IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

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

Submitted: October 18, 2013
Decided: January 21, 2014

Upon Defendant American Insurance Company's Motion for Partial Summary Judgment Regarding Defense Obligation Under the Excess Liability Policies Issued to Plaintiff Mine Safety Appliances Company
GRANTED

OPINION

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

James S. Yoder, Esquire, White & Williams LLP, Peter P. McNamara, Esquire, Lawrence A. Levy, Esquire, Robert A. Maloney, Esquire, Michael A. Kotula, Esquire (Argued), Rivkin Radler LLP, Attorneys for Defendant

JOHNSTON, J.

FACTUAL AND PROCEDURAL CONTEXT

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

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

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

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

In response, Defendant insurance companies filed Motions for Summary Judgment and Motions for Partial Summary Judgment, individually and collectively, challenging their payment and defense obligations.

American Insurance Company ("AIC") filed this Motion for Partial Summary Judgment on September 10, 2013. The following AIC excess policies ("Policies") are at issue:

Policy Number	Policy Period
XLX 120 34 94	12/31/75-4/1/76
XLX 120 34 96	4/1/76-4/1/77
XLX 126 80 12	4/1/77-4/1/78
XEX 130 28 32	4/1/78-4/1/79
XLX 130 12 40	4/1/79-4/1/80
XLX 136 99 39	4/1/80-4/1/81
XLX 136 99 94	4/1/81-4/1/82
XLX 148 45 20	4/1/82-4/1/83
XLX 148 45 81	4/1/83-4/1/84
XLX 162 12 42	4/1/84-4/1/85
XLX 174 89 15	4/1/85-4/1/86[1]

The Policies are identical, with the exception of Policy XEX 130 28 32, which contains substantively similar contractual language.

[1] Maloney Aff. Exs. D through N.

STANDARD OF REVIEW

Summary judgment is granted only if the moving party establishes that there are no genuine issues of material fact in dispute and judgment may be granted as a matter of law.[2] All facts are viewed in a light most favorable to the non-moving party.[3] Summary judgment may not be granted if the record indicates that a material fact is in dispute, or if there is a need to clarify the application of law to the specific circumstances.[4] When the facts permit a reasonable person to draw only one inference, the question becomes one for decision as a matter of law.[5] If the non-moving party bears the burden of proof at trial, yet "fails to make a showing sufficient to establish the existence of an element essential to that party's case," then summary judgment may be granted against that party.[6]

ANALYSIS

Contentions of the Parties

AIC contends that the Policies do not require AIC to provide a defense in connection with the Underlying Claims against MSA. In response to AIC's

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

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

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

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

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

Motion, MSA conceded that AIC does not have a duty to defend under the Policies.

AIC also alleges that it has no duty to indemnify MSA for defense costs unless the costs were incurred with AIC's consent. AIC did not consent to MSA incurring defense costs. AIC references the language in ten out of the eleven Policies, where AIC agreed to "indemnify the Insured for the Insured's ultimate net loss," and defines "ultimate net loss" without including defense costs. In the remaining Policy, XEX 130 28 32, AIC agreed to pay "costs covered by its policy which are incidental thereto." The Policy separately defines "costs" as "interests on all judgments, investigation, adjustment and legal expenses excluding all expenses for salaried employees and retained counsel and all office expenses of the insured." AIC argues that this exclusion for all expenses of retained counsel establishes that the Policy does not cover defense costs.

MSA contends that the Motion should be denied for three reasons: (1) industry custom and usage demonstrates that the intent of "Defense Costs" provisions is only to prevent reimbursement of unreasonable defense costs; (2) AIC's denial of coverage precludes it from insisting that MSA comply with Policy conditions; and (3) AIC has failed to demonstrate prejudice from MSA's alleged failure to comply with Policy conditions, which AIC must do in order to escape its coverage obligations.

First, MSA argues that insurance industry custom and usage should be considered in interpreting the "Defense Costs" provisions. MSA cites *Sunbeam Corp. v. Liberty Mutual Insurance Co.* for the proposition that industry custom and usage is always relevant to determining contractual intent.[7] MSA argues that "Defense Costs" are words with a special meaning within the industry, and should be presumed to be used in that special way, regardless of whether the contract language is ambiguous.[8] According to MSA, industry custom and usage evidences that the intent of "Defense Cost" provisions is to prevent an insurer from paying unreasonable defense costs. MSA intends to introduce expert testimony regarding custom and usage.

Second, MSA contends that AIC's denial of coverage relieved MSA from its obligation to seek AIC's consent. MSA argues that AIC breached its insurance contracts with MSA when AIC denied coverage for MSA's claims. MSA cites *Alfiero v. Berks Mutual Leasing Co.* in support of its position that an insurer breaching the insurance contract relieves the policyholder of its contractual obligations.[9] MSA concludes that it cannot be forced to comply with the terms of Policies that AIC breached.

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[7] 781 A.2d 1189, 1193-94 (Pa. 2001).

[8] *See id.* at 1193.

[9] 500 A.2d 169, 172 (Pa. Super. Ct. 1985).

Third, MSA contends that AIC cannot escape its Policy obligations because AIC has failed to show it has been prejudiced by MSA's failure to comply with Policy conditions. MSA argues the prejudice rule is applicable in this circumstance. In cases where a policyholder failed to obtain an insurer's consent before settling the underlying claims, the court has required the insurer to show prejudice.[10] In *Nationwide Mutual Insurance Co. v. Lehman*, the Pennsylvania Superior Court reasoned that "[w]here the insured settles with a tortfeasor without the insurer's consent and does not prejudice the insurer's interests, the purpose of the consent-to-settle clause is lacking."[11] MSA argues that the purpose of the "Defense Costs" provision is to prevent insurers from paying unreasonable defense costs. MSA concludes that AIC has failed to show that the purpose of the provision has been frustrated, and therefore AIC has failed to demonstrate prejudice.

Contract Interpretation

Insurance policies are contracts, and are subject to the rules of contract interpretation.[12] "The court, as a matter of law, determines the existence of an

[10] *See Nationwide Mut. Ins. Co. v. Lehman*, 743 A.2d 933, 940 (Pa. Super. Ct. 1999).

[11] *Id*.

[12] *Am. & Foreign Ins. Co. v. Jerry's Sport Ctr., Inc.*, 2 A.3d 526, 540 (Pa. 2010).

ambiguity and interprets the contract."[13] The goal in interpreting the insurance contract is "to ascertain the intent of the parties as manifested by the language of the written instrument."[14] "A contract is ambiguous if it is reasonably susceptible of different constructions and capable of being understood in more than one sense."[15] "Where a provision of a policy is ambiguous, the policy provision is to be construed in favor of the insured and against the insurer, the drafter of the agreement."[16] However, if "the language of the contract is clear and unambiguous, a court is required to give effect to that language."[17] The courts will not "distort the meaning of the language or resort to a strained contrivance in order to find an ambiguity."[18]

The duty to indemnify is a contractual obligation. An insurer's duty "to provide a defense for claims asserted against its insured is contractual, and the

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[13] *Hutchison v. Sunbeam Coal Co.*, 519 A.2d 385, 390 (Pa. 1986).

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

[15] *Hutchison v. Sunbeam Coal Co.*, 519 A.2d at 390.

[16] *Prudential Prop. & Cas. Ins. Co. v. Sartno*, 903 A.2d 1170, 1174 (Pa. 2006) (citing *Standard Venetian Blind Co. v. Am. Empire Ins. Co.*, 469 A.2d 563, 566 (Pa. 1983)).

[17] *Prudential Prop. & Cas. Ins. Co. v. Sartno*, 903 A.2d at 1174 (citing *Gene & Harvey Builders, Inc. v. Pa. Mfrs. Ass'n Ins. Co.*, 517 A.2d 910, 913 (Pa. 1986)).

[18] *Madison Const. Co. v. Harleysville Mut. Ins. Co.*, 735 A.2d at 106.

courts will therefore look to the language of the policy at issue to determine an insurer's defense obligations."[19]

Relevant Policy Provisions

Policies XLX 120 34 94, XLX 120 34 96, XLX 126 80 12, XLX 130 12 40, XLX 136 99 39, XLX 136 99 94, XLX 148 45 20, XLX 148 45 81, XLX 162 12 42, and XLX 174 89 15 are identical. These Policies provide, in relevant part:

> INSURING AGREEMENTS
> Coverage. To indemnify the Insured for the Insured's ultimate net loss in excess of the insurance afforded under the Blanket Excess Liability or "Umbrella" policies specified in Item 7 of the Declaration . . .
>
> DEFINITIONS
> "Ultimate net loss" means all sums actually paid, or which the Insured is legally obligated to pay, as damages in settlement or satisfaction of claims or suits for which insurance is afforded by this policy . . .
>
> CONDITIONS
> 4. Payment of Expenses. Loss expenses and legal expenses, including court costs and interest, if any, which may be incurred by the Insured with the consent of the Company in the adjustment or defense of claims, suits or proceedings shall be borne by the Company and the Insured in the proportion that each party's share of loss bears to the total amount of said loss. Loss expense hereunder shall not include salaries and expenses of the Insured's employees incurred in investigation, adjustment and litigation.[20]

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[19] *Henkel Corp. v. Hartford Acc. & Indem. Co.*, 399 F. Supp.2d 607, 613 (E.D. Pa. 2005), *aff'd*, 271 Fed. Appx. 161 (3d Cir. 2008) (citing 1 Barry R. Ostrager & Thomas R. Newman, *Handbook on Insurance Coverage Disputes* § 5.01 (12th ed. 2004)).

[20] Maloney Aff. Exs. D through F; H through N.

Policy XEX 130 28 32 provides, in relevant part:

> INSURING AGREEMENTS
> I. To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages on account of:
> (A) Bodily Injury Liability which means bodily injury, sickness or disease sustained by any person which occurs during the policy period, including death at any time resulting therefrom; . . . and arising out of hazards as covered by the primary policy or policies specified in the declarations as primary insurance and issued by the Primary Insurer or Insurers indicated.
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> II. The Insurance afforded by this policy is excess over the amount of primary limits stated in Item 3 of the declarations and applies only (1) after the Primary Insurer has paid or shall have been held liable to pay such primary limits plus costs, or (2) in the event the insured has by final judgment been adjudged to pay a sum which exceeds the limits of liability of the Primary Insurer and the Primary Insurer has admitted liability for the amount of such limits, plus costs covered by its policy which are incidental thereto.
>
> DEFINITIONS
> 1. Costs. The word "Costs" means interest on judgments, investigation, adjustment and legal expenses excluding all expenses for salaried employees and retained counsel and all office expenses of the insured.
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> CONDITIONS
> 1. Payment of Costs
> (a) In the event of claim or claims arising which are terminated by settlement or judgment for not more than the primary limits, then no costs shall be payable by the Company.
> (b) Should, however, the amount of such settlement or judgment described in (a) exceed the primary limits, and this policy is the only policy providing coverage in excess of primary insurance, such costs as are incurred personally by the insured with the written consent of the Company and which are not covered by primary insurance will be paid by the Company, but only until the limits of liability afforded by

this policy have been exhausted by payment of judgments or settlements.[21]

Custom and Usage

The Court finds the Policies' terms are clear and unambiguous. Therefore, the Court will not consider extrinsic evidence, such as expert testimony on "custom and usage." MSA argues that when interpreting contracts, "custom in the industry or usage in the trade is always relevant and admissible in construing commercial contracts and does not depend on any obvious ambiguity in the words of the contract."[22] However, unless a usage is "certain, continuous, uniform, and notorious," it will not be denominated a custom.[23] Custom and usage "must be a rule . . . so certain and uniform as to be, not only valid and enforceable in a court of law, but the parties must be presumed to have known it and acted in reference to it."[24]

Courts have interpreted similar "Defense Costs" provisions as an obligation conditioned on the consent of the insurer.[25] The Court finds that these cases refute

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[21] Maloney Aff. Ex. G.

[22] *Sunbeam Corp. v. Liberty Mut. Ins. Co.*, 781 A.2d at 1193.

[23] *Albus v. Toomey*, 116 A. 917, 917 (Pa. 1922).

[24] *Id*.

[25] *See AstenJohnson v. Columbia Cas. Co.*, 483 F. Supp. 2d 425, 480 (E.D. Pa. 2007) *aff'd in part, rev'd in part on other grounds*, 562 F.3d 213 (3d Cir. 2009) (finding that "the policy only requires the insurer to pay the defense costs it consents to"); *Crown Ctr. Redevelopment Corp. v. Occidental Fire & Cas. Co.*,

MSA's argument that "Defense Costs" provisions have a special meaning in the insurance industry rising to the level of "custom and usage." The Court finds no reason to permit expert testimony on "custom and usage."

Indemnification of Defense Costs

The Court must decide if "ultimate net loss" includes indemnification of defense costs. In *AstenJohnson*, under nearly identical circumstances, the United States District Court for the Eastern District of Pennsylvania refused to "read a duty into an insurance policy" and found that the insurer had no duty to indemnify the insured for defense costs where the policies contained a consent-to-defense provision and the insurer had not consented.[26]

In *Stonewall Insurance Co. v. Asbestos Claims Management Corp.*, certain policies stated: "[T]he insurer will pay a proportion of 'expense[s] and/or costs in connection with any claim or suit' that are 'incurred jointly by mutual consent.'"[27] The *Stonewall* Court found that the insurer had no duty to defend or pay costs, "but only has the right to do so at its own election. . . . The consent provision does not

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716 S.W.2d 348, 356-57 (Mo. Ct. App. 1986) (finding that where the policy plainly stated the insurer will pay costs which may be incurred by the insured with the consent of the insurer, "the entire obligation is conditioned on the consent of [insurer] and not simply the procedure by which the obligation is carried out").

[26] 483 F. Supp. 2d at 480.

[27] 73 F.3d 1178, 1219 (2d Cir. 1995).

require the insurer to indemnify [the insured] for defense costs unless the parties mutually agree beforehand to this arrangement."[28]

The Court finds MSA's argument regarding reasonable consent to be without merit. MSA contends that courts have required reimbursement in the absence of formal consent, and proposes that there is a custom in the insurance industry of not requiring consent. The Court does not find that the alleged requirement of reasonable consent rises to the level of established "custom and usage" in the insurance industry.[29]

The Court finds that the Policies do not create a duty that AIC indemnify MSA for defense costs.[30] The Policies only require AIC to pay the defense costs to which it consents.[31] AIC has not consented to pay any defense costs and the Court will not read that duty into the Policies.

CONCLUSION

The Court finds the Polices to be clear and unambiguous. The Court finds that "Defense Costs" provisions do not have an unwritten meaning -- that the

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[28] *Id*.

[29] *See AstenJohnson, Inc. v. Columbia Cas. Co.*, 562 F.3d at 230 (declining to read into the contract a "prohibition against unreasonable refusals where none exists"); *Stonewall Ins. Co. v. Asbestos Claims Mgmt. Corp.*, 73 F.3d at 1219 (finding no duty for the insurer to defend or pay costs, absent its election to do so).

[30] *See AstenJohnson v. Columbia Cas. Co.*, 483 F. Supp. 2d at 480.

[31] *See id*.; *Crown Ctr. Redevelopment Corp. v. Occidental Fire & Cas. Co.*, 716 S.W.2d 348, 356–57.

provisions are only intended to prevent reimbursement of unreasonable defense costs. Such a meaning is not "certain, continuous, uniform, and notorious," within the insurance industry rising to the level of "custom and usage." The Court finds that AIC has no duty to indemnify MSA for defense costs. The Policies only require AIC to pay defense costs to which it has consented. Because AIC has not consented to MSA incurring defense costs, AIC has no duty to indemnify.

MSA has conceded that AIC has no duty to defend under the Policies.

THEREFORE, Defendant American Insurance Company's Motion for Partial Summary Judgment Regarding Defense Obligation Under the Excess Liability Policies Issued to Plaintiff Mine Safety Appliances Company is hereby **GRANTED.**

IT IS SO ORDERED.

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