

The question in this case is which of several relatively innocent parties should bear the brunt of this cost: Conrail, or the insurance companies from which Conrail subsequently bought policies, long after most of the contamination by the defunct entities had occurred. Based on the clear terms of the policies and the undisputed facts, this court ruled predominantly, but not entirely, in favor of the insurers on those issues of policy interpretation and application that the parties put before it in their summary judgment motions.

In making those determinations, the court was careful to allocate the evidentiary burdens and the motion burdens appropriately:

In examining this matter, as with all summary judgment cases, [the court] must view the record in the light most favorable to the non-moving party, and all doubt as to the existence of a genuine issue of material fact must be resolved against the moving party. In order to withstand a motion for summary judgment, [Conrail] must adduce sufficient evidence on an issue essential to [its] case and on which [it] bears the burden of proof such that a jury could return a verdict in [its] favor. Failure to adduce this evidence establishes that there is no genuine issue of material fact and the [insurers are] entitled to judgment as a matter of law.²

In an action arising under an insurance policy, our courts have established a general rule that it is a necessary prerequisite for the insured [Conrail] to show a claim within the coverage provided by the policy. However, where an insurer relies on a policy exclusion as the basis for its denial of coverage, the insurer has asserted an affirmative defense, and accordingly, bears the burden of proving such defense.³

Since the “Operations Clause” in the relevant insurance policies defines in large part the coverage provided by those policies, this court properly imposed upon Conrail the burden of showing that its claims with respect to each of the contaminated sites fell within the limited

² Washington v. Baxter, 553 Pa. 434, 441, 719 A.2d 733, 737 (1998). See also Rauch v. Mike-Mayer, 783 A.2d 815, 824 (Pa. Super. 2001) “Under Rule 1035.2(2), [where the insurers are] the moving party, [they] may make the showing necessary to support the entrance of summary judgment by pointing to materials which indicate that [Conrail] is unable to satisfy an element of [its] cause of action. Correspondingly, [Conrail] must adduce sufficient evidence on an issue essential to its case and on which it bears the burden of proof such that a jury could return a verdict favorable to [Conrail].”)

³ McEwing v. Lititz Mut. Ins. Co., 77 A.3d 639, 646 (Pa. Super. 2013).

coverage provided by the “Operations Clause.” Conrail cannot shift its burden to prove coverage to the insurers simply by asserting that all the limitations contained in the policies’ coverage provisions rise to the level of exclusions for which the insurers have the burden of proof at trial.

For instance, the court had to consider whether the evidence, which was largely undisputed, showed damage to Conrail’s property, which is not covered, or to the property of others, which is covered. With respect to the Hollidaysburg site, there is no evidence that the property of third parties was actually contaminated by environmental pollution emanating from Conrail’s property, so the court found there was no coverage for that site.⁴

With respect to the existence of the Lloyd Italico policy, the court properly placed the evidentiary burden of proving the existence of the policy on Conrail.⁵ In order to withstand a motion for summary judgment, Conrail had to adduce sufficient evidence as to the existence of a valid policy, such that a jury could return a verdict in its favor.⁶ Conrail produced a policy that it claimed was issued on behalf of Lloyd Italico, and it produced evidence regarding Lloyd Italico and its relationships with certain relevant third parties. However, Conrail was not able to produce evidence that the alleged agent who signed the purported policy had either actual, apparent, or authority by estoppel from Lloyd Italico to issue the policy to Conrail. Due to this dearth of evidence, the court granted summary judgment for Lloyd Italico on the issue of the existence of a valid policy.

⁴ There was a threat that neighboring properties would be contaminated by migration of pollutants, so Conrail incurred prevention costs at the Hollidaysburg site. Unfortunately, under a plain reading of the policy language, only actual damage to others’ property, not the threat of future damage, is covered.

⁵ See Viso v. Werner, 471 Pa. 42, 46, 369 A.2d 1185, 1187 (1977).

⁶ See Washington, 553 Pa. at 441, 719 A.2d at 737.

For the reasons set forth in this Opinion and in the court's attached Orders and Opinions dated November 12, 2013, December 30, 2013,⁷ October 27, 2014,⁸ and December 30, 2014, it is respectfully requested that this court's rulings be affirmed on appeal.

Dated: July 15, 2015

BY THE COURT:



PATRICIA A. McINERNEY, J.

⁷ Conrail did not appeal from this Order because it prevailed, but the court includes it here to provide additional background and context for its other rulings.

⁸ There are two separate Orders and Opinions with this same date, both of which are attached and from both of which Conrail appeals.

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C. HART
CIVIL ADMINISTRATION

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. 13033771, 13033881
INSURANCE CO., et al.,	:	13040095
	:	
Defendants.	:	

ORDER

AND NOW, this 12th day of November, 2013, upon consideration of the parties Cross-Motions for Summary Judgment on the issue of the Operations Clause, the responses thereto, and all other matters of record, and after oral argument, and in accord with the Opinion issued simultaneously, it is **ORDERED** that plaintiff's and defendants' Motions with respect to the interpretation of the Operations Clause are **GRANTED in part** and **DENIED in part**.

BY THE COURT


PATRICIA A. McINERNEY, J.

Consolidated Rail Corp -ORDOP



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**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. 13033881, 13040095
INSURANCE CO., et al.,	:	
	:	
Defendants.	:	

OPINION

In or about 1976, plaintiff Consolidated Rail Corporation (“Conrail”) came into existence and acquired the railroad related assets of several bankrupt railroad companies, including Penn Central.¹ Between 1976 and 1985, the period at issue in this action, Conrail conducted railroad operations with, through, and on those acquired assets, and it continues to do so.

The acquired assets at issue here are parcels of real property located in several states that suffer from environmental contamination for which Conrail has been found liable under the Comprehensive Environmental Response Compensation and Liability Act (“CERCLA”). Under CERCLA, a current owner or operator of a contaminated site may be held strictly and wholly liable for the environmental clean-up of the site, even if the causes of that contamination predate its ownership or operation of the site.²

¹ Conrail was established in 1974, but it did not begin active railroad operations until 1976. *See* 45 U.S.C. §§ 716, 741.

² *See Penn Central Corp. v. United States*, 862 F. Supp. 437, 447 (Reg’l Rail Reorg. Ct. 1994) (“CERCLA imposes strict liability; moreover, unless the parties show that the harm is divisible, they are jointly and severally liable.”)

The defendants in this action are several insurance companies that issued general liability policies to Conrail during the 1976-1985 period (the "Policies") and from whom Conrail seeks coverage for its environmental clean-up costs at contaminated sites previously owned by Penn Central. The insurers raise several defenses to coverage which the parties address in their Cross-Motions for Summary Judgment. The first issue concerns the opening provisions of the Policies, in which the insurers agreed:

TO INDEMNIFY THE INSURED FOR ANY AND ALL SUMS THE INSURED SHALL BECOME LEGALLY LIABLE TO PAY AS DAMAGES, INCLUDING LIABILITY ASSUMED BY THE INSURED UNDER ANY AGREEMENT OR CONTRACT, TO ANY PERSON OR PERSONS AS COMPENSATION FOR:

* * *

(b) DAMAGE TO OR DESTRUCTION OF PROPERTY, INCLUDING LOSS OF USE THEREOF, EXCLUDING INSURED'S OWN PROPERTY BUT INCLUDING PROPERTY OF OTHERS IN INSURED'S CARE, CUSTODY OR CONTROL;

* * *

ARISING OUT OF ANY OCCURRENCE OR OCCURRENCES CAUSED BY OR GROWING OUT OF THE INSURED'S OPERATIONS ANYWHERE IN THE WORLD, AND ALL OPERATIONS INCIDENTAL THERETO.³

The Policies further provide that the "Named Insured" is Conrail, and "Occurrence means an event, or continuous or repeated exposure to conditions which cause injury or damage during the term of the policy."

Conrail argues that the extensive environmental contamination for which it is liable under CERCLA is a covered occurrence because it constitutes "continuous or repeated exposure to conditions which cause[d] injury or damage during the term of the [Policies.]" The Insurers argue that, while the contamination at issue may be an "occurrence" within the meaning of the Policies, not all of it constitutes an occurrence "caused by or growing out of [Conrail's]

³ Hereinafter, the "Operations Clause."

operations.” Instead, much of the environmental pollution at issue was caused by or grew out of the operations of Conrail’s predecessors at the contaminated sites, such as Penn Central.

In 1976, when the first Policies were executed, CERCLA did not yet exist, so such far reaching environmental liability was not contemplated by Conrail and its insurers. Conrail had expressly disclaimed assumption of its predecessor’s liabilities in its acquisition agreements,⁴ and the Policies did not include such predecessors in their definition of the “Insured.”

In enacting the Rail Act, Conrail’s enabling legislation, Congress intended for Conrail to get a “fresh start” with a “clean slate.”⁵ Then, in 1980, Congress enacted CERCLA and radically changed the legal landscape in which Conrail and its insurers had been operating.⁶

CERCLA was enacted to ensure that hazardous pollutants which had accumulated in the nation’s land and water through decades of industrial activity were removed, contained, or otherwise remediated.⁷ Under CERCLA, the government may opt to pursue only one potentially responsible party for the entire cost of the clean-up, and that party must then seek contribution

⁴ See Penn Central Corp., 862 F. Supp. At 463 (“The deeds further provide that Conrail would assume no obligation or liability for any pre-conveyance activity; where the obligation at issue occurred both before and after the conveyance date, Conrail would be responsible for only the liability allocable to its post-conveyance ownership.”)

⁵ See Consol. Rail Corp. v. United States, 883 F. Supp. 1565, 1577 (Reg’l Rail Reorg. Ct. 1995); Penn Central Corp., 862 F. Supp. at 461 (“Congress viewed [Conrail] as the phoenix rising from Penn Central’s ashes. The Rail Act and related conveyances are the mechanisms that Congress chose to effectuate its goals. Chief among Congress’s priorities was to give the railroads a fresh start; that is, to ‘wipe the slate clean’.”)

Interestingly, the Congressional Statement of Policy in the Rail Act contains the following language “Rail service and rail transportation offer economic and environmental advantages with respect to land use, air pollution, noise levels, energy efficiency and conservation, resource allocation, safety, and cost per ton-mile of movement to such extent that the preservation and maintenance of adequate and efficient rail service is in the national interest.” 45 U.S.C. § 701(a)(5).

⁶ See Penn Central Corp., 862 F. Supp. at 450 (“CERCLA is unique. It radically changed the horizon of environmental law by giving the government enforcement tools far beyond its previous capacity.”)

⁷ See *id.* at 458 (“Penn Central owned and operated the yards at a time when our collective knowledge of the safety and health threat posed by environmental hazards was woefully inadequate. We all are paying for that mistake. CERCLA is but one mechanism for remedying these decades of abuse.”)

from other responsible parties.⁸ In this case, Conrail has apparently settled or entered into tolling agreements with respect to its contribution claims against the reorganized Penn Central, so it does not have to shoulder the entire burden of the clean-up costs alone. However, there may be other potentially responsible parties who are defunct, insolvent, or otherwise unable to contribute their fair share to the clean-up costs, so Conrail may have to cover their portion too.

As noted by Judge Wisdom of the Special Regional Rail Reorganization Court, there is a potential conflict between the Rail Act's fresh start policy and CERCLA's broad liability provisions. However, he found that

CERCLA takes precedence over this general fresh start policy because Congress specifically stated that CERCLA liability arises "[n]otwithstanding any other provision or rule of law." In a conflict, CERCLA prevails. [As a result,] the fresh start policy may work to limit [Conrail's] liability to post-conveyance contamination; it does not, however, affect our decision to leave for the district courts the decision whether to impose joint and several liability [on Conrail under CERCLA].⁹

In reaching this conclusion, Judge Wisdom recognized that where the environmental harm caused by several potentially responsible parties is not clearly divisible, joint and several liability may be imposed, and, as a result, Conrail may end up paying for contamination that was caused by others, prior to 1976.¹⁰ However, just because Conrail may be found liable to pay for the clean-up of pollution that was not caused by its own operations, that does not necessarily mean its general liability insurers must reimburse it for such costs under the Policies.

The interpretation of a contract of insurance is a matter of law for the courts to decide. In interpreting an insurance contract, [the court] must ascertain the intent of the parties as manifested by the language of the written agreement. When the

⁸ See 42 U.S.C. §§ 9607(a), 9613(f).

⁹ Penn Central Corp., 862 F. Supp. at 468.

¹⁰ See *id.* ("Conrail, by virtue of its involuntary ownership and operation of the Paoli and Elkhart railyards, could become jointly and severally liable for decades of contamination long before it existed. Conrail had nothing to do with the railyards prior to the conveyances and, yet, it might end up paying for it.")

policy language is clear and unambiguous, [the court] will give effect to the language of the contract.¹¹

The language of the Policies makes clear that the insurers will reimburse Conrail only for the damages (clean-up costs) arising out of an occurrence (environmental contamination) that was caused by or grew out of Conrail's operations. Where Conrail's CERCLA liability is premised solely upon its status as a current, passive owner of the contaminated site, and not as a polluting operator, then the pre-existing environmental condition giving rise to the damages for which indemnification is sought by Conrail was not caused by, nor did it grow out of, Conrail's railroad operations. However, where Conrail contributed to that condition, *i.e.*, the contamination, by discharging some of the pollutants itself, then the occurrence giving rise to the damages for which Conrail seeks indemnification was caused by and grew out of Conrail's operations.

The Policies do not require that the damages incurred by Conrail arise out of an occurrence caused solely or wholly by Conrail. Nor do they expressly provide coverage for damages caused in part by Conrail's operation. However, the phrase "growing out of" Conrail's operations can reasonably be interpreted to include contamination caused only partially by Conrail. Therefore, where Conrail is liable because it caused some of the pollution itself, the insurers must provide coverage for the entire amount of damages that Conrail must pay, even if some of the damages arose out of pollution that was caused by other entities.

¹¹ Paylor v. Hartford Ins. Co., 536 Pa. 583, 586, 640 A.2d 1234, 1235 (1994).

This result is somewhat unusual - where Conrail did nothing wrong, it is not covered, but where it is at least partially at fault, it is entirely covered. However, that is the result dictated by a plain reading of the language of the Operations Clause at issue.¹²

CONCLUSION

For all the foregoing reasons, Conrail's and the insurers' Cross-Motions for Summary Judgment with respect to the Operations Clause of the Policies are granted in part and denied in part.

BY THE COURT



PATRICIA A. McINERNEY, J.

¹² In reaching this conclusion, the court ignores the pollution exclusion language of the Policies, which will be the subject of a separate opinion and which may take away from Conrail the little that it has gained here.

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. :

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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.

**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.	:	

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.

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

DOCKETED

CONSOLIDATED RAIL CORP.,	:	SEPTEMBER TERM, 2004	OCT 28 2014
	:		
Plaintiff,	:	NO. 02638	C. HART
	:		CIVIL ADMINISTRATION
v.	:	COMMERCE PROGRAM	
	:		
ACE PROPERTY & CASUALTY	:	Control Nos. 13033766, 13033767,	
INSURANCE CO., et al.,	:	13033768, 13033769, 13033770,	
	:	13040099	
Defendants.	:		

ORDER

AND NOW, this 27th day of October, 2014, upon consideration of the Continental Insurance Company's Motions for Summary Judgment, the responses thereto, and all other matters of record and in accord with the Opinion issued simultaneously, it is **ORDERED** that said Motions are **GRANTED in part** as follows:

1. The remediation and other costs Conrail has incurred and will incur at the Elkhart Site are not covered under the Continental insurance policies at issue in this litigation;
2. The remediation and other costs Conrail incurred with respect to the Hollidaysburg Site are not covered under the Continental insurance policies at issue in this litigation;
3. The remediation and other costs Conrail incurred with respect to the Control Tower Area of the Beacon Site are not covered under the Continental insurance policies at issue in this litigation;

Consolidated Rail Corp -ORDOP



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4. The remediation and other costs Conrail has incurred with respect to the Charles River Chamber Area of the Beacon Site are not covered under the Continental insurance policies that were issued prior to 1981.
5. The remediation and other costs Conrail incurred with respect to the Conway Site are not covered under the Continental insurance policies issued prior to 1977;
6. The \$707,200 in penalties Conrail incurred with respect to the Conway Site are not covered under the Continental insurance policies at issue in this litigation; and
7. The remediation and other costs Conrail incurred with respect to the Paoli Site are not covered under the Continental insurance policies issued prior to 1979.
8. The remediation and other costs Conrail incurred with respect to all sites are not covered under the Continental insurance policies issued for the 1985-1986 policy year and thereafter.

The remainder of the Continental Insurers' Motions are **DENIED**.

BY THE COURT


PATRICIA A. McINERNEY, J.

**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. 13033766, 13033767,
INSURANCE CO., et al.,	:	13033768, 13033769, 13033770,
	:	13040099
Defendants.	:	

OPINION

This Opinion addresses the second round of summary judgment motions filed in this complex environmental contamination insurance coverage case. At the end of the first round, the court ruled on several broad legal issues. The court is now called upon to apply those rulings to six representative contaminated sites (the “Sites”) for which plaintiff Consolidated Rail Corp. (“Conrail”) incurred defense, remediation and other costs beginning in the late 1980s.

The Continental Insurance Company, on behalf of itself and its predecessors (the “Continental Insurers”), filed separate motions with respect to each of the six sites. The Insurers seek rulings that the costs Conrail incurred with respect to each Site are not covered under the excess liability policies (the “Policies”) they issued to Conrail from its formation in 1976 through 1986.

I. SITE SPECIFIC FACTS

A. Hollidaysburg

The Hollidaysburg, Pennsylvania Site was owned by Conrail from 1976 until 1999. It “was a car shop, which was used to build, rebuild, and repair railway cars, and a reclamation

plant, which was used to repair rail cars and components, to recover parts and equipment from rail cars, and to recycle rail equipment and materials that could no longer be used.”¹

In 1997, the PaDEP and Conrail discovered over 3,500 drums of waste material buried on the Site. It appears that Conrail’s predecessors buried the drums. In addition, there was apparently “spilling and/or leaking of hazardous waste from [Conrail’s] drum crusher and its catch basin onto the adjacent ground.”²

PCB and lead contamination was found in the soil at the Hollidaysburg Site, but not at any neighboring sites. Arsenic contamination was also a problem at the site. In addition, “[n]aphthalene and various metals were present at levels exceeding established maximum allowable levels” in the groundwater at the Site, but “Conrail’s environmental consultants concluded that the contaminated groundwater was not migrating offsite.”³

The PaDEP ordered Conrail to excavate and remove the drums. “Conrail was also ordered to install a control system to prevent off-site migration of surface water, submit a plan to control wind dispersion of contamination, and submit a groundwater monitoring plan to determine whether any contaminated groundwater was migrating off-site. Conrail promptly undertook the remediation required by [the PADEP’s] Administrative Order, which included the performance of groundwater flow and usage studies; the testing and monitoring of groundwater; the performance of an ecological assessment of the Beaverdam and Frankstown branches of the Juniata River; and the investigation of potential contamination at other locations at the Site.”⁴

¹ Conrail’s Response to the Continental Insurers’ Motion for Summary Judgment Regarding the Hollidaysburg Rail Yard, ¶ 2. Because these are defendants’ Motions for Summary Judgment, the court will rely upon plaintiff’s version of the facts where the facts are disputed.

² *Id.* ¶ 11.

³ *Id.* ¶ 19.

⁴ *Id.* ¶ 15.

In connection with the Hollidaysburg Site, Conrail paid \$4,999,806.60 in remediation costs and \$2,828,740.45 in defense costs which it seeks to recover from its insurers. It also paid \$4.1 million in governmental fines and penalties for which it seeks coverage.⁵

B. Elkhart

From 1976 through 1999, Conrail owned a large classification yard for freight cars in Indiana. In 1986, the EPA found significant amounts of TCE and CCl₄ in portions of Conrail's property and in the groundwater under a large number of neighboring properties.⁶ Conrail's and its neighbors' properties together constitute the Elkhart Superfund Site. The TCE appears to have emanated from the Track 65/66 area and the CCl₄ from the Track 69 area,⁷ although an additional source may have been "the drag strip area," which was not operated by Conrail and which was "downgradient from the rail yard."⁸

"[T]he evidence demonstrates that the CCl₄ release in the Track 69 area was caused by a collision or overturning of a rail car/railroad vehicle in or around 1968."⁹ "A rail car accident has been identified as the likely source of the TCE contamination in the Track 65-66 area," and it "likely occurred before April 1, 1976."¹⁰ No such TCE accidents have been identified during Conrail's tenure at the site. However, Conrail employees told the EPA that unnamed "solvents"

⁵ *Id.* ¶ 35.

⁶ Conrail apparently still disputes the EPA's determination that the railyard was the sole source of the two contaminants. See Conrail's Response to the Continental Insurers' Motion for Summary Judgment Regarding the Elkhart Rail Yard, ¶¶ 18-21. However, the remediation costs for which it seeks coverage here are the result of the EPA's determination that Conrail's property was the source of the contamination. For purposes of deciding these summary judgment motions, the court will assume that the railyard was at least a source, if not the source, of the pollutants.

⁷ *Id.* ¶ 28.

⁸ *Id.* ¶ 21, 38.

⁹ *Id.* ¶ 29.

¹⁰ *Id.* ¶¶ 33-34.

were used as degreasers at the car shop, then poured onto concrete pads and hosed down; they did not specify the year(s) in which this occurred.¹¹

Through September, 2012, Conrail incurred over \$15 million in remediation costs, approximately \$3.8 million in government payments, and more than \$2 million in defense costs in connection with the Elkhart Site. Remediation is ongoing and Conrail continues to incur additional costs with respect to the Elkhart Site.¹²

C. Douglasville

The Douglasville Disposal Site is located in Pennsylvania. It was never owned or operated by Conrail. It was operated by Berks Associates as a waste oil recycling plant. Between 1976 when Conrail came into being and 1985 when waste oil processing ceased at the Douglassville Site, Conrail sent its waste oil to be processed there, as did many other entities.¹³ At least one Conrail agent testified to the effect that “Conrail contracted with Berks Associates to safely process and recycle its waste oil, and to do so in compliance with all applicable environmental regulations.”¹⁴

In the 1980s, the EPA investigated the Site and discovered a panoply of contaminants, including VOCs, PCBs, PAHs, and lead in the soil, ground and surface water, which had emanated from 10 different source areas of contamination at the Site.¹⁵ The contamination was the result of Berks Associates’ waste storage and disposal methods, including “disposing of it in

¹¹ See Conrail’s Supplemental Summary Judgment Motion filed May 9, 2014, Exs. 16, 21, 26.

¹² Conrail’s Response to the Continental Insurers’ Motion for Summary Judgment Regarding the Elkhart Rail Yard, ¶ 39.

¹³ The parties agree that Conrail did so, but they have not provided the court with exact dates, so the court will assume that Conrail did so for each of the coverage years at issue here.

¹⁴ Conrail’s Response to the Continental Insurers’ Motion for Summary Judgment Regarding the Douglassville Disposal Site, ¶ 54.

¹⁵ *Id.* ¶ 16.

lagoons, landfarming it, and depositing filter cakes,”¹⁶ as well as “leaks and spills resulting from Berks’ recycling operations.”¹⁷ There were also “serious risks [of further contamination] arising from Berks’ abandoned processing facility.”¹⁸

Litigation and remediation took place over the next 10 or more years. In 2001, Conrail and other potentially responsible parties entered into agreements regarding payment of their respective shares of the remediation costs. Conrail claims it paid \$5,983,997.95 in such costs and incurred \$1,313,053.02 in defense costs for both of which it seeks payment from the Insurers here.¹⁹ Additional costs may yet be incurred by Conrail.

D. Conway

The Conway railyard is located in western Pennsylvania. A creek, Crows Run, flows through a stone and concrete culvert under the railyard. “Upon exiting the culvert, Crows Run flows approximately 200 feet before joining the Ohio River. Thirty-eight storm water outfalls and drains intersect the Rail Yard and discharge into the Ohio River or into Crows Run along the culvert wall.”²⁰ Conrail operated Conway from 1976 until 1999.

“[C]ertain areas at the Conway Rail Yard were contaminated with oil [as a result of releases occurring] both before and after April 1, 1976, [when Conrail assumed control of the site. The oil] leached and migrated through the soil and was able to enter Crows Run by way of

¹⁶ *Id.* ¶ 50.

¹⁷ *Id.* ¶ 15.

¹⁸ *Id.*

¹⁹ *Id.* ¶¶ 4, 39.

²⁰ Conrail’s Response to the Continental Insurers’ Motion for Summary Judgment Regarding the Conway Rail Yard, ¶ 11.

the Conway drainage system, as well as from groundwater seepage through the culvert side wall.”²¹

Two documented oil releases occurred at Conway while Conrail was operating there. The first “occurred on or around September 29, 1977, and resulted from a spill that made its way into the Ohio River through a sewer outfall. The release of oil appears to have continued unabated until approximately October 7, 1977. Although Conrail was never able to confirm the source of the spill, it was suspected that the discharge was caused when part of the wastewater treatment facility was temporarily shut down by a contractor hired to clean out sewer lines at the Rail Yard.”²²

The second spill occurred in December 1979 “when an underground fueling pipe separated at a joint, causing the release of oil directly into the ground (as opposed to directly into Crows Run) near a building in the vicinity of Crows Run. Approximately 25,000 gallons of oil was recovered from Crows Run during and immediately after the spill; the quantity of oil that was released from the pipeline but stayed in the ground and was not [immediately] released to Crows Run or the river is unknown. Although the spill was originally thought to have occurred because of a ruptured pipeline, the actual source of the spill was identified on December 31, 1979 as a separated pipeline and was repaired by January 2, 1980. Booms and other recovery efforts were implemented to remove oil from Crows Run.”²³

There were also two, non-oil, chemical spills at Conway, one of styrene monomer in 1984 and one of carbon disulfide in 1985.²⁴

²¹ *Id.* ¶ 4.

²² *Id.* ¶ 52.

²³ *Id.* ¶ 54.

²⁴ *Id.* ¶¶ 55-59.

Conrail admits that it knew about the existing oil contamination when it assumed control of Conway, but denies that it knew until the 1990s that it would be liable for millions of dollars in remediation costs with respect to the Site.²⁵ Conrail seeks coverage relating to the remediation of diesel fuel and lubricant oil, as well as styrene and carbon disulfide, from the ground and subsurface of the railyard, as well as from the groundwater, Crows Run, and the Ohio River.²⁶

Through December 2012, Conrail has incurred over \$14 million in remediation costs, almost \$1.2 million in government payments to the Commonwealth of Pennsylvania and the Borough of Conway, and more than \$2 million in defense costs.²⁷ Conrail continues to incur additional remediation costs.

E. Beacon

The Beacon Park Railyard is located in Massachusetts and was operated by Conrail from 1976 through 1999. The railyard is bisected by the Massachusetts Turnpike, so that it comprises two distinct units. Portions of both units are contaminated with LNAPLs, primarily oil and diesel fuel.²⁸

“[T]he first area of contamination at the Beacon Park Site is known as the ‘Charles River Chamber’ Area and is located near the diesel servicing facility in the loop track area. The Charles River Chamber is a collection point for several storm sewers. LNAPL in the surrounding groundwater entered the chamber through cracks and fissures in the sewer system, often as the result of heavy rains. The sources of this contamination are the various historical releases at the

²⁵ *Id.* ¶ 5.

²⁶ *Id.* ¶¶ 13, 64.

²⁷ *Id.* ¶ 63.

²⁸ Conrail’s Response to the Continental Insurers’ Motion for Summary Judgment Regarding the Beacon Park Railyard, ¶ 9.

Beacon Park Site as well as the diesel servicing area and the lube oil tank area west of the chamber, all of which migrated to the area surrounding the chamber.”²⁹

The second area of contamination is located in the classification yard section of Beacon Park and is known as the “Control Tower” Area. “Contamination at the Control Tower Area consists of a layer of LNAPL on the water table beneath the Turnpike and the northern portion of the rail yard. When precipitation increased the height of the water table, the oil would infiltrate a storm drain running through this area and flow into the Charles River.”³⁰

“Conrail knew, at the time that it took over operations of the Beacon Park Rail Yard, that there was contamination [there], and that an EPA Administrative Order had been issued regarding contamination at Beacon Park on March 1, 1976. . . . Conrail [also] knew, in August 1976, that it would be responsible for complying with an order issued by the Massachusetts Division of Water Pollution Control. Once Conrail completed the work required by these two orders, however, [Conrail claims] it had no reason to believe that it would be responsible for further remediation of the Site.”³¹ Conrail denies that it “was aware in 1976, or at any other time during the period when the Continental Insurers issued policies, [that subsequent] remediation would approach the level of coverage provided by the Continental Insurers’ Policies.”³²

“There is evidence that at least two spills occurred [in the Charles River Chamber Area after Conrail assumed operations of the railyard]: a spill of approximately 2,000 gallons of fuel

²⁹ *Id.* ¶ 10.

³⁰ *Id.* ¶ 11.

³¹ *Id.* ¶ 65.

³² *Id.* ¶ 69.

reported to Conrail on November 1, 1981, and a spill of approximately 800 gallons on or about August 9, 1982.”³³

With respect to the 1981 leak, the EPA determined that “oil discharg[ing] from Conrail’s corroded underground 2” pipe [entered] into surrounding earth, leached through the ground and groundwater into a storm conduit, flowed through the conduit to a junction box, and spilled through two culverts from the junction box to the Charles River.”³⁴ “[C]ontamination from the pipe leak reached the Charles River Chamber Area of Beacon Park.”³⁵ The leak occurred for 8 days until Conrail located its source and capped the pipe.³⁶

“[N]o identifiable release or source of the contamination in the Control Tower Area of the yard was ever identified.”³⁷

Conrail seeks coverage here for \$5,388,264.76 in remediation costs and \$352,101.49 in defense costs.³⁸ Conrail dropped its claim for approximately \$2.5 million in government penalties that it paid.³⁹

³³ *Id.* ¶ 37. Other leaks occurred in 1992-1994, but they necessarily did not cause damage during the period covered by the 1976-1986 Policies at issue here. *See id.* ¶ 46.

³⁴ *Id.* ¶ 40.

³⁵ *Id.* ¶ 39.

³⁶ *Id.* ¶ 80.

³⁷ *Id.* ¶ 52.

³⁸ *Id.* ¶ 53.

³⁹ *See* Conrail’s Supplemental Summary Judgment Memorandum filed on May 9, 2014, p. 10.

F. Paoli

The Paoli Site was a rail yard and car shop that Conrail operated in Pennsylvania from 1976 through 1982, and which was operated by SEPTA thereafter. “[F]rom the early 1950s, rail cars using transformer oil that contained PCBs were repaired and maintained at the Paoli Rail Yard. . . . [F]or most of the period before April 1, 1976, the hazards of PCBs were unknown and . . . from an environmental standpoint the PCB-containing transformer fluid was treated similarly to other oils. . . . [R]eleases of PCB-containing fluid onto the ground occurred during Conrail’s and SEPTA’s occupancy at the site, including some releases during maintenance operations.”⁴⁰

“[A]fter [Conrail] assumed operations at Paoli, federal and state regulations began to require that PCBs be treated as hazardous substances and Conrail’s own internal policies began to require that PCBs be treated as a hazardous substance soon thereafter. [As a result,] there was a significant decrease in the incidence of PCB discharges during the operations conducted by Conrail and . . . known spills were commonly cleaned up promptly.”⁴¹

However, on at least 20 different occasions between 1979 and 1985, PCBs spilled from railcars at the Paoli Site.⁴² “Conrail admits that the [railcar] transformers were designed to release PCB-containing fluid in the event of excessive pressure,”⁴³ but “Conrail denies that th[is] “burping” of the transformers was routine or that it was the exclusive source of PCB releases into the ground at Paoli.”⁴⁴ “Conrail [also] admits that leaks occurred from time to time from faulty

⁴⁰ Conrail’s Response to the Continental Insurers’ Motion for Summary Judgment Regarding the Paoli Rail Yard Site, ¶¶ 9-11.

⁴¹ *Id.* ¶¶ 12-13.

⁴² *Id.* Ex. 4.

⁴³ *Id.* ¶ 132.

⁴⁴ *Id.* ¶ 134.

gaskets or eroded and fractured sight glass on some cars, but denies that such leaks occurred frequently.”⁴⁵

Conrail seeks \$12,766,859.05 in indemnity costs and \$5,215,407.74 in defense costs from the insurers here.⁴⁶ Some of those costs were incurred by SEPTA, which Conrail claims is an additional insured under the Policies.⁴⁷

II. POLICY LANGUAGE

The Policies at issue here, which were issued to Conrail by the Continental Insurers, contain the following relevant provisions:⁴⁸

[The Insurer shall] INDEMNIFY THE INSURED FOR ANY AND ALL SUMS THE INSURED SHALL BECOME LEGALLY LIABLE TO PAY AS DAMAGES, INCLUDING LIABILITY ASSUMED BY THE INSURED UNDER ANY AGREEMENT OR CONTRACT, TO ANY PERSON OR PERSONS AS COMPENSATION FOR:

* * *

(b) DAMAGE TO OR DESTRUCTION OF PROPERTY, INCLUDING LOSS OF USE THEREOF, EXCLUDING INSURED’S OWN PROPERTY BUT INCLUDING PROPERTY OF OTHERS IN INSURED’S CARE, CUSTODY OR CONTROL;

* * *

ARISING OUT OF ANY OCCURRENCE OR OCCURRENCES CAUSED BY OR GROWING OUT OF THE INSURED’S OPERATIONS ANYWHERE IN THE WORLD, AND ALL OPERATIONS INCIDENTAL THERETO.⁴⁹

Occurrence means an event, or continuous or repeated exposure to conditions which cause injury or damage during the term of the policy.

THIS POLICY DOES NOT APPLY: . . . TO PERSONAL INJURY OR PROPERTY DAMAGE ARISING OUT OF THE DISCHARGE, DISPERSAL,

⁴⁵ *Id.* ¶ 135.

⁴⁶ *Id.* ¶ 14.

⁴⁷ *Id.* ¶ 82.

⁴⁸ This court previously examined the meaning of certain of these provisions in its Opinions issued on November 13, 2013, and December 30, 2013.

⁴⁹ Hereinafter, the “Operations Clause.”

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;⁵⁰ BUT THIS EXCLUSION DOES NOT APPLY IF SUCH DISCHARGE, DISPERSAL, RELEASE OR ESCAPE IS SUDDEN AND ACCIDENTAL . . .⁵¹

III. ANALYSIS

“In an action arising under an insurance policy, our courts have established a general rule that it is a necessary prerequisite for the insured to show a claim within the coverage provided by the policy. However, where an insurer relies on a policy exclusion as the basis for its denial of coverage, the insurer has asserted an affirmative defense, and accordingly, bears the burden of proving such defense.”⁵²

In this case, Conrail has the burden of proof with respect to the Operations Clause and the other general coverage language of the Policies. In other words, Conrail must show that it had to pay money damages as compensation for physical damage to a third party’s property arising out of an event, or continuous or repeated exposure to conditions, which caused injury or damage during the term of the policy, which event or conditions were caused by or grew out of Conrail’s operations.

Conrail has failed to meet this burden with respect to the Hollidaysburg Site because it has not shown the pollution affected a third party’s property, i.e., the multiple contaminants present on Conrail’s property did not migrate to neighboring properties.

⁵⁰ Hereinafter the “Pollution Exclusion.”

⁵¹ Hereinafter the “Exception to the Pollution Exclusion.” This exception was included in the 1976-1982 and 1984-1985 Policies. The Policies issued from 1982-1984 used the term “accidental” instead of “sudden and accidental” in the exception. The Policy for 1985-1986 contained no exception, so its Pollution Exclusion is absolute.

⁵² McEwing v. Lititz Mut. Ins. Co., 77 A.3d 639, 646 (Pa. Super. 2013)

Conrail has also failed to meet its burden with respect to the Elkhart Site because the one documented spill of CCl₄ occurred before Conrail came into existence and there were no specific spills of TCE identified for any of the Policy years at issue here. The alleged dumping of solvents by Conrail employees at the car shop at Elkhart is not covered because no year was identified in connection with those vaguely remembered occurrence(s). As a result, Conrail cannot show “an event, or continuous or repeated exposure to conditions which cause injury or damage during the term of” any of the Policies at issue here. Furthermore, the evidence cited by Conrail does not identify what solvent/degreaser was purportedly dumped at the car shop, although Conrail speculates that it was something “like TCE.”⁵³

Finally, Conrail failed to meet its burden with respect to the Control Tower Area at the Beacon Site because Conrail has not shown that any spill occurred at that Site during its tenure there.

Conrail has also failed to show an occurrence caused by its operations and causing damage within the term of any Policy prior to the 1981 oil spill at the Charles River Chamber Area at Beacon Site, prior to the 1977 oil spill at the Conway site, and prior to a 1979 PCB spill at the Paoli Site, so the Policies for the years prior to those occurrences are not implicated at those Sites. Douglasville is the only Site for which Conrail appears to have met its burden of proof regarding relevant occurrences implicating all Continental Policies because there is no dispute between the parties that Conrail sent its waste oil there between 1976 and 1985.

The Insurers argue with respect to the Douglasville oil recycling Site that there is no coverage because Conrail did not contribute to the pollution by discharging some of the waste there itself. However, the Operations Clause in the Policies provides coverage not only for

⁵³ See Conrail’s Supplemental Summary Judgment Motion filed May 9, 2014, pp. 22-23, Exs. 16, 21, 26.

occurrences directly “caused by” Conrail’s operations, but also occurrences “growing out of the insured’s operations anywhere in the world, and all operations incidental thereto.” The mistreatment of Conrail’s waste, which it sent to a third party for recycling or disposal, necessarily grows out of Conrail’s operations and is incidental thereto.

If Conrail fails to meet its burden of proof as to coverage with respect to a specific site, then the Insurers’ summary judgment motions must be granted. Summary judgment will therefore be granted in favor of the Continental Insurers with respect to the Hollidaysburg and Elkhart Sites, the Control Tower Area at the Beacon Site, the pre-1981 Policies at the Charles River Chamber Area of the Beacon Site, the pre-1977 Policies at the Conway site, and the pre-1979 Policies at the Paoli Site.

With respect to the 1981 occurrence at the Charles River/Beacon Site, the 1977 and 1979 occurrences at the Conway Site, and the multiple occurrences at Paoli beginning in 1979, the Continental Insurers contend that Conrail has failed to show that the costs it paid for more general site-wide clean-up long after each specific spill occurred arose out of those occurrences. The Insurers argue that each such occurrence was promptly remediated by Conrail at the time it happened, or shortly thereafter. In the Continental Insurers’ view, those specific, immediately remediated, spills did not contribute to the general pollution of the Site which Conrail eventually had to pay to remediate.

The Continental Insurers’ argument raises disputed issues of fact as to whether each of the specifically identified occurrences was a contributing cause of the larger Site pollution that ultimately had to be remediated at great cost to Conrail and others. This is a battle for the experts to fight at trial, not for the court to resolve now as a matter of law.

The Continental Insurers also argue that the documented spills at the Paoli Site were *de minimus* compared to the decades of PCB burps and drips that preceded Conrail's take-over of the Paoli Site. Similarly, the Insurers argue that Conrail's oil spills at Conway and Beacon Park was *de minimus* compared to the overall pollution at the Sites. The Policies do not speak to *de minimus* occurrences. Instead, they provide coverage for property damage arising out of "any occurrence" arising out of Conrail's operations. Therefore, if the spills that occurred on Conrail's watch were a contributing cause to the environmental damage later remediated at the Conway, Beacon Park and Paoli Sites, then they are covered occurrences under the Policies.

For now, the court can rule only that Conrail has shown occurrence(s) potentially covered by the Policies beginning in 1981 at the Charles River/Beacon Site, in 1977 at the Conway Site, in 1979 at the Paoli Site, and in 1976 at Douglasville.

With respect to the Sites and Policies for which Conrail has shown a potentially covered occurrence, the burden then shifts to the Insurers to show that each occurrence at each Site falls within the Pollution Exclusion. Since all such occurrences involve the discharge, dispersal, release or escape of pollutants, the Insurers have met their initial burden. With respect to the Policies in effect from 1985-1986 and onward, which contain no Exception to the Pollution Exclusion, the inquiry ends, and summary judgment must be granted in favor of the Continental Insurers with respect to all remaining Sites and those post-1985 Policies.

However, the Policies in effect from 1976-1985 contain a "sudden and accidental" or "accidental" Exception to the Pollution Exclusion, which this court has previously ruled are both synonymous with the term "unexpected and unintended."⁵⁴ While the burden of proving an

⁵⁴ The court notes that even if "sudden and accidental" also meant "abrupt" as the Insurers contend, all the potentially covered releases, except possibly those at the Douglasville Site, were abrupt.

exception to an exclusion may fall on the insured,⁵⁵ in this case that initial burden is easily met with a description of the nature of the occurrence⁵⁶ and Conrail's assertion that it did not expect or intend the occurrence. Such assertions of innocence are subject to the Nanty-Glo rule and preclude a grant of summary judgment.⁵⁷

As a practical matter, the burden then, necessarily, shifts to the Continental Insurers to proffer evidence that the polluting discharge was expected or intended. For instance, the Insurers contend that the PCB railcar burps that occurred at the Paoli site were expected and intended because the railcars were designed by General Electric to release PCB laden oil in the event of overheating or other equipment malfunction, and they regularly did so. The question of whether such designer-induced burps were expected or intended by Conrail is an issue of fact for trial. Furthermore, not all of the spills documented at the Paoli site during Conrail's tenure were burps, so some of these spills may well prove to have been unexpected and unintended.

The Continental Insurers also argue that the improper disposal of waste materials at Douglasville was expected and intended because Berks Associates did it deliberately. However, the proper test is whether the insured, Conrail, expected or intended the release of waste oil at the Site, not whether a third party, who is a stranger to the Policies, did.⁵⁸ Since Conrail employees

⁵⁵ See Northern Ins. Co. of New York v. Aardvark Assocs. Inc., 942 F.2d 189, 194-5 (3d. Cir. 1991).

⁵⁶ An open and notorious leak of toxic chemicals that continued unabated for months or years would likely cause Conrail to fail in its burden, whereas a quick or hidden discharge would likely satisfy this burden.

⁵⁷ "However clear and indisputable may be the proof when it depends upon oral testimony, it is nevertheless the province of the jury to decide, under instructions from the court, as to the law applicable to the facts, and subject to the salutary power of the court to award a new trial if they should deem the verdict contrary to the weight of the evidence. . . . The credibility of these witnesses, without whose testimony plaintiff could not have recovered, was for the jury, and plaintiff's motion for binding instructions should not have been granted." Borough of Nanty-Glo v. Am. Sur. Co. of New York, 309 Pa. 236, 238, 163 A. 523, 524 (1932).

⁵⁸ See Covington Twp. v. Pacific Employers Ins. Co., 639 F. Supp. 793, 800 (M.D. Pa. 1986) (Pollution Exclusion with Exception "does not relieve [insurer] of its duty to defend claims based on the discharge, etc., of waste material by those other than the named insured.") See also Emerson Elec. Co. v. Aetna Cas. & Sur. Co., 319 Ill. App. 3d 218, 244-45, 743 N.E.2d 629, 648-49 (Ill. App. Ct. 2001) ("Under Missouri law, an accident includes

claim they did not know of, expect, or intend Berks' apparently purposeful polluting activities, Conrail's knowledge, expectation, and intent become issues of fact for trial.

The Continental Insurers further argue that coverage is barred at the Beacon, Conway and Paoli Sites, by the 'Known Loss Doctrine,' *i.e.*, that Conrail knew the Sites were polluted when it acquired them and therefore knew that they were polluted when it applied for the Policies at issue here. Under the Known Loss Doctrine, the question for trial is "whether the evidence shows that the insured was charged with knowledge which reasonably shows that it was, or should have been, aware of a likely exposure to losses which would reach the level of coverage" provided by the Policies at issue.⁵⁹

Conrail asserts that it did not know, during the 1976 through 1985 period when it applied for the Policies here, the extent of the loss or damages it would later be required to pay for remediation of the contamination, much of which was caused by others before Conrail even came into being. Whether that is a true statement is for the finder of fact to determine.⁶⁰

The Continental Insurers' final argument is that any fines and penalties Conrail paid in connection with any of the Sites are not recoverable under the Policies because they do not constitute "damages" paid by Conrail as "compensation for . . . damage or destruction of property" and coverage for them is barred as a matter of public policy.

that which happens by chance or fortuitously, without intention or design, and which is unexpected and unforeseen. Thus where a policyholder contracts with a waste hauler for the disposal of hazardous waste, subsequent releases of pollutants are considered accidental for purposes of insurance coverage so long as the insured had no knowledge that the wastes were to be disposed of improperly. This is true even though the hauler may have acted intentionally.")

⁵⁹ See *Rohm & Haas Co. v. Cont'l Cas. Co.*, 566 Pa. 464, 475, 781 A.2d 1172, 1178 (2001) ("the evidence easily supports the jury's conclusion that [insured] certainly knew of damage or injury for which there would be legal liability large enough to reach the excess layers of insurance.")

⁶⁰ See *id.*

With respect to the 3.5 remaining Sites, Conrail paid approximately \$1.2 million to governmental entities in connection with the clean-up at the Conway Site only.⁶¹ Of this amount, the Insurers contest coverage with respect to \$616,000 in civil penalties Conrail paid to the PaDEP and \$91,200 it paid to the Borough of Conway.⁶²

Both the state and local fines Conrail paid were assessed as “penalties” and were in addition to the costs Conrail was required to incur for corrective or remedial action, *i.e.*, clean-up and prevention of further violations.⁶³ Since the state legislature and the municipality termed them “penalties,” the intent was to punish Conrail rather than compensate other property owners for damage.⁶⁴ The Policies allow for the recovery only of amounts paid as “compensation.” Furthermore, Pennsylvania law prohibits the recovery of punitive or penal damages under

⁶¹ Conrail does not claim to have incurred such costs in connection with the Douglasville and Paoli Sites, and it withdrew its claim for coverage for the fines it paid the US EPA in connection with the Beacon Site.

⁶² The Insurers do not appear to dispute the remaining approximately \$490,000 Conrail claims to have paid in connection with Conway.

⁶³ See Reply Brief In Further Support of Continental Insurers’ Motion for Summary Judgment Regarding the Conway Rail Yard, Exs. 4 and 5; 35 Pa. Stat. Ann. § 691.605 (Clean Streams Law) (“In addition to proceeding under any other remedy available at law or in equity for a violation of a provision of this act, rule, regulation, order of the department, or a condition of any permit issued pursuant to this act, the department, after hearing, may assess a civil penalty upon a person or municipality for such violation. Such a penalty may be assessed whether or not the violation was willful. The civil penalty so assessed shall not exceed ten thousand dollars (\$10,000) per day for each violation. In determining the amount of the civil penalty the department shall consider the willfulness of the violation, damage or injury to the waters of the Commonwealth or their uses, cost of restoration, and other relevant factors.”); 35 Pa. Stat. Ann. § 6018.605 (Solid Waste Management Act) (“In addition to proceeding under any other remedy available at law or in equity for a violation of any provision of this act, any rule or regulation of the department or order of the department or any term or condition of any permit issued by the department, the department may assess a civil penalty upon a person for such violation. Such a penalty may be assessed whether or not the violation was willful or negligent. In determining the amount of the penalty, the department shall consider the willfulness of the violation, damage to air, water, land or other natural resources of the Commonwealth or their uses, cost of restoration and abatement, savings resulting to the person in consequence of such violation, and other relevant factors.”)

⁶⁴ See Black’s Law Dictionary (9th ed. 2009) (“Penalty” is a “[p]unishment imposed on a wrongdoer, usu. in the form of imprisonment or fine”).

insurance policies like the ones at issue here.⁶⁵ Therefore, Conrail is not entitled to recover from the Continental Insurers the civil penalties it paid to the PaDEP and the Borough of Conway.

CONCLUSION

For all the foregoing reasons, the Continental Insurers' Motions for Summary Judgment are granted in part and denied in part.

BY THE COURT


PATRICIA A. McINERNEY, J.

⁶⁵ See Martin v. Johns-Manville Corp., 508 Pa. 154, 169, 494 A.2d 1088, 1096 (1985) (“In Pennsylvania, the function of punitive damages is to deter and punish. Consistent with that theory, we preclude insurance against them.”); In re Texas E. Transmission Corp. PCB Contamination Ins. Coverage Litig., 870 F. Supp. 1293, 1338-39 (E.D. Pa. 1992) (“Relying on Pennsylvania's refusal to permit insurance against punitive damages, I conclude that Pennsylvania would likewise refuse to permit insurance against civil penalties assessed for the violation of Pennsylvania's environmental laws.”) Both of these cases have been the subject of subsequent negative treatment by the courts on grounds other than those for which they are cited here.

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

CONSOLIDATED RAIL CORP.,	:	SEPTEMBER TERM, 2004	DOCKETED
	:		
Plaintiff,	:	NO. 02638	OCT 28 2014
	:		
v.	:	COMMERCE PROGRAM	C. HART
	:		CIVIL ADMINISTRATION
	:		
ACE PROPERTY & CASUALTY	:	Control Nos. 13033764, 13040098,	
INSURANCE CO., et al.,	:	13051107	
	:		
Defendants.	:		

ORDER

AND NOW, this 27th day of October, 2014, upon consideration of the Stonewall Insurance Company's Amended Renewed Motion for Summary Judgment, the responses thereto, and all other matters of record and in accord with the Opinion issued simultaneously, it is **ORDERED** that said Motion is **GRANTED**, and the remediation and other costs Conrail has incurred and will incur at the Elkhart Site are not covered under the Stonewall policies at issue in this litigation.

BY THE COURT


PATRICIA A. McINERNEY, J.

Consolidated Rail Corp -ORDOP



04090263800927

**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. 13033764, 13040098,
INSURANCE CO., et al.,	:	13051107
	:	
Defendants.	:	

OPINION

Defendant Stonewall Insurance Company (“Stonewall”) moves for summary judgment with regards to its coverage obligation to its insured, Consolidated Rail Corp (“Conrail”), under two excess policies issued for the year 1985-1986 (the “Policies”) with respect to only one of the sites currently at issue in this litigation – the Elkhart Rail Yard.

I. FACTS

From 1976 through 1999, Conrail owned a large classification yard for freight cars in Indiana. Beginning in 1986, the EPA found significant amounts of TCE and CC14 in portions of Conrail’s property and in the groundwater under a large number of neighboring properties.

Conrail admits that “[t]here is only one incident that resulted in carbon tetrachloride contamination at Elkhart – a release of [CC14] in the vicinity of track number 69 . . . in May 1968 while Penn Central was operating Elkhart . . . eight years before Conrail began its own operations at Elkhart.”¹

Conrail also claims that “[t]he principal source of the TCE contamination at Elkhart was a release of TCE in the Track 65-66 area of the rail yard. The TCE emanating from the railyard

¹ Compare Stonewall’s Amended Renewed Motion for Summary Judgment, ¶ 27 (1)-(4) with Conrail’s Response to Stonewall’s Renewed Motion for Summary Judgment, ¶ 27.

has reached the drag strip and the St. Joseph River on the northern border of the site. The EPA's expert, Gary Chirlin, opined that 'Substantial TCE contamination exists over the entire aquifer thickness... within this source area; this is consistent with a local release of sufficient magnitude that separate phase TCE ('DNAPL') penetrated nearly to bedrock.' Conrail's lead environmental consultant at the Elkhart Site, Miranda Menzies, testified that the nature of the contamination at Tracks 65-66 – i.e., a large release of contaminants in undissolved form that sank through the soil into the aquifer – is consistent with a large spill from a tank car, as opposed to multiple small spills that would remain close to the soil surface. While the exact date of this release [of TCE] is unknown, it likely took place before 1976.²

In addition, Conrail notes that its employees told the EPA that solvents were used as degreasers at the car shop, then poured onto concrete pads and hosed down; they did not specify the year(s) in which this occurred or the types of solvent(s) used.³

Through September, 2012, Conrail incurred over \$15 million in remediation costs, approximately \$3.8 million in government payments, and more than \$2 million in defense costs in connection with the Elkhart Site. Remediation is ongoing and Conrail continues to incur additional costs with respect to the Elkhart Site.⁴

II. POLICY LANGUAGE

The language of the Stonewall Policies is slightly different than that of the Continental Policies which are dealt with in a Opinion being issued simultaneously with this one. Under the Stonewall Policies, Stonewall is required:

² Conrail's Response to Stonewall's Renewed Motion for Summary Judgment, ¶ 20.

³ See Conrail's Supplemental Summary Judgment Motion filed May 9, 2014, Exs. 16, 21, 26.

⁴ Conrail's Response to the Continental Insurers' Motion for Summary Judgment Regarding the Elkhart Rail Yard, ¶ 39.

- A. TO INDEMNIFY THE INSURED FOR ANY AND ALL SUMS THE INSURED SHALL BECOME LEGALLY LIABLE TO PAY AS DAMAGES, INCLUDING LIABILITY ASSUMED BY THE INSURED UNDER ANY AGREEMENT OR CONTRACT, TO ANY PERSON OR PERSONS AS COMPENSATION FOR:
(1) PERSONAL INJURY
(2) PROPERTY DAMAGE
(3) EVACUATION EXPENSES
- B. TO REIMBURSE THE INSURED FOR COSTS PAID OR INCURRED BY THE INSURED IN CONNECTION WITH PERSONAL INJURY, PROPERTY DAMAGE OR EVACUATION EXPENSES ARISING OUT OF AN OCCURRENCE TO WHICH THIS POLICY APPLIES. SUCH COSTS ARE PAYABLE IN ADDITION TO ANY LIMIT OF INSURER'S LIABILITY FOR ULTIMATE NET LOSS, BUT THE INSURER'S [sic] SHALL NOT BE OBLIGATED TO PAY ANY GREATER PROPORTION OF SUCH COSTS THAN THE AMOUNTS OF ULTIMATE NET LOSS PAYABLE UNDER THIS POLICY BEARS TO THE TOTAL OF ALL ULTIMATE NET LOSS RESULTING FROM SUCH OCCURRENCE.

ARISING OUT OF ANY OCCURRENCE OR OCCURRENCES CAUSED BY OR GROWING OUT OF THE INSURED'S OPERATIONS ANYWHERE IN THE WORLD, AND ALL OPERATIONS INCIDENTAL THERETO.

* * *

"OCCURRENCE" MEANS AN EVENT, OR CONTINUOUS OR REPEATED EXPOSURE TO CONDITIONS WHICH CAUSE PERSONAL INJURY, PROPERTY DAMAGE OR EVACUATION EXPENSES.

* * *

"PROPERTY DAMAGE" MEANS (1) PHYSICAL INJURY TO OR DESTRUCTION OF TANGIBLE PROPERTY (OTHER THAN PROPERTY OWNED BY THE NAMED INSURED) WHICH OCCURS DURING THE POLICY PERIOD, INCLUDING LOSS OF USE THEREOF AT ANY TIME RESULTING THEREFROM, OR (2) LOSS OF USE OF TANGIBLE PROPERTY WHICH HAS NOT BEEN PHYSICALLY INJURED OR DESTROYED PROVIDED SUCH LOSS OF USE IS CAUSED BY AN OCCURRENCE DURING THE POLICY PERIOD, BUT (2) ABOVE SHALL NOT INCLUDE EVACUATION EXPENSES.

III. ANALYSIS

“In an action arising under an insurance policy, our courts have established a general rule that it is a necessary prerequisite for the insured to show a claim within the coverage provided by the policy.”⁵ In this case, Conrail has the burden of proof with respect to the general coverage language of the Policies. In other words, Conrail must show that it had to pay money damages to third parties for physical injury to or destruction of their tangible property, which injury or destruction occurred during the policy period 1985 -1986 and was caused by an event, or continuous or repeated exposure to conditions, which event or conditions were caused by or grew out of Conrail’s operations.

Conrail has failed to meet its burden with respect to the Elkhart Site because the one documented spill of CCl₄ occurred before Conrail came into existence and there were no specific spills of TCE identified for the Policy year at issue here. The evidence regarding the alleged dumping of solvents by Conrail employees at the car shop at Elkhart does not identify what solvent/degreaser was purportedly spilled, although Conrail speculates that it was something “like TCE.”⁶ Conrail therefore cannot prove that its dumping activities caused the specific contamination that it was forced to pay to remediate at Elkhart. Furthermore, no year was identified in connection with those vaguely remembered occurrence(s). As a result, Conrail cannot show an event, or continuous or repeated exposure to conditions, which caused injury or destruction to a third party’s property during the term of the Policies at issue here.

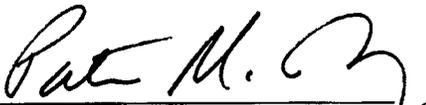
⁵ *McEwing v. Lititz Mut. Ins. Co.*, 77 A.3d 639, 646 (Pa. Super. 2013)

⁶ See Conrail’s Supplemental Summary Judgment Motion filed May 9, 2014, pp. 22-23, Exs. 16, 21, 26.

CONCLUSION

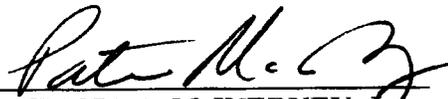
For all the foregoing reasons, Stonewall Insurance Company's Motion for Summary Judgment is granted.

BY THE COURT


PATRICIA A. McINERNEY, J.

2. Lloyd Italico's remaining Motions for Summary Judgment and Conrail's Cross Motion for Summary Judgment are **DISMISSED** as **MOOT**.¹

BY THE COURT:


PATRICIA A. McINERNEY, J.

¹ For the reasons set forth in the court's site-specific summary judgment Opinion entered on October 28, 2014, even if Conrail could show that the Lloyd Italico Policy existed, that Policy would not cover the costs incurred by Conrail at the Hollidaysburg, Beacon, Paoli, and Elkhart sites. In light of the Pennsylvania Supreme Court's recent decision in Pa. Mut. Cas. Ins. Co. v. St. John, 2014 WL 7088712 (Pa. Dec. 15, 2014), the Lloyd Italico Policy might not cover the Conway or Douglassville sites either.

**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 No. 14061731
INSURANCE CO., et al.,	:	
	:	
Defendants.	:	

OPINION

This opinion addresses the third round of summary judgment motions filed in this complex environmental contamination insurance coverage case. In this action, plaintiff Consolidated Rail Corp. (“Conrail”) claims that defendant Lloyd Italice & Ancora (“Lloyd Italice”) issued a \$1,000,000 Umbrella Excess Liability Policy to Conrail for the April 1, 1978 through April 1, 1979 policy period. Lloyd Italice denies that it issued any such policy to Conrail.¹ Due to the passage of time (36 years), many relevant records have been lost or destroyed, memories have dimmed, and witnesses can no longer be found, so the court must determine which party must bear the consequences of this lack of evidence.

The court starts with the basic premise that “[t]he burden is on the plaintiff to prove by a preponderance of the evidence the existence of the contract to which the defendant is a party.”²

In support of its claim that Lloyd Italice issued an insurance contract to Conrail, Conrail proffers a single page that purports to be an “Umbrella Excess Liability Policy Issued By Lloyd

¹ Lloyd Italice does not appear to exist any longer. Its business was transferred to other entities and run-off by them. See Conrail’s Opposition to Lloyd Italice’s Motion for Summary Judgment Regarding the Non-Existence of the Insurance Policy (“Response”), Ex. 36, 37, 44.

² *Viso v. Werner*, 471 Pa. 42, 46, 369 A.2d 1185, 1187 (1977). Conrail bears this burden of proof at trial. Lloyd Italice’s burden at summary judgment is to show that Conrail has failed to produce evidence of facts essential to its cause of action, such as the existence of the Policy. Pa. R. Civ. P. 1035.2(2)

Italo & L'Ancora – Genua” (the “Lloyd Italo Policy”).³ It is signed by “Joseph F. Ambriano” on behalf of “PLAR GROUP.” There is also a second page that purports to be “Endorsement No 1” to the Lloyd Italo Policy, which increases the coverage provided by the Policy from \$500,000 to \$1,000,000.⁴ That Endorsement is signed by “R.A. Browing” on behalf of the “Independence Marine Group.” A third page purports to be “Endorsement No. 2” to the Policy.⁵ It sets forth a computation of the earned premium based on Conrail’s revenues during the Policy year, which results in an additional premium payment due. Endorsement No. 2 was issued in July 1979, after the Policy period ended, and is signed “Richard H. Byron for Plar.”

Through discovery, Conrail has established that, at the time this transaction allegedly occurred, the following relationships existed:

1. Conrail’s broker was Marsh & McLennan (“Marsh”) in New York, New York.
2. Marsh worked with a sub-broker East West International (“EWI”) in Geneva, Switzerland.⁶
3. EWI negotiated with Mr. Ambriano of Davis, Dorland & Co. (“Davis Dorland”) in New York, New York.⁷
4. Mr. Ambriano and George B. McNeill International had some authority to act on behalf of the Pool Latino Americano de Reaseguros (“PLAR”) in Panama.⁸

³ Response, Ex. 13.

⁴ *Id.*

⁵ Lloyd Italo’s Motion for Summary Judgment Regarding the Non-Existence of the Insurance Policy (“SJM”), Ex. 1.

⁶ *Id.* Exs. 12, 13.

⁷ Response, Ex. 12.

⁸ SJM, Exs. 8, 9; Response, Ex. 16. Their authority appears to be limited to reinsurance contracts only. *See* SJM, Ex. 9.

5. Lloyd Italico was a member of PLAR.⁹ In February, 1977, Lloyd Italico expressly authorized PLAR's Administrator, Estudio Consultivo De Seguros S.A. "to accept shares in Reinsurance¹⁰ transactions" on behalf of Lloyd Italico up to a limit of \$10,000.¹¹

Based on these facts, Conrail argues that Mr. Ambriano's signature on the \$500,000 Lloyd Italico Excess Policy binds Lloyd Italico because Mr. Ambriano had express or apparent authority to act on behalf of Lloyd Italico.

Agency cannot be assumed from the mere fact that one does an act for another. Whether an agency relationship exists is a question of fact. The party asserting an agency relationship has the burden of proving it by a fair preponderance of the evidence. Agency is created where there exists a manifestation by the principal that the agent shall act for him, the agent's acceptance of the undertaking and the understanding of the parties that the principal is to be in control of the undertaking. Before a factfinder can conclude that an agency relationship exists and that the principal is bound by a particular act of the agent, the factfinder must determine that one of the following exists:

- 1) express authority directly granted by the principal to bind the principal as to certain matters; or
- 2) implied authority to bind the principal to those acts of the agent that are necessary, proper and usual in the exercise of the agent's express authority; or
- 3) apparent authority, i.e. authority that the principal has by words or conduct held the alleged agent out as having; or
- 4) authority that the principal is estopped to deny.¹²

⁹ PLAR apparently no longer exists; it was dissolved and "run-off" in the mid-1980s. See SJM, Ex. 6.

¹⁰ "Reinsurance" is "Insurance of all or part of one insurer's risk by a second insurer, who accepts the risk in exchange for a percentage of the original premium. 'The term 'reinsurance' has been used by courts, attorneys, and textwriters with so little discrimination that much confusion has arisen as to what that term actually connotes. Thus, it has so often been used in connection with transferred risks, assumed risks, consolidations and mergers, excess insurance, and in other connections that it now lacks a clean-cut field of operation. Reinsurance, to an insurance lawyer, means one thing only — the ceding by one insurance company to another of all or a portion of its risks for a stipulated portion of the premium, in which the liability of the reinsurer is solely to the reinsured, which is the ceding company, and in which contract the ceding company retains all contact with the original insured, and handles all matters prior to and subsequent to loss.'" Black's Law Dictionary (9th ed. 2009) citing 13A John Alan Appleman & Jean Appleman, Insurance Law and Practice § 7681, at 479-80 (1976).

¹¹ SJM, Ex. 7.

¹² Volunteer Fire Co. of New Buffalo v. Hilltop Oil Co., 412 Pa. Super. 140, 146-47, 602 A.2d 1348, 1351-52 (1992).

“The burden of establishing an agency relationship rests with the party asserting the relationship.”¹³

Conrail has not been able to discover any document giving PLAR or Mr. Ambriano express authority to bind Lloyd Italico with respect to the issuance of excess¹⁴ policies in the amount of \$500,000, such as the one at issue here.¹⁵ Instead, the evidence shows only that PLAR’s and thereby Mr. Ambriano’s, express authority to act on behalf of Lloyd Italico was limited to reinsurance policies up to \$10,000.¹⁶

Conrail obtained an affidavit from Mr. Ambriano, who stated as follows with respect to the Lloyd Italico Policy:

I do not recognize the policy number or the form of such number. I have no recollection of signing this document. However, the signature that appears on [it] is a photocopy of my signature.

Although I have no specific recollection of signing [it] or the 1978 transaction to which it refers approximately 36 years ago, I recall that Lloyd Italico was a member of PLAR and I wrote business on behalf of PLAR. I understood I was authorized to sign [it] in May 1978. I would not have signed [it] if I did not believe I was authorized by PLAR to sign it on behalf of Lloyd Italico.

Even when the court views this statement in the light most favorable to Conrail, Mr. Ambriano’s vague, artfully written, recollection is not evidence that he had express authority to execute the excess Policy for Lloyd Italico. At best, it is evidence that he believed he was authorized to sign the Policy by PLAR.

¹³ Basile v. H&R Block, Inc., 563 Pa. 359, 367-8, 761 A.2d 1115, 1120 (2000).

¹⁴ “Excess insurance” is “An agreement to indemnify against any loss that exceeds the amount of coverage under another policy.” Black’s Law Dictionary (9th ed. 2009). Excess policies are usually between an insurer and an insured that is not also an insurer, unlike reinsurance where both parties are insurance companies.

¹⁵ Conrail has also not produced any evidence that Lloyd Italico expressly authorized R.A. Browning, Independence Marine Group, or Richard H. Byron to act for Lloyd Italico with respect to the Endorsements to the Policy.

¹⁶ SJM, Ex. 7.

Conrail next argues that Mr. Ambriano had apparent authority to act on behalf of Lloyd Italico with respect to the Policy.

Apparent authority exists where a principal, by words or conduct, leads people with whom the alleged agent deals to believe that the principal has granted the agent the authority he or she purports to exercise. Therefore, in determining the apparent authority of an agent, the court must look to the actions of the principal, not the agent. An agent cannot, simply by his own words, invest himself with apparent authority. Such authority emanates from the action of the principal and not the agent.¹⁷

There is no evidence that Lloyd Italico did anything to lead Conrail, or Conrail's brokers, to believe that PLAR or Mr. Ambriano had authority to issue the excess Policy on behalf of Lloyd Italico.¹⁸

There is evidence that Mr. Ambriano and other PLAR representatives represented in 1978 to Conrail's brokers that they were acting on behalf of Lloyd Italico.¹⁹ However, at the time the parties' entered into the Policy, Conrail and its brokers could not rely upon only the agent's declaration of authority; they needed some manifestation from the principal upon which to base their reliance. There is no evidence of earlier or contemporaneous act(s) by Lloyd Italico, as principal, that were witnessed by Conrail or someone acting on behalf of Conrail, which act(s) appeared to cloak Mr. Ambriano with the authority to act for Lloyd Italico. There is no evidence that Lloyd Italico misled or confused Conrail as to Mr. Ambriano's authority.

¹⁷ Volunteer Fire Co. of New Buffalo v. Hilltop Oil Co., 412 Pa. Super. 140, 149, 602 A.2d 1348, 1353 (1992).

¹⁸ There is also no evidence that Lloyd Italico did anything to lead Conrail, or Conrail's brokers, to believe that R.A. Browing, Independence Marine Group, or Richard H. Byron had authority to act for Lloyd Italico with respect to the Endorsements to the Policy.

¹⁹ See SJM, Exs. 10, 11, 13, 14, 15, 16; Lloyd Italico's Reply to SJM, Ex. 5. Interestingly, the premium checks, which no one disputes that Conrail paid, were not made out directly to "Lloyd Italico," but appear to have been made out to "George B. McNeill Int'l", "Independence Marine Service, Inc." and "National Brokerage Agencies, Inc." See SJM, Exs. 14, 17, 25; Response, Ex. 13.

The lack of any evidence of acts by Lloyd Italico distinguishes this case from the two upon which Conrail relies for its argument that conduct of the agent can serve as evidence of the agent's authority. In Turner Hydraulics, Inc. v. Susquehanna Construction Corp.²⁰ the principal delegated to his agent so much authority for a construction project that the court found it was reasonable for the third party to believe the agent also had the authority to promise payment for additional work. In Leidigh v. Reading Plaza Gen., Inc.,²¹ the principal engaged in affirmative acts that confirmed the authority of the agent to make the purchase in question.²² Here, there is no evidence that Lloyd Italico knew Mr. Ambriano was acting for it in any capacity, nor that Lloyd Italico participated or acquiesced in, or benefited from, any of Mr. Ambriano's actions.

The much later, incomplete, recollection of the purported agent, Mr. Ambriano, is not evidence of apparent authority that would bind Lloyd Italico to honor the Policy. It is true that "[t]he authority of an agent can always be proven [at trial] by the agent himself."²³ If Mr. Ambriano had testified that he recalled a specific statement made, a document executed, or some other act by Lloyd Italico that gave him authority to execute the Excess Policy on behalf of Lloyd Italico, then the court would be required to send the issue of his credibility to trial. However, he did not so testify. He testified only that he believed PLAR had authorized him to

²⁰ 414 Pa. Super. 130, 606 A.2d 532 (1992).

²¹ 431 Pa. Super. 310, 636 A.2d 666 (1994), relying upon Turner Hydraulics. In Leidigh, an advisory jury "found that the general partner of [the principal] was aware of [the limited partner agent's] participation in the negotiation and purchase of the dining car." *Id.* 636 A.2d at 667. As a result, the principal was, in effect, estopped from denying the agent's authority to purchase the rail car.

²² Specifically, the principal sent the seller a check for moving expenses for the railcar after the agent negotiated the purchase of the railcar.

²³ See Stern v. Dekelbaum, 153 Pa. Super. 452, 455-56, 34 A.2d 272, 273 (1943) (Explaining "the well-known rule that agency cannot be established by the declarations of the alleged agent. . . . [T]he 'declarations' as used in the rule, means evidence of hearsay statements made by the alleged agent out of court to some person who is called as a witness. It does not exclude the testimony of the alleged agent himself, appearing as a witness in court. . . . The rule excludes an agent's declarations to prove agency when offered by a third person, but authority may be shown by the agent's own testimony [at trial].")

sign on behalf of Lloyd Italico. Unfortunately, there is no evidence that PLAR itself had the authority to deputize him to execute a \$500,000 excess policy for Lloyd Italico.

Where there is no evidence, testimonial or otherwise, that Lloyd Italico expressly, or even apparently, authorized PLAR or Mr. Ambriano to issue this large Excess Policy in Lloyd Italico's name, then there is no issue of fact for the jury. In order to find for Conrail, the jury would have to engage in improper speculation to find that Mr. Ambriano had authority and that the Policy is valid. Instead, the court must conclude that Conrail has failed to proffer evidence to prove that the Lloyd Italico Policy exists and is enforceable.

Conrail claims that Lloyd Italico should be estopped from denying Mr. Ambriano's agency because it failed promptly to deny the existence of the Policy when Conrail attempted, in the 1990s, to notify Lloyd Italico of its claims under the Policy. "Authority by estoppel occurs when the principal fails to take reasonable steps to disavow the third party of their belief that the purported agent was authorized to act on behalf of the principal."²⁴ However, by the time Conrail presented its claims to Lloyd Italico, there was nothing Conrail could have done to correct the problem even if it had immediately been informed of the problem. The Policy had been issued and had run its course more than ten years earlier. Even if Lloyd Italico had promptly responded to the first notice of claim it received from Conrail, in 1995, and had told Conrail that Mr. Ambriano was not authorized to issue the Policy, Conrail could not at that point have obtained substitute coverage for the 1978-1979 Policy year.²⁵

²⁴ See Walton v. Johnson, 66 A.3d 782, 786 (Pa. Super. 2013) .

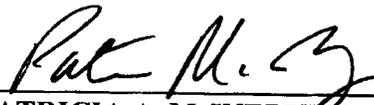
²⁵ Conrail makes much of the fact that Lloyd Italico did not expressly dispute the authority of Mr. Ambriano and the validity of the Policy until 2010, when it filed its first pleading in this action, rather than in 1995 when Conrail sent Lloyd Italico's successor some documents purporting to represent the Policy. However, at least part of that delay was caused by Conrail, who did not file this suit until 2004, and who may never have made proper service on Lloyd Italico.

There is no evidence that Lloyd Italico was on notice of the Policy at or about the time Mr. Ambriano signed it in 1978 and that Lloyd Italico chose to remain silent about his lack of authority. If such evidence existed, then an estoppel argument might prevail.

CONCLUSION

For the reasons set forth above, Lloyd Italico's Motion for Summary Judgment Regarding the Non-Existence of the Insurance Policy must be granted.

BY THE COURT:



PATRICIA A. McINERNEY, J.

CONSOLIDATED RAIL CORPORATION

Plaintiff,

v.

ACE PROPERTY AND CASUALTY
INSURANCE CO., ET AL.

Defendants.

IN THE PENNSYLVANIA
COURT OF COMMON PLEAS
PHILADELPHIA COUNTY
TRIAL DIVISION

CIVIL ACTION
SEPTEMBER TERM 2004

No. 002638

DOCKETED

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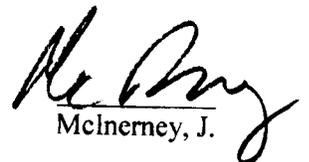
R. POSTELL
DAY FORWARD

AND NOW, this 8th day of April, 2015, upon consideration of the Stipulation for

Entry of Final Judgment filed by Plaintiff Consolidated Rail Corporation ("Conrail") and Defendants Continental Insurance Company in its own right, Continental Insurance Company as successor-in-interest to certain policies issued by Harbor Insurance Company, and Continental Insurance Company as successor-in-merger to Pacific Insurance Company (the "Continental Insurers"), it is hereby ORDERED that

(1) Conrail's Environmental Claims regarding the 27 non-Focus Sites listed in the Complaint are discontinued without prejudice due to lack of ripeness.

(2) Final judgment is entered in favor of defendants and against Conrail as to all remaining claims and all remaining parties, without costs to any party, pursuant to Pennsylvania Rule of Appellate Procedure 341(b)(1).


McInerney, J.

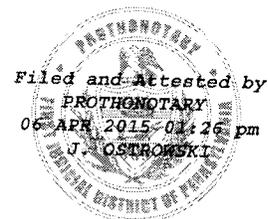
Consolidated Rail Corp -STPAP

Case ID: 040902638
Control No.: 15040703



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Attorneys for Plaintiff
 Consolidated Rail Corporation

CONSOLIDATED RAIL CORPORATION <div style="text-align: right;"><u>Plaintiff,</u></div>	:	IN THE PENNSYLVANIA
	:	COURT OF COMMON PLEAS
	:	PHILADELPHIA COUNTY
	:	TRIAL DIVISION
	:	CIVIL ACTION
v.	:	SEPTEMBER TERM 2004
ACE PROPERTY AND CASUALTY INSURANCE CO., ET AL.	:	No. 002638
	:	
<u>Defendants.</u>	:	

STIPULATION FOR ENTRY OF FINAL JUDGMENT

Plaintiff Consolidated Rail Corporation (“Conrail”) and Defendants Continental Insurance Company in its own right, Continental Insurance Company as successor-in-interest to certain policies issued by Harbor Insurance Company, and Continental Insurance Company as successor-in-merger to Pacific Insurance Company (the “Continental Insurers”), by and through their respective undersigned counsel, hereby stipulate as follows:

WHEREAS, Conrail filed a Complaint for Declaratory Relief and Breach of Insurance Contracts (“Complaint”) against 55 insurers with respect to Conrail’s claims for insurance

coverage under general liability and excess liability insurance policies (“Policies”) that Conrail purchased from the insurers to indemnify Conrail for its alleged liability for property damage at 33 environmental sites (“Environmental Claims”);

WHEREAS, all but three defendants have previously been dismissed from this action based on the settlement of their disputes with Conrail;

WHEREAS, the first phase of this environmental insurance coverage litigation has been limited to Conrail’s Environmental Claims at six “Focus Sites”: the rail yards at Beacon Park, Massachusetts; Conway, Pennsylvania; Elkhart, Indiana and Paoli, Pennsylvania; the car shop and reclamation facility at Hollidaysburg, Pennsylvania; and the Berks disposal facility at Douglassville, Pennsylvania;

WHEREAS, based on the Court’s interpretation and application of the Operations Clause and applicable facts, Conrail’s Environmental Claims regarding the other 27 sites listed in the Complaint involve, for each site, remaining covered damages that are currently below the amount of the Policies’ underlying limits and/or retentions and on presently known facts are not expected to exceed such underlying limits and/or retentions in the foreseeable future and thus are not ripe;

WHEREAS, on December 30, 2014, the Court granted Defendant Lloyd Italico & L’Ancora’s Motion for Summary Judgment Regarding the Non-Existence of the Insurance Policy (“Lloyd Italico Ruling”), thereby effectively ruling that Lloyd Italico has no liability to Conrail regarding any of its Environmental Claims;

WHEREAS, on October 28, 2014, the Court granted Defendant Stonewall Insurance Company’s Amended Motion for Summary Judgment (“Stonewall Ruling”), thereby effectively

ruling that Stonewall has no liability to Conrail regarding its Environmental Claims regarding the Elkhart, Indiana Site;

WHEREAS, on October 28, 2014, the Court granted in part and denied in part the Continental Insurers' Motions for Summary Judgment ("Continental Summary Judgment Ruling");

WHEREAS, in the Continental Summary Judgment Ruling, based on its interpretation and application of the "Operations Clause" in the Continental Policies, the Court held that the Continental Insurers have no liability to Conrail with respect to the Elkhart Site, the Control Tower Area of the Beacon Park Site, pre-1981 damage at the rest of the Beacon Park Site (including the Charles River Chamber Area), pre-1977 damage at the Conway Site; and pre-1979 damage at the Paoli Site;

WHEREAS, the Court also held that the Continental Insurers have no liability to Conrail with respect to the Hollidaysburg Site, based on the Court's interpretation of the "Own Property Exclusion" in the Continental Policies and on its finding that Conrail had "not shown the pollution [at Hollidaysburg] affected a third party's property, i.e., ... did not migrate to neighboring properties";

WHEREAS, the Court also held that the Continental Insurers have no liability to Conrail for \$707,200 in penalties Conrail incurred with respect to the Conway Site;

WHEREAS, the Court also held that the remediation and other costs Conrail incurred with respect to the Focus Sites are not covered under the Continental Policies issued for the 1985-1986 policy year and thereafter;

WHEREAS, under the Continental Summary Judgment Ruling, coverage is not wholly precluded for Conrail's Environmental Claims with respect to some damages at the Beacon Park Site, the Paoli Site, the Conway Site and the Douglassville Site;

WHEREAS, nonetheless, based on the Court's interpretation and application of the Operations Clause and applicable facts, the damages that remain potentially covered with respect to the Beacon Park Site, the Conway Site, the Douglasville Site and the Paoli Site currently are below – and on presently known facts are expected for the foreseeable future to remain below – the amount necessary to exceed the underlying limits and/or retentions of the Continental Policies deemed potentially applicable by the Court;

WHEREAS, therefore, based on the Court's interpretation and application of the Operations Clause and applicable facts, the Continental Insurers have no liability to Conrail for its Environmental Claims regarding the Beacon Park Site, the Conway Site, the Douglasville Site and the Paoli Site, and the Continental Insurers are entitled to summary judgment in their favor with respect to those Environmental Claims.

WHEREAS, Conrail and the Continental Insurers wish to enter into this stipulation in order to provide for an efficient resolution of this action via an appeal and any subsequent proceedings; and

WHEREAS, the Parties intend to preserve all of their appeal rights and do not intend by this stipulation to waive any rights with respect to appellate or subsequent remand proceedings or to any other matters that arise after the Court, based on this Stipulation, enters final judgment in this case;

NOW, THEREFORE, it is hereby stipulated and agreed by the parties to this litigation, by and through their respective undersigned counsel, that the Court may enter an order:

(1) Discontinuing without prejudice Conrail's Environmental Claims regarding the 27 non-Focus Sites listed in the Complaint due to lack of ripeness; and

(2) Entering final judgment in favor of defendants and against Conrail as to all remaining claims and all remaining parties, without costs to any party, pursuant to Pennsylvania Rule of Appellate Procedure 341(b)(1).

Date: April 6, 2015

Respectfully submitted,

/s/ Laurence Z. Shiekman

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