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KING COUNTY, WASHINGTON
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DEPARTMENT OF
JUDICIAL ADMINISTRATION

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

ALCOA INC. and NORTHWEST ALLOYS, INC. Plaintiffs, v. ACCIDENT & CASUALTY INSURANCE COMPANY, et al., Defendants.	Case No. 92-2-28065-5 SEA - CONSOLIDATED The Honorable Sharon Armstrong [JOINTLY ~~PROPOSED~~] ORDER DENYING OLD REPBULIC'S MOTION FOR SUMMARY JUDGMENT RE: SUIT LIMITATION AS TO SITE I LANDFILL AND ROAD OIL SPILL AREA

THIS MATTER comes before the Court on Old Republic's Motion for Summary Judgment Regarding Suit Limitation as to Site I Landfill and Road Oil Spill Area ("Old Republic's Suit Limitation Motion"). In addition to argument of counsel, the Court considered the following papers and related attachments:

Defendant Old Republic Insurance Company's Motion for Summary Judgment Re: Suit Limitation as to Site I Landfill and Road Oil Spill Area;

Certain Defendants' Joinder in Old Republic Insurance Company's Motion for Summary Judgment Re: Suit Limitation as to Site I Landfill and Road Oil Spill Area;

Defendant Birmingham's Joinder in Old Republic Insurance Company's Motion for Summary Judgment Re: Suit Limitation as to Site I Landfill and Road Oil Spill Area;

Royal Belge's Joinder in Old Republic Insurance Company's Motion for Summary Judgment Re: Suit Limitation as to Site I Landfill and Road Oil Spill Area;

Plaintiffs' Opposition to Defendant Old Republic Insurance Company's Motion for Summary Judgment Re: Suit Limitation as to Site I Landfill and Road Oil Spill Area; and,

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Heller Ehrman White & McAuliffe LLP
701 Fifth Avenue, Suite 6100
Seattle, Washington 98104-7098
Telephone (206) 447-0600

SHARON S. ARMSTRONG
JUDGE OF THE SUPERIOR COURT
KING COUNTY COURT HOUSE
SEATTLE, WASHINGTON 98104
(206) 296-9303

To: Counsel of Record

Re: Alcoa, Inc. v. Accident and Casualty Insurance Co., et al
King County Cause No. 92-2-28065-5 SEA Consolidated

Date: July 17, 2003

Dear Counsel:

This letter constitutes a summary of my rulings on the motions for summary judgment argued July 11, 2003. The prevailing party on each motion is requested to prepare an order for that motion in proper format, i.e. listing all materials considered, etc., and to note the order for presentation not later than August 1, 2003.

1. Plaintiffs' Motion for Summary Judgment Regarding Damages at Vancouver Site

Granted as to $128,735

Denied as to balance of damages sought (see Item 2 below)

2. Certain Defendants' Motion for Summary Judgment Regarding Non-Litigated Areas at the Vancouver Site

Granted as to Vanexco Oil Disposal Area.

Denied as to ACPC Area due to disputed issues of material fact concerning characterization of costs and whether ACPC area damage is part of the Rod Mill area damage and was caused by the Rod Mill operations.

Granted as to the Northeast Parcel Landfill to the following extent:

Judge Learned granted plaintiff's motion for summary judgment as to certain loss areas, finding that damage in such areas was fortuitous prior to various referenced dates:

"Landfill Area-East
soils and groundwater outside WMU

Landfill Area-North
landfill itself
soils and groundwater outside WMU"

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Copy received; Approved as to Form;
Notice of Presentation Waived; Objected
to on the grounds set out on brief and in
oral argument:

STEPTOE & JOHNSON LLP.

By: _____
for Roger E. Warin

Attorney for Lexington Insurance Company and
Birmingham Fire Insurance Company of Pennsylvania

DAAR, FISHER, KANARIS & VANEK, PC

By: _____
for Lawrence D. Mason.

Attorney for Commonwealth Insurance Company

The Northeast Parcel Remedial Action Report at p. iv (A 69110016), Tab 35 of Declaration of Mark A. Black, describes the Northeast Parcel as geographically distinct from the East Landfill and the North and North 2 Landfill. At the same time, the trial testimony established that the groundwater contamination associated with these landfills extends over a considerable number of acres, presumably beyond the boundaries of the landfills themselves. See Trial Testimony Volume LVI page 10392 lines 6 to 20 and page 10396 line 5, at Tab 33 of Black Declaration. The jury awarded $442,176.34 in damages for the two landfills. This is the same amount plaintiffs' damages trial expert had requested for undifferentiated "On-Site Landfill."

The import of all this information is that groundwater and soils contamination caused by the North and East Landfills that may have penetrated the Northeast Parcel is damage for which future costs may be recovered because a fortuity determination as to these damages has already been entered. Damage in the Northeast Parcel caused by some other source of contamination is not recoverable as a future cost because damages from any other source of contamination within that area was not tried and the issue was not preserved at trial.

3. Lexington's Motion for Partial Summary Judgment Reducing the Vancouver Judgment for Pre-1996 Costs Because of Alcoa's Impairment of Lexington's Contribution Rights

Denied. Alcoa's failure to timely pursue other potentially liable insurers is not a violation of the subrogation impairment clause of the policy. Further, there is no common law equitable right of reduction in these circumstances

4. Lexington's Motion for Partial Summary Judgment Re: Prong II of the Waste Management Occurrence at Massena

Denied due to disputed issues of material fact. Judge Learned's oral decision of August 23, 2002 cannot fairly be interpreted to grant defendants' summary judgment motion on this issue. Furthermore, the documents presented by defendants in support of the motion, without more, do not establish as a matter of law that by July 1, 1977 Alcoa knew or should have known the cost of cleanup and repair of the Massena waste management unit would likely reach $250,000.

Nevertheless, for purposes of guiding the parties in their mediation, the court notes that there is no compelling reason to exclude the SPL remediation costs from the Prong II level of coverage calculation and that at least one of the four documents presented by defendants appears to be highly probative of the issue.

5. Certain Defendants' Motion for Summary Judgment Re High-Level Excess Policies

Granted in part. It is consistent with Judge Learned's prior decisions to measure the excess carriers' potential liability on an occurrence by occurrence basis. Whether the existence of a justiciable controversy is measured by a standard of "practical likelihood", "real and concrete" or "potential", at this advanced stage of the litigation there are only three occurrences that may exceed $50 million in damages: Massena (Waste), Pt. Comfort (Waste) and Badin (Waste). Claims relating to all other occurrences at the 11 sites are dismissed without prejudice.

6. Old Republic's Motion for Summary Judgment Re: Suit Limitation as to Site I Landfill and Road Oil Spill Area

Denied due to disputed issues of material fact. The court relieves Alcoa of its counsel's error in designating "Site 1" reserves.

Knowledge that the Road Spill Area may have been contaminated with a dilute solution of PCB's (less than 50 ppm) is not knowledge that this property was damaged (i.e. that materials are present in sufficient quantities to pose a risk to plants or organisms or exist at levels that might require remediation).

Thank you for your excellent argument and briefing on these issues.

Very truly yours,

Sharon S. Armstrong

Honorable Sharon S. Armstrong

SHARON S. ARMSTRONG
JUDGE OF THE SUPERIOR COURT
KING COUNTY COURT HOUSE
SEATTLE, WASHINGTON 98104
(206) 296-9363

TO: COUNSEL OF RECORD

RE: ALCOA, INC. V. ACCIDENT AND CASUALTY INSURANCE CO., ET AL
KING COUNTY CAUSE NO. 92-2-28065-5 SEA CONSOLIDATED

LEXINGTON'S MOTION FOR SUMMARY JUDGMENT RE: OFFSET

CERTAIN DEFENDANTS' MOTION TO STRIKE PLAINTIFFS' REPLY

DATE: JULY 16, 2003

This matter comes before the court on Lexington's Motion for Partial Summary Judgment Reducing the Vancouver Judgment for Pre-1996 Costs Because of Alcoa's Settlements with Other Property Carriers. In addition to argument of counsel, the court considered the following papers and related attachments:

Lexington's Motion for Partial Summary Judgment Reducing the Vancouver Judgment for Pre-1996 Costs Because of Alcoa's Settlements with Other Property Carriers

Plaintiffs' Opposition to Lexington's Motion

Certain Defendants' Response to Lexington's Motion

Plaintiffs' Reply to the Joint Policy Defendants' Response

Lexington's Reply to Alcoa's Opposition

Certain Defendants' Motion to Strike Plaintiffs' Reply to their Response to Lexington's Motion

Plaintiffs' Opposition to Certain Defendants' Motion to Strike

Certain Defendants' Reply

For the following reasons, the motion is denied.

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Motion to Strike

The motion to strike is denied. Since new issues not discussed in Lexington's memorandum were raised by Certain Defendant's response, it was acceptable for Alcoa to file an additional reply.

Lexington's Motion

Alcoa has obtained judgment against Lexington for $5,534,221.49 for the pre-1956 manufacturing occurrence costs at the Vancouver Rod Mill and Extrusion Building. Lexington seeks a reduction of that judgment to reflect the liability of other carriers on that risk. The judgment affects carriers that participated in three primary level policies: July 1, 1977 to July 1, 1980 (Lexington only); July 1, 1980 to July 1, 1980 (various participants); and July 1, 1983 to July 1, 1984 (various participants). Each policy had different limits.

Lexington's 1977-1980 policy included an Other Insurance clause that provides other insurance shall respond first to damages. The 1980-1983 policy has essentially the same provision. The 1983 -1984 policy has both an Other Insurance clause and a Joint Loss clause that supercedes the Other Insurance clause in certain instances. The court concludes the Joint Loss clause does not apply here and therefore this analysis assumes the three relevant policies have mutually inconsistent Other Insurance clauses that provide each policy is excess to the other. (Judge Learned's orders of August 23, 2000 seem to provide that the three policies are joint and severally liable but that among the insurers on the 1980-83 and 1983-84 policies there is only several liability. While this court does not understand how these rulings would work together in practice, it is not necessary to reach the issue because the request for offset is being denied.)

Alcoa has settled with carriers that subscribed to a majority of the coverage provided by the 1980-1983 and 1983-1984 policies. Lexington now seeks an offset against its judgment for coverage percentages triggered by these policies, even though the settlements themselves do not allocate amounts to any specific occurrence.

Choice of Laws.

It is the law of this case that insurance contract interpretation issues that raise choice of laws issues are governed by Pennsylvania law. Alcoa v. Acma Ca. & Sur. Co., 140 Wn. 2d 517, 522 n.2 (2000). The interpretation of Other Insurance clauses and a Joint Loss Clause are issues of contract interpretation. If Washington law conflicts with Pennsylvania law, these issues would be governed by Pennsylvania law. The primary issue for determination in this motion is whether Pennsylvania law on the point exists.

Washington law as expressed in Weverhaeuser v. Commerical Union Ins. Co., 142 Wn. 2d 654, 15 P.3d 115 (2000), and Puget Sound Energy v. Alba General Insurance Co., 2003 WL 1835164 (Wa.) requires an insurer to prove the insured has received a double recovery for indivisible environmental losses before the insurer will be entitled to an offset for amounts received by the insured from settling carriers.

There is no Pennsylvania appellate court decision directly on point. Lexington argues that Koppers Co. Inc. v. Aetna Ca. and Sur. Co., 98 F.3d 1440 (3d Cir. 1996), a Third Circuit decision predicting what Pennsylvania law would be based on decisions of the Pennsylvania intermediate appellate court, requires application of the apportioned share set-off rule. That is, the carriers found liable for the total cost of environmental cleanup are entitled to an offset for the insured's settlements with other solvent defendant insurers in the amount of the settling insurers' apportioned shares of coverage liability. If Koppers is an accurate prediction of Pennsylvania law on this issue, then the laws of the two states conflict because they would produce a different outcome. Seizer v. Sessions, 132 Wn.2d 642, 648, 940 P.2d 261, 264 (1997). Pennsylvania law, assuming it exists, should therefore apply.

Pennsylvania Law

Is there Pennsylvania law on the issue of setoff?

The Koppers court notes that the Pennsylvania Supreme Court in J.H. France Refractories Co. v. Allstate Insurance Co., 534 Pa. 29, 626 A.2d 502 (1993) held that in a multiple trigger indivisible harm case, all insurers whose coverage had been triggered were jointly and severally liable for the full amount of the loss up to policy limits, and that the insured was entitled to select the policy or policies under which it would be indemnified. Any insurer saddled with more than its fair share of liability then could recover, through a contribution action, a share of its liability from other insurers on the risk. J.H. France did not, however, involve settling insurers.

To predict what the Pennsylvania court would do if some defendant insurers had settled, the Koppers court examined Gould, Inc. v. Continental Cas. Co., 401 Pa. Super. 219, 585 A.2d 16 (1991) and Charles v. Giant Eagle Mkts., 513 Pa. 474, 522 A.2d 1 (1987). In Gould, the Pennsylvania Superior Court applied the apportioned share set-off rule, holding that where two insurers are obligated to cover the same loss (one primary and one excess) and the primary insurer settles, the litigating excess insurer cannot seek contribution from the settling insurer. Instead, the litigating insurer is entitled to prorate the amount of coverage based on the settling insurer's proportionate share of coverage responsibility as determined by the terms of the two policies. The Koppers court concluded that Gould was not inconsistent with J.H. France.

Similarly, in Charles, the Pennsylvania Supreme Court in a joint and several tort liability case adopted the apportioned share set-off rule. It rejected any right of contribution against settling defendants and instead reduced the verdict by the amount of the settling defendants' apportioned share of liability, regardless of the amount actually received by plaintiff in settlement.

The Koppers court therefore concluded:

> We accordingly predict, that, if presented with our case, the Pennsylvania Supreme Court would hold that each non-settling insurer whose policy was triggered to cover an indivisible loss is jointly and severally liable, up to the limits of its policy, for the full amount of the judgment, *less* the settling insurers' apportioned shares.

Koppers, at 1453.

Lexington argues that Koppers therefore authorizes setoffs and that American Casualty Co. of Reading v. Phico Insurance Co., 549 Pa. 682, 702 A.2d 1050 (1997), decided after Koppers, resolves the issue of how the setoff should be allocated among multiple insurers on the risk when all policies have an "other insurance clause". In Phico, the plaintiff's medical malpractice case had settled and the remaining issue in the declaratory judgment action between two excess carriers was how they should divide the liability to the plaintiff between them. Both policies had "other insurance" clauses, which the court held essentially cancelled each other out. The court instead relied on equitable principles to conclude that the equal shares allocation method rather than the policy limits method would be used. The case does not involve the offset issue.

Alcoa observes, correctly, that Koppers is not Pennsylvania law, that Phico does not address the setoff issue, and that the Phico court remanded the case for determination of what amount Phico had already paid on behalf of the jointly insured defendant. The remand order suggests a Weyerhaeuser-type analysis, i.e. that the claiming party must show the amount actually paid on the loss before it can recover overpayments.

Alcoa further argues that Gould does not support the Koppers setoff rule, that whether pro rata apportionment is available depends on the language of the policy, and that the Gould decision does not address offset. Alcoa urges the application of Washington law because it is well-settled whereas there is no clear Pennsylvania law. Alcoa opines that Koppers, by applying pro rata setoff, in effect overrules the J.H. France joint and several liability rule, a rule designed to assure the insured it will be fully compensated for its loss. Finally, Alcoa argues that apportioned set-off would be inconsistent with the Washington Supreme Court's Alcoa decision, now law of this case, which holds that the policies do not provide for proration of coverage and that such a provision will not be implied. Alcoa at 56.

This court concludes that on the issue of setoff allocation Koppers is inconsistent with Pennsylvania law and with the law of this case.

The J.H. France court in a multiple-trigger asbestosis case held that every insurer on the risk during the development of the disease had an obligation to indemnify the insured and that each insurer was obligated to pay the sums the insured became obligated to pay. The court rejected the trial court's pro rata allocation of loss according to coverage year for several reasons, the most significant of which was the policy language.

First and most compelling, is the language of the policies themselves. Each insurer obligated itself to 'pay on behalf of the Insured *all sums* which the Insured shall become legally obligated to pay as damages because of bodily injury to which this insurance applies'. . . Under any given policy, the insurer contracted to pay *all sums* which the insured becomes legally obligated to pay, not merely some pro rata portion thereof." J. H. France at 41 (emphasis in original).

The court concluded: "In order to accord J.H. France the coverage promised by the insurance policies, J.H. France should be free to select the policy or policies under which it is to be indemnified." Id.

The court made clear that its ruling would "not alter the rules of contribution or the provisions of 'other insurance' clauses in the applicable policies. There is no bar against an insurer obtaining a share of indemnification of defense costs from other insurers under 'other insurance' clauses or under the equitable doctrine of contribution." J.H. France at 41. The court does not address, of course, the procedure to be followed when contribution is foreclosed, as it is here. Nevertheless, the significance of this decision for our purposes is that compensating the insured as the insurer agreed to do under the policy is a paramount consideration.

In this case, where there are competing "other insurance" provisions, Phico holds that the clauses cancel out and must be disregarded as unhelpful. Instead, the court is to consult common law equitable principles to determine whether allocation is available. For Koppers to be correct, common law equitable principles permitting allocation would need to trump the language of the insurance policies. None of the Pennsylvania cases applying the doctrine of equitable contribution do so in a manner that conflicts with insurance policy language.

The Koppers court's reliance on Gould is misplaced. In Gould, the court held an excess carrier had no right of contribution against the settling primary carrier on the same risk where the two carriers were not in privity of contract. Instead, the court held that the excess carrier's other insurance or pro rata clauses in its own contract would determine any pro rata allocation. "Regardless of whether the other insurers have paid their obligated sums, National Union [the excess carrier] cannot be made to pay coverage for which the other insurers are liable or any other amount, unless National Union agreed to such payment in its insurance policy." Gould at 225. The decision is based purely on policy language, not on equitable principles, and provides no guidance here.

Similarly, Charles v. Giant Eagle Markets, 513 Pa. 474, 522 A.2d 1 (1987) involved interpretation of Pennsylvania's Comparative Negligence Act and its Uniform Contribution Among Tortfeasors Act. The defendants were tortfeasors, not insurers with whom the plaintiff had a contractual relationship. The court held that the non-settling tortfeasor is required to pay his full pro-rata share of damages, even though that would result in a windfall to the plaintiff where settling tortfeasors had paid more than their pro rata share. The court pointed to the policy of encouraging settlements and the fact that a jury verdict does not more accurately measure a tortfeasor's obligation than an agreement between plaintiff and settling defendant. "There is no basis for concluding the jury verdict must serve as a cap on the total recovery that a plaintiff may receive." 522 A.2 at 2. Charles does not support the Koppers court conclusion nor does it support Lexington's position here.

For these reasons, Koppers is not an accurate prediction of Pennsylvania law on the issue of apportioned share offset. Instead, the Pennsylvania court would follow the J.H. France analysis and hold that where other insurance clauses must be disregarded because they are mutually inconsistent, the insured must receive full recovery of sums promised under the policy, and non-settling insurers are not entitled to an offset for settling insurers' pro rata shares of liability.

Law of the Case

Finally, the Washington Supreme Court has held that in the perils insured clause of the DIC policies here,

> the insurers obligated themselves to insure 'against all physical loss of, or damage to, the insured property,' not merely to some prorated portion thereof. . .
>
> Moreover, if DIC policies mean what the insurers claim they mean, the policy language should reflect that meaning. The policies in this case do not, and we decline to write a proration of coverage into the policies when the insurers failed to do so themselves.

Alcoa, 140.Wn.2d at 567-8. The setoff urged by Lexington is but another form of proration. The relief sought by Lexington would be inconsistent with the Washington Supreme Court's decision. The relief for setoff must therefore be denied.

Burden of Proof

Alcoa urges that Lexington cannot prove that Alcoa has received amounts in settlement that would constitute a double recovery for the Vancouver Rod Mill and Extrusion Building damages. While the court assumes that the Pennsylvania court would require the non-settling defendants to prove double recovery at trial, neither the correct burden of proof, nor the sufficiency of evidence of double recovery, is before this court for decision. Those issues are reserved for later discovery and determination.

Conclusion

For the foregoing reasons, Lexington's motion for partial summary judgment on the issue of pro rata offset is denied. Lexington may be able to prove at some future time that it is entitled to a reduction in judgment based on double recovery.

Dated this 16th day of July, 2003.

Sharon S. Armstrong

Honorable Sharon S. Armstrong