PUBLIC VERSION
IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

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

Submitted: January 9, 2014
Decided: March 24, 2014

Upon Plaintiff's Motion for Partial Summary Judgment
on the Expected or Intended Exclusion
GRANTED

OPINION

Jennifer C. Wasson, Esquire, Michael B. Rush, Esquire, Potter Anderson & Corroon LLP, Mark A. Packman, Esquire, Gabriel Le Chevallier, Esquire (Argued), Jenna A. Hudson, Esquire, Katrina F. Johnson, Esquire, Gilbert LLP, Attorneys for Plaintiff

Peter B. Ladig, Esquire, Jason C. Jowers, Equire, David J. Soldo, Esquire, Morris James LLP, Alan S. Miller, Esquire (Argued), Bridget M. Gillespie, Esquire, Picadio Sneath Miller & Norton, P.C., Attorneys for Defendant North River Insurance Company

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

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

JOHNSTON, J.

FACTUAL AND PROCEDURAL CONTEXT

Plaintiff Mine Safety Appliances Company ("MSA"), a Pennsylvania corporation licensed to do business in Delaware, manufactures and sells safety equipment, including heat protection clothing and respirators. Allegedly, at one time, MSA's respirators were defective and its heat protection clothing contained asbestos. Users of MSA's safety products have filed thousands of actions against MSA, claiming that, as a result of using MSA's products, they were exposed to asbestos, silica, and coal dust, and suffered injuries.

MSA purchased liability insurance coverage to protect itself from a variety of risks, including potential tort liability. MSA purchased insurance in layers with an escalation in policy limits, in an effort to ensure that it would have sufficient coverage should any policy be exhausted or otherwise become unavailable. MSA contends that it is covered for personal injury damages under the excess coverage policies it had purchased.

Defendant insurance companies dispute their obligations to cover tort claims against MSA ("Underlying Claims"). The Underlying Claims arose out of harm suffered by the users of MSA's products. MSA has incurred significant financial expense in defending and settling the Underlying Claims. MSA filed the Delaware action on July 26, 2010, against 31 insurance companies, concerning 125 insurance policies. MSA seeks: (1) declaratory judgment that the Defendant insurance

companies are obligated to defend and/or indemnify MSA; and (2) an award of monetary damages incurred by MSA relating to MSA's entitlement to coverage.

MSA filed this Motion for Partial Summary Judgment on September 18, 2013. MSA seeks a declaration that the "expected/intended" provision in the policies issued by Defendants North River Insurance Company ("North River"), Hartford Accident and Indemnity Company, First State Insurance Company, Twin City Fire Insurance Company (collectively, "Hartford"), and Travelers Casualty and Surety Company ("Travelers") does not apply to losses arising from the use of MSA's allegedly defective respirators.

STANDARD OF REVIEW

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 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

[1] Super. Ct. Civ. R. 56(c).

[2] *Hammond v. Colt Indus. Operating Corp*., 565 A.2d 558, 560 (Del. Super. 1989).

[3] Super. Ct. Civ. R. 56(c).

[4] *Wootten v. Kiger*, 226 A.2d 238, 239 (Del. 1967).

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]

ANALYSIS

Burden of Proof

Defendants issued policies to MSA that provide coverage for an "occurrence." In substantively similar terms, Defendants' policies define an "occurrence" as an accident, including continuous and repeated exposure to conditions, resulting in bodily injury, which is neither expected nor intended by the insured ("expected/intended provision"). The Court must determine which party bears the burden of proof regarding the expected/intended provision.

If the provision is an exclusion, Defendants, as the insurers, will assert the provision as an affirmative defense to coverage. Therefore, Defendants would bear the burden of proof.[6] Defendants argue that the expected/intended provision is incorporated into the coverage grant. Thus, MSA bears the burden of proving a covered occurrence, including that the injury was not expected to occur.

The Court finds the case precedent relied upon by both parties is distinguishable from this case.

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[5] *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

[6] *See Madison Const. Co. v. Harleysville Mut. Ins. Co.*, 735 A.2d 100, 106 (Pa. 1999).

In *United Services Automobile Association v. Elitzky*, the insurance policy had an exclusionary clause, stating: "Medical payments to others do not apply to bodily injury or property damage [w]hich is expected or intended by the insured."[7] *Elitzky* is distinguishable from the circumstances in this dispute because in *Elitzky* the expected or intended language expressly was placed in an exclusionary clause.[8] However, in both cases the clause has the same impact on coverage.

In *Koppers Company, Inc. v. Aetna Casualty and Surety Company*, the insurance policy at issue did not include an expected/intended provision or a requirement that the loss be fortuitous.[9] However, the United States Court of Appeals for the Third Circuit predicted that Pennsylvania, as a matter of public policy, would not enforce an insurance contract providing coverage for a non-fortuitous loss.[10] "As with exclusions stated in an insurance policy itself, when an insurer relies on public policy to deny coverage of a claim, the insurer must bear the burden."[11] *Koppers* is distinguishable from this case due to *Koppers'* focus on public policy regarding non-fortuitous losses, rather than limiting language the parties contractually have agreed upon.

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[7] 517 A.2d 982, 985 (Pa. Super. 1986).

[8] *Id*. at 985-86.

[9] 98 F. 3d 1440, 1446 (3d Cir. 1996).

[10] *Id*. at 1447.

[11] *Id*.

In *Riehl v. Travelers Insurance Company*, the United States Court of Appeals for the Third Circuit stated that "the burden of establishing a valid policy claim falls upon the insured."[12] It was the insured's burden "to establish, by affidavit, the existence of an 'occurrence' or a loss during the policy period."[13] The policies defined "occurrence" as an accident "which results in bodily injury or property damage neither expected nor intended from the standpoint of the Insured."[14]

In *Riehl*, the plaintiff inherited property and continued an existing lease to a third party who was using the property as a landfill and metal reclamation site.[15] Toxic waste was dumped on the property during the third party's lease, contaminating the soil, surface, and ground waters.[16] To trigger liability insurance coverage, an event must have happened during the policy period.[17] Based on the record below, the Court of Appeals could not "determine whether, or when, any of these events giving rise to this action took place."[18] For this reason, the Court of Appeals found that the District Court's grant of summary judgment in favor of the

[12] 772 F.2d 19, 23 (3d Cir. 1985).

[13] *Id*. at 23.

[14] *Id*. at 20-21.

[15] *Id*. at 21.

[16] *Id*. at 21.

[17] *Id*. at 23.

[18] *Id*. at 23.

insured was inappropriate.[19] The Court of Appeals did not decide the issue of an occurrence.[20] *Riehl* is distinguishable from the case at hand because the insured in *Riehl* did not establish a *prima facie* case for coverage.

In *New Castle County v. Hartford Accident and Indemnity Company*,[21] the United States Court of Appeals for the Third Circuit affirmed the United States District Court for the District of Delaware's finding in *New Castle County v. Continental Casualty Company* ("*New Castle III*"),[22] that the expected/intended provision did not apply to bar coverage for pollution damage originating in a county-operated landfill. The District Court, in a prior disposition of summary judgment claims arising out of the same declaratory judgment action ("*New Castle II*"),[23] interpreted the "'neither expected nor intended' language in the 'occurrence' clause to bar coverage only if, before the policy period begins, 'there is evidence . . . indicating a substantial probability that a loss will occur.'"[24]

In *New Castle III*, the District Court adopted the insurer's witness' evaluation of the site at the relevant time. The District Court found as a factual

[19] *Id*. at 23-24.

[20] *Id*. at 23.

[21] 933 F.2d 1162, 1191 (3d. Cir. 1991), *cert. denied*, 507 U.S. 1030 (1993).

[22] 725 F. Supp. 800 (D. Del. 1989).

[23] *New Castle Cnty. v. Hartford Accident & Indem. Co.*, 685 F. Supp. 1321, 1331 (D. Del. 1988).

[24] 933 F.2d at 1191 (citing *New Castle Cnty. v. Hartford Accident & Indem. Co.*, 685 F. Supp. at 1330).

matter that prior to the issuance of the insurance policy, there was not a "substantial probability" that the damage would occur.[25] The Court of Appeals stated that "to establish coverage, the County must show that, prior to the effective date of its policies with [the insurer], it 'neither expected nor intended' environmental damage."[26] However, the Court of Appeals affirmed the District Court's finding in which the County did not expressly bear the burden.[27]

In this case, the Court finds that the expected or intended language is either an exclusion or the functional equivalent of an exclusion. Therefore, after MSA establishes a *prima facie* case for coverage (which MSA has done), the burden shifts to Defendants to demonstrate that the expected/intended provision applies to negate coverage.[28]

The Expected/Intended Provision Does Not Bar Coverage in Analogous Cases

The Court next must examine when the expected/intended provision bars coverage. The Court looks to the relevant case law regarding the standard.[29]

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[25] *New Castle Cnty. v. Cont'l Cas. Co.*, 725 F. Supp. at 814.

[26] *New Castle Cnty. v. Hartford Accident & Indem. Co.*, 933 F.2d at 1191.

[27] *Id*. at 1192.

[28] *See Morris James LLP v. Cont'l Cas. Co.*, 928 F.Supp.2d 816, 822 (D. Del. 2013); *State Farm Fire & Cas. Co. v. Hackendorn*, 605 A.2d 3, 7 (Del. Super. 1991).

[29] The Court need not decide the choice of law issue at this time.

In *United Services Automobile Association v. Elitzky*, the policy at issue covered "damages because of bodily injury and property damages" subject to an expected/intended exclusionary clause.[30] The *Elitzky* court analyzed the application of the expected/intended exclusion, finding that "[i]nsurance coverage is not excluded because the insured's actions are intentional unless he also intended the resultant damage. The exclusion is inapplicable even if the insured should reasonably have foreseen the injury which his actions caused."[31]

The expected/intended provision bars coverage where the insured acted intentionally, and expected the resultant injury.[32] For the expected/intended provision to apply: (1) MSA must have intended or have been substantially certain that the respirators would fail; and (2) MSA must have anticipated that such failure would result in occupational lung diseases such as pneumoconiosis, mesothelioma, or silicosis.

Hartford conceded at argument that if evidence shows MSA was doing what it could to improve its equipment, the expected/intended provision would not apply, even if the equipment was found to provide less-than-optimal protection against disease.

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[30] 517 A.2d at 985.

[31] *Id*. at 987; *see Mohn v. Am. Cas. Co. of Reading*, 326 A.2d 346, 351 (Pa. 1974).

[32] *United Servs. Auto. Ass'n v. Elitzky*, 517 A.2d at 987.

This Court considers analogous case law. In the asbestos context, courts have found that where a company made a "calculated risk," it did not amount to an "expectation of damage."[33]

In *Union Carbide Corporation v. Affiliated FM Insurance Company*, the plaintiff manufactured and sold products that contained asbestos.[34] The plaintiff was able to establish that bodily injury claims from exposure to its products were the result of an "occurrence."[35] Therefore, the claims were covered by the defendant's insurance policy.[36] The record reflected that at all relevant times, the plaintiff believed its products could be used safely under the right conditions.[37] The record showed that the plaintiff was "merely aware that asbestos could cause injuries and that claims could be filed."[38] The court found that the defendant failed to meet its burden to show that coverage was not available due to the expected/intended exclusion.[39] The court ruled that the plaintiff's "'calculated risk'

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[33] *Union Carbide Corp. v. Affiliated FM Ins. Co.*, 955 N.Y.S. 2d 572, 575 (N.Y. App. 2012); *see In re Wallace & Gale Co.*, 275 B.R. 223, 246 (D. Md. 2002); *Armstrong World Indus., Inc. v Aetna Cas. & Sur. Co.*, 52 Cal. Rptr. 2d 690, 724 (Cal. Ct. App. 1996).

[34] *Union Carbide Corp. v. Affiliated FM Ins. Co.*, 955 N.Y.S. 2d at 575.

[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] *Id.*

in manufacturing and selling its products despite its awareness of possible injuries and claims does not amount to an expectation of damage."[40]

In *Armstrong World Industries, Inc. v. Aetna Casualty and Surety Company*, the insureds were asbestos manufacturers and the coverage at issue was for third parties' asbestos-related bodily injury and property damage claims.[41] The *Armstrong* court found that an insured's "general knowledge of asbestos dangers might support a finding that [the insured] should have expected the asbestos bodily injuries."[42] Nevertheless, the *Armstrong* court held that the insurer failed to meet its burden to show, directly or circumstantially, that the insured was "actually aware the asbestos bodily injuries were practically certain to occur."[43] The court reasoned that "general knowledge of the hazards of asbestos is not equivalent to knowledge that asbestos bodily injuries were practically certain to occur."[44]

In *In re Wallace & Gale, Co.*, the insurers disputed coverage for workers' claims of asbestos-related bodily injury against an insulation contractor.[45] The policies at issue define "occurrence" as an accident resulting in "bodily injury or

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[40] *Id*. at 575; *see Cont'l Cas. v. Rapid-Am. Corp.*, 609 N.E.2d 506, 510 (N.Y. 1993).

[41] 52 Cal. Rptr. 2d at 696.

[42] *Id*. at 724.

[43] *Id*.

[44] *Id*. at 723.

[45] 275 B.R. at 227.

property damage neither expected or intended from the standpoint of the insured."[46] The court focused on "what the insured actually intended at the time the insured committed the allegedly tortious act, not what the insured knew, should have known or actually came to know after the act was committed."[47] The court rejected the insurer's expected/intended defense.[48] The court noted that the fact the insured "might have anticipated or expected general types of asbestos-related claims has no bearing."[49]

Pennsylvania courts have refused to apply the expected/intended provision in cases involving murder where questions exist concerning the insured's state of mind.[50] In *Brethren Mutual Insurance Company v. McKernan*, the insured swung a knife at the victim during an argument and the knife struck the victim, resulting in his death.[51] The insured was convicted of recklessly endangering another person and simple assault.[52] The simple assault conviction was pursuant to 18 Pa. Const. Stat. Ann. § 2701(a)(2), for conduct that "negligently causes bodily injury to

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[46] *Id*. at 244.

[47] *Id*. at 245.

[48] *Id*. at 245.

[49] *Id*. at 246.

[50] *See Titan Indem. Co. v. Cameron*, 2002 WL 1774059, at **8-11 (E.D. Pa. 2002), *aff'd*, 77 F. App'x 91 (3d Cir. 2003); *Brethren Mut. Ins. Co. v. McKernan*, 961 A.2d 205, 206-07 (Pa. Com. Pl. 2004).

[51] *Brethren Mut. Ins. Co. v. McKernan*, 961 A.2d at 206.

[52] *Id*. at 207.

another with a deadly weapon."[53] The *Brethren* court noted that "the convictions did not conclusively trigger the exclusionary clause of the insurance contract which negated coverage for intentional conduct."[54]

In *Titan Indemnity Company v. Cameron*, the insured was a police officer who shot and killed a man after the man struck the officer twice with his truck.[55] The insurer claimed that the police officer intended to cause bodily injury to the decedent, and therefore the insurer was not required to indemnify the insured.[56] The United States District Court for the Eastern District of Pennsylvania found that where the evidence and officer testimony established that the officer fired a shot at the victim's car with the intent to stop the vehicle, the insured did not have the intent to injure the decedent.[57] The *Titan* court found that the insurer must indemnify the officer.[58]

The parties have not presented any case law in which the expected/intended provision barred toxic tort claims.

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[53] 18 Pa. Const. Stat. Ann. § 2701(a)(2); *Id*. at 207 n.8.

[54] *Brethren Mut. Ins. Co. v. McKernan*, 961 A.2d at 207 n.10.

[55] *Titan Indem. Co. v. Cameron*, 2002 WL 1774059, at *1.

[56] *Id*.

[57] *Id*. at **13-14.

[58] *Id*. at *2.

Defendants Fail to Establish that Additional Discovery is Necessary

Defendants argue that additional discovery is needed to determine if the expected/intended provision is applicable. Rule 56(f) of the Superior Court Civil Rules governs whether Defendants are entitled to additional discovery.[59] Additional discovery "is appropriate only when the party seeking the additional discovery has stated with specificity the material facts being sought through discovery and has demonstrated that those facts are both essential to its opposition and are outside its own knowledge and control."[60]

North River requests additional discovery regarding MSA's knowledge that electrostatic filters degraded in real world conditions. In a 1994 speech given by William Lambert, MSA's current president and CEO, Lambert states that NIOSH is concerned, and should address "that certain respirator particulate filters degrade under typical use and storage conditions."[61] **REDACTED**[62] North River contends that MSA has denied having the knowledge Lambert relied upon to make

[59] Super. Ct. Civ. R. 56(f).

[60] *Sequa Corp. v. Aetna Cas. & Sur. Co.*, 1992 WL 179386, at *1 (Del. Super.).

[61] NIOSH Proposed Rule on Respiratory Protective Device, Informal Public Hearing, June 24, 1994 (MSA-NR-NB0636231).

[62] **REDACTED.**

these statements and that additional discovery should be used to establish these facts.

Travelers argues that additional fact and expert discovery is warranted. Travelers requests depositions of William Berner, MSA's Director of Litigation and Risk, and Charles Siebel, Jr., MSA's Manager of Product Safety, as well as additional unnamed fact witnesses, regarding MSA's knowledge and to what extent MSA expected or intended the resulting injuries. Travelers contends that expert discovery is appropriate here because of the complex technical questions of product design and causation.

Hartford argues that deciding this issue on summary judgment is premature because the insurers have not yet taken their own depositions or expert testimony. Hartford requests to depose knowledgeable witnesses from MSA, former employees, and/or former regulators. Hartford contends that after deposing the relevant witnesses, it may be in a position to retain expert witnesses to testify about what MSA knew or "must have known" regarding product defects and the expected resulting injuries.

MSA contends that additional discovery is not needed and that Defendants fail to identify specific facts to be established through discovery. MSA has produced: (1) documents regarding its design, testing, and manufacture of respirators; (2) correspondence between MSA, the government, and Los Alamos

Scientific Laboratory concerning the respirators; and (3) expert reports and testimony.

The Court finds that Defendants' requests for additional discovery—on issues surrounding MSA's knowledge, expectations, and intentions—fail to identify with specificity the facts sought to be established. Here, Defendants have a considerable evidentiary record, including deposition transcripts from current and former MSA employees. Travelers has previous deposition transcripts from William Berner and Charles Seibel, both of whom Travelers has requested to depose without specifying additional facts to be established. Defendants simply fail to identify facts with specificity which would warrant additional discovery. This failure demonstrates that additional discovery is not a prerequisite to the Court's assessment of the application of the expected/intended policy provision.

The Undisputed Facts do not Support the Application of the Expected/Intended Provision

The undisputed facts, or the facts viewed in the light most favorable to the non-moving party, demonstrate that MSA did not expect or intend that the respirators would fail, and that failure would result in occupational lung diseases. Defendants do not dispute that MSA sought and obtained government approval for

its respirators. All of the respirators were approved at all relevant times. While regulatory compliance is one factor, it is not dispositive of intent.[63]

Defendants present purportedly disputed facts in support of their argument that MSA may have expected or intended injuries to the users of its products. North River alleges that MSA was substantially certain that inhalation of disease causing particles would cause occupational lung diseases due to common knowledge within the scientific community and MSA's position in that community. Travelers claims that MSA was aware of the shortcomings of regulatory approval and continued to allow users to rely on inadequate respiratory protection. According to Travelers, discovery suggests that MSA knew about specific defects in its respirators that would cause bodily injury to the users. Hartford alleges that MSA may have expected or intended injury due to defects in face piece design and filter design.

The Court finds that Defendants' claims are either unsupported allegations or not genuine issues of material fact sufficient to overcome entitlement to summary judgment. There is some evidence supporting a *prima facie* case that the products were defective. However, the evidence does not support a *prima facie* case of "intentional" conduct "substantially certain" to result in bodily injury.

[63] *See* Restatement (Third) of Torts: Liability for Physical & Emotional Harm § 16(a) ("An actor's compliance with a pertinent statute, while evidence of nonnegligence, does not preclude a finding that the actor is negligent under § 3 for failing to adopt precautions in addition to those mandated by the statute.").

There is a difference between being: (1) "substantially certain" that disease will result from exposure to coal dust or particulates; and (2) "substantially certain" that known failure of the respirators will result in occupational lung disease.

These two concepts cannot be conflated for purposes of deciding whether the expected/intended provision applies. The Court finds the proper standard is whether the insured is substantially certain that a known failure of its product will proximately cause the injury suffered by a plaintiff. Defendants have failed to demonstrate a genuine issue of material fact on this issue. Further, Defendants have failed to show that additional discovery will raise a genuine issue of material fact.

Facts and studies relied upon by Defendants are of a type generally admissible and relevant in cases involving allegations of negligence, and even punitive damages. However, there is no *prima facie* evidence that Defendants: (1) intended that bodily injury would result; and (2) expected or were reasonably certain that bodily injury or disease would result from or be caused by any failure of Defendants' products.

CONCLUSION

The Court finds that the expected/intended provision is either an exclusion or the functional equivalent of an exclusion. MSA has established a *prima facie*

case for coverage. Therefore, the burden shifts to Defendants to show that the expected/intended provision applies to negate coverage.

Defendants have failed to show: (1) that MSA intended or was substantially certain that the respirators would fail; and (2) that such expected or intended known failure would result in occupational lung diseases. The Court finds that the undisputed facts, and the facts viewed in the light most favorable to the non-moving party, do not support the application of the expected/intended provision to negate coverage. Defendants have failed to identify with specificity entitlement to additional discovery on these issues.

The Court does not decide the choice of law issue at this time.

THEREFORE, MSA's Motion for Partial Summary Judgment is hereby **GRANTED.**

IT IS SO ORDERED.

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