware

judge would take kindly to an Alabama judge simply disregarding a Delaware bench ruling, regardless of the nature and stage of the proceedings.

The threshold choice-of-law question in this action is whether the laws of Delaware and Alabama are in conflict. The Delaware Supreme Court has accepted the continuous trigger standard. Unless and until an Alabama appellate court (or another trial judge) disagrees with Judge Carl, the exposure trigger applies in Alabama. Therefore, a conflict exists. For the reasons discussed previously in this opinion, under the most significant relationship test, Alabama law (*i.e.*, the exposure coverage trigger) applies.

ALL SUMS OR PRO RATA ALLOCATION

Shook & Fletcher proposes that the relevant policy language mandates an "all sums" allocation rule, consistent with Delaware law, and urges that Alabama courts have not ruled on this issue. The "all sums" approach means that once the insurance policy is triggered, Safety has an independent obligation to pay Shook & Fletcher in full for all liability and defense costs incurred for covered claims, subject only to any applicable policy limits. Safety argues that, according to Alabama law, where two or more policies cover the same loss, pro-ration of the liability is required.

The applicable policies state that Safety "will pay on behalf of the insured for ultimate net loss in excess of the retained limit hereinafter stated which the Insured shall become legally obligated to pay as damages because of ... personal injury...." "Ultimate Net Loss" is defined as:

> 13. "Ultimate Net Loss" means the total sum which the Insured, or any company as his insurer, or both, become obligated to pay by reason of personal injury, property damage or advertising liability claims, either through adjudication or compromise, and shall also include hospital, medical and funeral charges and all sums paid as salaries, wages, compensation, fees, charges and law costs, premiums on attachment or appeal bond, interest, expenses for doctors, lawyers, nurses and investigator and other persons, and for litigation, settlement, adjustment and investigation claims and suits which, are paid as a consequence of any occurrence covered hereunder, excluding only the salaries of the Insured's or of any underlying insurer's permanent employees. The Corporation shall not be liable for expenses as aforesaid when such expenses are included in other valid and collectible insurance.

The Safety Mutual Casualty Corporation Excess Umbrella Policy Declarations state:

> The Company hereby agrees, subject to the limitations, terms and conditions hereinafter mentioned, to indemnify the insured for all sums which the Insured shall be obligated to pay by reason of the liability imposed upon the Insured by law, or assumed under contract or agreement by the Named Insured for damages, direct or consequential and expenses on account of: (a) Personal Injuries, including death at any time resulting therefrom,...

The Alabama Supreme Court has held: "When two or more insurance carriers have primary insurance coverage of the same insurable interest, subject matter, and risk, they share liability in accordance with the proportion that the limits of each policy bear to the total limit of insurance applicable to the loss."[22] If an insurer has paid the entire amount of a loss, that insurer may seek *pro rata* contribution from other insurers, even if the other insurers' policies do not contain a provision for apportionment of liability. The other insurers cannot assert exhaustion of policy limits as a defense to contribution.[23]

There is no reason to believe that the Alabama Supreme Court would not apply the same rule of *pro rata* allocation among excess insurance carriers. Therefore, if another excess insurance carrier is found to have contracted to provide coverage for the same subject matter and risks insured by Safety, Safety's obligation is coverage for Shook & Fletcher's liability in accordance with the proportion that the limits of each policy bear to the total limit of insurance applicable to the loss.

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[22]*Nationwide Mutual Ins. Co. v. Nationwide Mutual Ins. Co.,* 643 So.2d 551, 561 (Ala. 1994).

[23]*Id.* at 561.

EXHAUSTION OF UNDERLYING LIMITS

Two of the three Safety policies apply as excess insurance to policies issued by other insurers with policy limits of $500,000. These policy periods extend from December 31, 1081 through May 23, 1985. The third Safety policy is excess to coverage providing limits of $10.5 million, with a policy period from August 16, 1983 through December 31, 1983. Shook & Fletcher has primary coverage from August 18, 1955 through 1985 and other excess coverage from March 12, 1965 through 1985.

Safety argues that its policies provide coverage only when all other underlying primary and lower level policies are exhausted by payment of covered claims for settlements of judgments. For example, if a claim involves a plaintiff exposed to asbestos from 1975 to 1985, all ten years of primary or lower level insurance from 1975 through 1985 are triggered and must be exhausted before Safety's policies would apply. In support of its position, Safety relies on the "Other Insurance" clause:

> If other collectible insurance with any other insurer is available to the insured covering a loss also covered hereunder (except insurance purchased to apply in excess of the sum of the retained limit and the limit of liability hereunder), the insurance hereunder shall be in excess of, and not contribute with such other insurance.

Safety also cites the policy section referring to the retained limit:

> With respect to personal injury, property damage or advertising injury, or any combination thereof, the Corporation's liability shall be only for the ultimate net loss in excess of the insured's retained limit defined as the greater of:
>
> a. An amount equal to the limits of liability indicated besides the underlying insurance listed in Schedule A, plus the applicable limits of any other underlying insurance collectible by the insured...

Shook & Fletcher argues that primary coverage need only be exhausted as to the policies directly under the Safety policies for the same policy years. Thus, in the case of the two lower-level excess policies, Safety is required to begin paying when Shook & Fletcher has incurred $500,000 in liability for claims that trigger those policies' years. The third Safety policy applies after exhaustion of the underlying $10.5 million policy.

The Court's previous determination that the exposure trigger applies simplifies the analysis of the exhaustion issue. For every claimant demonstrating exposure during the applicable Safety policy period, the first inquiry is which primary policy is triggered. The policy limits of the triggered primary policy must be exhausted before Safety is obligated to provide coverage. The same principle pertains with regard to the policy that applies after exhaustion of the primary $500,000 policy and the excess $10.5 million policy.

The calculation becomes somewhat more complicated when a claimant has proven exposure stretching over several primary and excess policy periods. In such circumstances, the policy limits of all of the primary policies triggered by the individual's exposure must be exhausted before Safety's excess coverage is implicated. As previously determined, the *pro rata* allocation analysis applies after the exhaustion calculation is made.

This approach is consistent with Alabama law.[24] The germane amount for calculation of exhaustion is the policy limits amount, as set forth in the Safety policies. The amounts of Shook & Fletcher's settlements with other insurers do not affect the policy limits of those insurers, and such amounts do not increase Safety's obligations in a way that would require Safety to make up the difference between other insurers' policy limits and the lower settlement amounts.[25]

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[24]*See Isler v. Federated Guar. Mut. Ins. Co.,* 594 S.2d 37, 39-40 (Ala. 1992); *State Farm Fire & Cas. Co. v. Hartford Accident & Indemnity Co.,* 347 So.2d 389, 392-93 (Ala. 1977).

[25]*See Barnwell v. Allstate Ins. Co.,* 316 So.2d 696, 697-98 (Civ. App. Ala. 1975).

CONCLUSION

Having considered the parties' cross-motions for partial summary judgment, the Court finds:

(1) The threshold choice-of-law question in this action is whether the laws of Delaware and Alabama are in conflict. The Delaware Supreme Court has accepted the continuous trigger standard. Unless and until an Alabama appellate court (or another trial judge) disagrees with the ruling of The Honorable Jack D. Carl of the Circuit Court in and for Jefferson County, Alabama, in *Safety National Casualty Corporation v. Shook & Fletcher Insulation Company,* the exposure trigger applies in Alabama. Therefore, a conflict exists.

(2) Under the "most significant relationship" test, Alabama law (*i.e.*, the exposure coverage trigger) applies.

(3) Having resolved on other grounds the issue of choice of law and whether the continuous or exposure trigger applies, the Court need not reach the question of collateral estoppel.

(4) Under Alabama law, when two or more insurance carriers have primary insurance coverage over the same insurable interest, subject matter, and risk, they share liability in accordance with the proportion that the limits of each policy bear to the total limit of insurance applicable to the loss. If an insurer has

paid the entire amount of a loss, that insurer may seek *pro rata* contribution from other insurers. Therefore, if another excess insurance carrier is found to have contracted to provide coverage for the same subject matter and risks insured by Safety, Safety's obligation is coverage for Shook & Fletcher's liability in accordance with the proportion that the limits of each policy bear to the total limit of insurance applicable to the loss.

(5) The policy limits of any primary policy implicated by the exposure trigger must be exhausted before Safety is obligated to provide coverage for those claims triggered by exposure during the policy years covered by Safety. When a claimant has proven exposure stretching over several primary and excess policy periods, the policy limits of all of the primary policies triggered by the individual's exposure must be exhausted before Safety's excess coverage is implicated. Safety's coverage obligations do not increase to require Safety to make up the difference between other insurers' policy limits and any lower settlement amounts.

IT IS SO ORDERED.

The Honorable Mary M. Johnston