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 INSURANCE CO., et al.,	:	Control Nos. 13033771, 13033881 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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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]

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[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:
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> * * *
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> (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;
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> * * *
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> 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

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[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

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[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.

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[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.