

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
TRIAL DIVISION – CIVIL**

CONSOLIDATED RAIL CORP.,	:	SEPTEMBER TERM, 2004	
	:		
Plaintiff,	:	NO. 02638	
	:		
v.	:	COMMERCE PROGRAM	
	:		
ACE PROPERTY & CASUALTY	:	Control Nos.: 13033879, 13033882,	
INSURANCE CO., et al.,	:	13040094, 13040096	
	:		
Defendants.	:		

DOCKETED

DEC 30 2013

**C. HART
CIVIL ADMINISTRATION**

ORDER

AND NOW, this 30th day of December, 2013, upon consideration of the Continental Defendants' Motion for Summary Judgment Regarding Choice of Law, The Pollution Exclusion and Coverage for Fines and Penalties, Conrail's Motion for Partial Summary Judgment Regarding the "Sudden and Accidental" Exclusion, and Conrail's Motion for Partial Summary Judgment On Choice of Law, the responses thereto, and all other matters of record, and in accord with the Opinion issued simultaneously, it is **ORDERED** as follows:

1. Conrail's Sudden and Accidental Motion is **GRANTED**;
2. Conrail's Choice of Law Motion is **GRANTED**; and
3. The remainder of the Continental Defendants' Motion is **DENIED**.¹

BY THE COURT

Consolidated Rail Corp -ORDOP



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PATRICIA A. McINERNEY, J.

¹ The court previously ruled on the Operations Clause issue raised in this Motion.

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OPINION

Plaintiff Consolidated Rail Corporation (“Conrail”) brought this action against several insurance companies that issued general liability policies to Conrail during the 1976-1985 period (the “Policies”). Conrail seeks coverage from its insurers for environmental contamination clean-up costs it incurred and continues to incur at numerous railroad related sites in the Northeastern United States. The Policies at issue contain pollution exclusions such as the following:

THIS POLICY DOES NOT APPLY: . . . TO PERSONAL INJURY OR PROPERTY DAMAGE ARISING OUT OF THE DISCHARGE, DISPERSAL, RELEASE OR ESCAPE OF SMOKE, VAPORS, SOOT, FUMES, ACIDS, ALKALIS, TOXIC CHEMICALS, LIQUIDS OR GASES, WASTE MATERIALS OR OTHER IRRITANTS, CONTAMINANTS OR POLLUTANTS INTO OR UPON LAND, THE ATMOSPHERE OR ANY WATERCOURSE OR BODY OF WATER; BUT THIS EXCLUSION DOES NOT APPLY IF SUCH DISCHARGE, DISPERSAL, RELEASE OR ESCAPE IS SUDDEN AND ACCIDENTAL . . . (the “Pollution Exclusion”)¹

¹ CRL-1979 Policy. This exclusion was included in the 1979-1982 and 1984-1985 Policies, and it is almost identical to the one contained in the 1976-1979 Policies. The Policies issued from 1982-1984 had a similar exclusion, but used the term “accidental” instead of “sudden and accidental” in the exception. The Policy for 1985-1986 contained no exception, so its Pollution Exclusion purports to be absolute.

Conrail and its insurers have two disagreements regarding the Pollution Exclusion. First, the insurers claim “sudden and accidental” means short, quick, or temporally limited, and Conrail argues it is not so limited. Second, Conrail claims the law of Indiana should be applied to interpret the Pollution Exclusion with respect to a contaminated site in Indiana. The insurers argue that Pennsylvania law should apply.

I. The Sudden and Accidental Exception to the Pollution Exclusion.

At the time these Policies were written, “sudden” and “accidental” were both legal terms of art defined as “unexpected,” meaning unforeseen and unintended by the insured:

Accidental. Happening by chance, or unexpectedly; taking place not according to usual course of things; casual; fortuitous.²

Sudden. Happening without previous notice or with very brief notice; coming or occurring unexpectedly; unforeseen, unprepared for.³

The current version of Black’s declines to define “sudden,” and it defines “accidental” differently, as

Not having occurred as a result of anyone’s purposeful act; esp., resulting from an event that could not have been prevented by human skill or reasonable foresight. Not having been caused by a tortious act.⁴

The newer Black’s also discusses a sea change in policy language that occurred in 1985, which eliminated the need to define the terms “sudden” and “accidental” for insurance purposes:

pollution exclusion. A provision in some commercial general liability policies, excluding coverage for bodily injury or property damages arising from the discharge, dispersal, release, or escape of chemicals, waste, acid, and other pollutants. Pollution-exclusion clauses may take one of two forms: (1) sudden and accidental, and (2) absolute. The sudden-and-accidental clause, usu[ally] limited to policies issued before 1985, contains an exception under which the damages

² Black’s Law Dictionary (“BLD”), p. 15 (5th ed. 1979); BLD, p. 16 (6th ed. 1990)

³ BLD, p. 1284 (5th ed. 1979); BLD, p. 1431 (6th ed. 1990)

⁴ BLD (9th ed. 2009).

are covered (i.e., exempted from the exclusion) if the discharge or other release was sudden and accidental. The absolute pollution exclusion, in most policies issued since 1985, does not contain this exception.⁵

The general liability Policies at issue here were all written before the change in policy language occurred in 1985, and they must be interpreted in the context of the period and the industry in which they were written.⁶ At that time, “sudden and accidental” and “accidental” both meant unexpected and unintended within the insurance industry. Neither necessarily meant quick or abrupt, although a discharge of pollutants that continues over time is obviously less likely to be unexpected from the point of view of the insured.

This conclusion is further supported by the Pennsylvania Supreme Court’s holding in Sunbeam v. Liberty Mutual Ins. Co., in which the court recognized that, based on regulatory estoppel and custom in the insurance industry, “sudden and accidental” could mean “unexpected and unintended” rather than “abrupt.”⁷

II. Choice of Law For the Indiana Site.

One of the contaminated sites at issue in this litigation is located in Indiana. It appears that the law of Indiana is quite different from that of Pennsylvania with respect to the interpretation of pollution exclusions in insurance contracts. The parties allege that under Indiana law the Pollution Exclusions in the Conrail Policies would probably not bar coverage for the pollution clean-up costs at the Indiana site because the Pollution Exclusions do not

⁵ *Id.* (“Exclusion”).

⁶ While it may be unfair to impose an insurance industry term of art upon a consumer insured, it is not improper to impose upon the insurers their own industry’s definition of the term “sudden and accidental.”

⁷ 566 Pa. 494, 781 A.2d 1189 (2001). Like the insured in Sunbeam, Conrail relies in large part on custom and usage in the insurance industry and regulatory estoppel for its argument that “sudden and accidental” when used in an exception to a pollution exclusion does not mean “abrupt.”

specifically exclude coverage for each of the toxic chemicals found at the Indiana site.⁸ Under Pennsylvania law, the broad Pollution Exclusions in the Conrail Policies would likely bar coverage for the clean-up costs, unless the sudden and accidental exception applies.⁹ This court is, therefore, faced with a true conflict of laws and must decide which state's law should be used to interpret the language of the Policies as applied to the costs incurred by Conrail in Indiana.¹⁰

Since the mid-1960s, Pennsylvania courts have taken the “modern” approach to conflicts, which is set forth in the Restatement (Second) of Conflicts of Laws (the “Restatement”).

In the case of *Griffith v. United Airlines*, 416 Pa. 1, 203 A.2d 796 (1964), our Supreme Court laid to rest the *lex loci delecti* rule that existed in Pennsylvania for many years. Instead, the *Griffith* court held that the court must now apply the law of the state having the most significant contacts or relationships with the particular issue, [which is the approach favored by the Restatement] . . . When doing this, it must be remembered that a mere counting of contacts is not what is involved. The weight of a particular state's contacts must be measured on a qualitative rather than quantitative scale. When applied to the case at bar, this means we must determine which state-Pennsylvania or [Indiana]-has demonstrated, by reason of its policies and their connection and relevance to the matter in dispute, a priority of interest in the application of its rule of law.¹¹

With respect to breach of contract issues, the Restatement suggests that courts consider the following:

⁸ See *State Auto. Mut. Ins. Co. v. Flexdar, Inc.*, 964 N.E.2d 845, 851 (Ind. 2012) (“Applying basic contract principles, our decisions have consistently held that the insurer can (and should) specify what falls within its pollution exclusion.”)

⁹ See *Madison Const. Co. v. Harleysville Mut. Ins. Co.*, 557 Pa. 595, 607-08, 735 A.2d 100, 107 (1999) (“The definition of pollutant in the policy, including as it does ‘any ... irritant,’ clearly and unambiguously applies to the product in question.”)

¹⁰ See *Thibodeau v. Comcast Corp.*, 912 A.2d 874, 886 (Pa. Super. 2006) (“Pursuant to the Pennsylvania choice of law analysis, the first step requires a determination of whether the laws of the competing states actually differ. . . . If we determine that a true conflict is present, we must then analyze the governmental interests underlying the issue and determine which state has the greater interest in the application of its law to the matter at hand.”)

¹¹ *McCabe v. Prudential Prop. & Cas. Ins. Co.*, 356 Pa. Super. 223, 230, 514 A.2d 582, 585 (1986).

- (1) The rights and duties of the parties with respect to an issue in contract are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the transaction and the parties
- (2) In the absence of an effective choice of law by the parties, . . . the contacts to be taken into account . . . 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.¹²

The Restatement sets forth a specific rule with respect to coverage issues under insurance contracts:

The validity of a contract of fire, surety or casualty insurance and the rights created thereby are determined by the local law of the state which the parties understood was to be the principal location of the insured risk during the term of the policy, unless with respect to the particular issue, some other state has a more significant relationship . . . to the transaction and the parties, in which event the local law of the other state will be applied.¹³

The comments to that rule explain what a court should do when one insurance contract covers several risks located in different states, as do the Policies here:

f. Multiple risk policies. A special problem is presented by multiple risk policies which insure against risks located in several states. A single policy may, for example, insure dwelling houses located in states X, Y and Z. These states may require that any fire insurance policy on buildings situated within their territory shall be in a special statutory form. If so, the single policy will usually incorporate the special statutory forms of the several states involved. **Presumably, the courts would be inclined to treat such a case, at least with respect to most issues, as if it involved three policies, each insuring an individual risk.** So, if the house located in state X were damaged by fire, it is thought that the court would determine the rights and obligations of the parties under the policy, at least with respect to most issues, in accordance with the local law of X. In any event, that

¹² Restatement (Second) of Conflict of Laws § 188 (1971).

¹³ *Id.* § 193.

part of a policy which incorporates the special statutory form of a state would be construed in accordance with the rules of construction of that state.¹⁴

Under this reasoning, the law of Indiana should govern the interpretation of the Pollution Exclusions in the Policies as they apply to the contaminated site in Indiana.

Indiana, rather than Pennsylvania, has a significantly greater interest in making sure the clean-up of environmental contamination in Indiana is fully funded by active polluters, passive landowners, and their insurers, who are the parties best able to spread the risk of such costs throughout their own industry. While Texas,¹⁵ California,¹⁶ New Jersey,¹⁷ and Pennsylvania¹⁸ all have contacts with the Policies at issue here, no state has a greater interest than Indiana with respect to coverage for a contaminated site in Indiana.¹⁹

III. Coverage For Fines And Penalties.

Conrail and its insurers also dispute whether certain payments made by Conrail in connection with the polluted sites are “damages” covered under the Policies, or are unrecoverable fines and penalties. It is unlikely that a fine paid to the government in connection with a guilty plea for knowingly discharging pollutants would be covered. However, it is possible that “donations” made to local environmental groups as part of a civil settlement would qualify as “damages.”

¹⁴ Restatement (Second) of Conflict of Laws § 193, Comment (f) (1971) (emphasis added).

¹⁵ One of the insurers apparently had its headquarters in Texas at the time the Policies were issued.

¹⁶ The other insurer’s headquarters were in California.

¹⁷ Conrail’s broker, who negotiated the Policies, was located in New Jersey.

¹⁸ Conrail’s headquarters were in Pennsylvania, it received the Policies there, and it paid the premiums from there.

¹⁹ Pennsylvania’s interests would obviously be paramount with respect to a polluted site located in Pennsylvania.

The court will defer ruling on this issue until it considers the specific facts related to the clean-up of each site in the next round of summary judgment motions.

CONCLUSION

For all the foregoing reasons, Conrail's sudden and accidental and choice of law Motions must be granted and the insurers' Motion with respect to these issues must be denied.

Dated: December 30, 2013

BY THE COURT



PATRICIA A. McINERNEY, J.