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

ANHEUSER-BUSCH, INC., Plaintiff,	:	March Term 2011
v.	:	No. 315
INSURANCE COMPANY OF NORTH AMERICA, Defendant.	:	COMMERCE PROGRAM
	:	Control Nos. 12052634/12052746/12052749
	:	3449 EDA 2012

OPINION

The instant appeal is relative to this court's order dated November 1, 2012, granting defendant Insurance Company of America's Motions for Summary Judgment on the issues of choice of law and allocation, and on the claim for bad faith; and denying plaintiff Anheuser-Bush, Inc.'s Motion for Summary Judgment as moot. Plaintiff Anheuser-Busch, Inc. ("Anheuser-Busch") instituted this action against defendant Insurance Company of North America ("INA")[1] as a result of INA's October 28, 2009 denial of insurance coverage for claims brought against Anheuser-Busch by a former employee for injuries caused by exposure to asbestos.

On May 13, 2008, Pete Seper and Merle June Seper filed suit against Anheuser-Busch, as well as other defendants, seeking damages for injury arising from asbestos exposure.[2] Mr. Seper, a Missouri resident, alleged he was continuously exposed to asbestos at Anheuser-Busch's

[1] Century is the successor and interest to INA.

[2] Due to changes in Missouri law, the Seper's were permitted to bring a civil action for injuries Seper suffered while working as an Anheuser-Busch employee. The Missouri Worker's Compensation Law was held not to apply to occupational diseases such as asbestos related injury or mesothelioma.

brewery in St. Louis, Missouri from 1948 to 1982. Mr. Seper retired from his employment with Anheuser- Busch in 1982 and died after he settled his claim with Anheuser-Busch.

Anheuser-Busch is a Missouri corporation with its principal place of business in St. Louis, Missouri. Anheuser-Busch has twelve breweries located across the Unites States. One brewery is located in Baldwinsville, New York. There are no breweries located within the Commonwealth of Pennsylvania. INA is an insurance company with its principal place of business in Philadelphia, Pennsylvania.

For the policy period 1981 to 1982, Anheuser-Busch engaged its broker Marsh & McLennan to negotiate the renewal of its insurance policies with INA. Marsh & McLennan has an office in New York, New York where INA and it communicated regarding the Anheuser-Busch renewal. [3] The premium for the INA policy was billed to Marsh & McLennan in New York with directions to forward payment to INA's Special Risk office in New York. [4]

INA sold two different policies to Anheuser-Busch covering the July 1, 1981 to July 1, 1982 policy period. One was a Standard Workmen's Compensation and Employer's Liability Policy ("Employer's Liability Policy") issued by Pacific Employers Insurance Company with liability limits of $100,000. The second was an Excess Blanket Catastrophic Liability Policy issued by INA with limits of $4,000,000 in excess of the specified underlying insurance (or $100,000). The Excess Liability Policy was signed by the President and Secretary of INA in Philadelphia, Pa.

The Employers' Liability Policy provided coverage for Anheuser-Busch's legal liability to its employees for bodily injury caused by disease. The policy specifically provided that with respect to disease due to exposure at the place of employment, the applicable Employer's

[3] Exhibit "A" to Defendant INA'S Motion for Summary Judgment - CEN 000001-42.

[4] Exhibit "B" contained within Exhibit "A" *supra,* CEN 003965, 003975, 004000.

Liability Policy is the one in effect on the last day the employee is exposed to the conditions causing the disease. The Employer's Liability Policy excludes bodily injury by disease where the claim is not made within thirty six (36) months of the expiration of the policy.

On June 19, 2008, Anheuser-Busch put INA on notice of the underlying Seper action at INA's New York location as required by the policy. On August 25, 2009, INA denied coverage to Anheuser-Busch for the Seper claim because the Seper's suit was not made within thirty six months of the July 1, 1982 expiration of the policy. On September 14, 2009, Anheuser-Busch informed INA that it was submitting the Seper claim under the Excess Liability Policy. The Excess Liability Policy provided coverage to Anheuser-Busch for ultimate net loss in excess of the retained limit for damages that Anheuser-Busch became obligated to pay as damages for personal injury. The retained limit on the policy was $100,000.

On October 9, 2009, INA acknowledged coverage and agreed to defend Anheuser-Busch under the Excess Liability Policy subject to a reservation of rights. On October 20, 2009, Anheuser-Busch settled the underlying action with the Sepers for $1,000,000. On October 28, 2009, INA denied coverage under the Excess Liability Policy. INA claimed that the Excess Liability Policy was not required to respond until Anheuser-Busch paid a $100,000 retention for each of the thirty years that Seper alleged he was exposed to asbestos.

On December 21, 2009, the settlement was satisfied. Anheuser-Busch also paid $52,907.17 in defense costs in the underlying matter.

On March 1, 2011, Anheuser-Busch filed the instant action against INA for breach of contract and bad faith pursuant to 42 Pa. C. S. § 8371. INA filed two motions for summary judgment. One motion addressed the issue of choice of law and allocation and the other sought dismissal of the bad faith claim. Anheuser-Busch also filed a motion for summary judgment

requesting the court to find INA breached its contract by failing to find coverage under the Excess Liability Policy for the Seper claim. On November 1, 2012, this court granted defendant INA's motions for summary judgment and denied plaintiff Anheuser-Bush's motion for summary judgment as moot. On November 28, 2012, plaintiff Anheuser-Bush filed the instant appeal.

DISCUSSION

A. Breach of Contract.

At issue was whether INA breached the Excess Policy by refusing to indemnify Anheuser-Busch for the defense costs and settlement paid to Seper in the underlying action, less $100,000 retention. An insurer's duty to indemnify arises only where the insured is held liable for a claim that is actually covered by the policy. Unlike the duty to defend, the duty to indemnify cannot be determined merely on the basis of whether the factual allegations of the complaint potentially state a claim against the insured.[5] Rather, there must be a determination that the insurer's policy actually covers a claimed incident. [6]

Here, the Excess Liability Policy issued by INA states in part as follows:

> INA will indemnify the insured [Anheuser-Busch] for ultimate net loss in excess of the retained limit hereinafter stated which the Insured [Anheuser-Busch] shall become legally obligated to pay as damages because of
>
> A. personal injury or
> B. property damage or
> C. advertising injury
>
> to which this insurance applies, caused by an occurrence, and
>
> (1) With respect to any personal injury, property damage or advertising injury not within the terms of this coverage of underlying insurance but within the terms of coverage of this insurance; or ...

The INA policy provides certain limitations of liability which provides:

---

[5] Regis Insurance Company v. All American Rathskeller, Inc., 2009 PA Super 99, 976 A.2d 1157, 1161 (Pa. Super. 2009) (*quoting* American States Ins. Co. v. State Auto Ins. Co., 721 A.2d 56, 63 (Pa. Super. 1998)).

[6] Am. States Ins. Co. v. State Auto Ins. Co., 721 A.2d 56, 63 (Pa. Super. 1998).

> ...INA's liability is limited as follows: with respect to the personal injury ....INA's liability shall be only for the ultimate net loss in excess of the insured's [Anheuser-Busch's] retained limit defined as the greater of:
> (a) an Amount equal to the limits of liability indicated beside the underlying insurance listed in Schedule A hereof, plus the applicable limits of any other underlying insurance collectible by the Insured [Anheuser-Busch] or
> (b) the amount specified in item 3. of the Limits of Liability section of the declarations because of personal injury, property damage or advertising injury not within the terms of the coverage of the underlying insurance listed in Schedule A:....For the purpose of determining the limits of INA's limit of liability, [1] all personal injury ...arising out of continuous or repeated exposure to substantially the same general conditions shall be considered as arising out of the one occurrence...

"Occurrence" is defined as "accident and/or event including continuous or repeated exposure to conditions, which results in personal injury or property damage neither expected or intended from the standpoint of the Insured."[7] Personal injury is defined as bodily injury. Bodily injury is defined as bodily injury, sickness or disease sustained by any person which occurs during the policy period, including death at any time resulting therefrom.[8]

The INA policy also has a limitation regarding policy period and territory which specifically provides:

> This policy applies to personal injury, property damage or advertising injury which occurs anywhere during the policy period.

Based on the language of the policy, INA denied coverage under the Excess Liability Policy because Anheuser-Busch had not exhausted its underlying self insured retention of $100,000. According to INA because Seper's bodily injury claim was alleged to have occurred over a span of more than thirty years and because it is not possible to assign accurately any part of the damages attributable to the bodily injury occurring during any particular year, the total loss was to be allocated over all years in which the bodily injury occurred. Hence, when

[7] Exhibit "6" to Anheuser-Busch's Motion for Summary Judgment CEN003874.

[8] Id.

allocating $1,000,000, the amount of the settlement over thirty years, the INA excess layer above $100,000 is not reached. INA applied Missouri law when the coverage decision was made. Missouri has accepted the allocation method. INA argued that New York law should apply which also endorsed the allocation method.

Anheuser-Busch, on the other hand, argued that allocation is not the law in Pennsylvania and that Pennsylvania law should apply since Pennsylvania has the greatest interest in regulating the insurance policy issued by a Pennsylvania insurer. Anheuser-Busch argued that even though the bodily injury giving rise to the claim arose within a span of thirty years, under Pennsylvania Law, INA should be jointly and severally liable for the entirety of the Seper claim.[9]

Prior to determining whether INA breached its contract with Anheuser-Busch, the court first determined whether to apply Pennsylvania or New York law. The first step in a choice of law analysis under Pennsylvania law is to determine whether an actual conflict exists between the laws of the competing states. If no conflict exists, further analysis is unnecessary. If a conflict is found, it must be determined which state has the greater interest in the application of its law. Weighing these interests requires a further determination as to which state had the most significant contacts or relationships with the insurance contract.[10]

In the case at bar, an actual conflict of laws exists with respect to how indemnity and defense obligations are allocated among successive liability insurers and self-insurers whose

---

[9] Anheuser-Busch argues that since this is an employer/employee matter the court should apply "the last exposure rule" which Pennsylvania and New York subscribe to and therefore a choice of law analysis is unnecessary. The "last exposure rule" however is not applicable to the case at hand. A review of the Employer's Liability Policy demonstrates that the "last exposure rule" is incorporated within the Employer's Liability Policy language and therefore would apply if the Employer's Liability Policy provided coverage. The Excess Liability Policy, however, does not provide for the application of the "last exposure rule". Instead, the Excess Liability Policy states that the "the policy applies to personal injury,...which occurs anywhere during the policy period." Based on the foregoing this court finds that the "last exposure rule" is inapplicable to the case at hand.

[10] Budtel Assocs., LP v. Cont'l Cas. Co., 915 A.2d 640, 643 (Pa.Super. 2006).

periods of coverage or self-insurance are triggered. Pennsylvania takes the minority view that every insurer which was on the risk during the time during development of a claimant's asbestos-related disease has an obligation to indemnify the insurer and the insured is free to select the policy or policies under which it is to be indemnified.[11] This approach is referred to as the "all sums" or "joint and several" approach.

The state of New York, however, has adopted the view accepted and endorsed by a majority of the states including Colorado, Connecticut, Kansas, Kentucky, Louisiana, Massachusetts, Minnesota, Nebraska, New Jersey, New Hampshire, South Carolina, Utah and Vermont. New York courts prorate indemnity and defense obligations among the respective carriers and self-insurers based on their "time on the risk". This allocation formula is often referred to as the "time on the risk" approach.[12]

Since an actual conflict exists, choice of law analysis proceeds and an "analysis of the policies and interests underlying the particular issue before the court and a determination of which jurisdiction is most intimately concerned with the outcome of the litigation" must be undertaken.[13] If the governmental policy of one jurisdiction will not be adversely affected by the implementation of the other's law, then there is no true conflict. However, if there is a true conflict, then an examination of both jurisdictions' contacts with the litigation, and, more specifically, with the underlying insurance policy, is required. [14]

---

[11] J.H. France Refractories Co. v. Allstate Ins. Co., 534 Pa. 29, 626 A.2d 502 (Pa. 1993).

[12] *See* Consol Edison Co. of N.Y. v. Allstate Ins. Co., 774 N.E. 2d 687 (N.Y. 2002).

[13] Griffith v. United Air Lines, Inc., 416 Pa. 1, 203 A.2d 796 (Pa., 1964).

[14] Ratti v. Wheeling Pittsburgh Steel Corp., . 758 A.2d 695, 702 (Pa. Super. 2000); Cipolla v. Shaposka. 439 Pa. 563, 267 A.2d 854, 856 (Pa., 1970).

In the case at hand, New York applies the time on the risk method of allocation for the very same reason Pennsylvania declines to do so, i.e., an insured's loss due to exposure to a continuing exposure generally occurs over the span of several years or decades, thereby making it impossible to associate specific damages with individual policy periods. [15] New York's interest in allocating an insured's losses based upon the "time on the risk" stems from the practical difficulty of identifying when liability arose. On the other hand, Pennsylvania courts consider it unfair to presume that an insured's losses occurred evenly across different policy periods. Given the two states' divergent rationales for their respective laws, a true conflict exists and the court must now determine which jurisdiction has the most significant relationship using the guides set forth in Griffith v. United Air Lines, Inc.[16]

In Griffith, our Supreme Court adopted the approach of the Restatement of Conflict of Laws, (Second) for resolving choice of law questions with respect to contracts.[17] Restatement of Law (Second) § 188 (2) sets forth the following contacts considered in the analysis: (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. [18] Proper application of the analysis

---

[15] Crucible Materials Corp v. Certain Underwriters at Lloyd's London & London , 681 F. Supp. 2d 216, (D.C. N.Y. 2010)(*comparing* Consol. Edison, 98 N.Y. 2d at 224, 746 N.Y.S. 2d at 630 ("Yet collecting all the indemnity from a particular policy presupposes ability to pin an accident to a particular policy period."); J.H. France, 534 Pa. at 40 (warning courts not to assume a linearity of disease progression.").

[16] 416 Pa. 1, 203 A.2d 796 (1964).

[17] Id. at 15, 203 A.2d at 802.

[18] Id.

depends not on a mere counting of contacts with the respective jurisdictions; the contacts must be measured on a qualitative rather than a quantitative scale.[19]

Here, after considering the contacts set forth in Section 188 (2) of the Restatement of Law (Second), it was clear that the choice of forum was New York. The facts of record demonstrate that the INA policy was sent from INA's New York office and delivered to Anheuser-Busch's broker in New York. Additionally, the record demonstrates that endorsements were prepared and executed by Anheuser-Bush's New York broker and underwriter from INA's New York office. [20] Hence, it was clear that all action regarding the place of contracting was New York.

The place of negotiation also favored New York. Anheuser-Busch's broker, Marsh & McLennam was located in New York when the INA Policy was negotiated. The INA policy was negotiated through INA's New York office. Written communications regarding the negotiation of the INA policy took place directly between Anheuser-Busch's New York broker and INA's New York underwriters. All of the premiums and corresponding scope of coverage were discussed, negotiated and agreed upon in New York. [21]

The place of performance of contract was New York. Anheuser-Busch paid its premiums for the INA policy to the broker in New York. Once the commission was paid to the broker, the broker then sent the payment to the INA's New York office. [22]

The last elements, the place of insured risk and place of business, are not easily determined. Anheuser-Busch operates twelve breweries in the United States with one facility in

---

[19] Caputo v. Allstate Ins. Co., 344 Pa. Super. 1, 495 A.2d 959, 961 (Pa. Super. 1985).

[20] CEN 003965, 003975, 004000, 003899.

[21] CEN 003965, 003975, 004000, 003899, 003925, 003941.

[22] CEN 009944, 003965, 003975, 004000, 003899.

New York. Anheuser-Busch is a Missouri Company that has its principal place of business in Missouri. INA is a Pennsylvania company with an office in New York. These contacts do not sway in favor of either state, Pennsylvania or New York.

After reviewing all the contacts and weighing them qualitatively, it was clear that the New York contacts were the center of this transaction. Other than INA being a Pennsylvania company, there were no further contacts with Pennsylvania. On the other hand, the insurance policy was negotiated, contracted and the premium was paid in New York. In light of the forgoing, the applicable choice of law was New York.

Having determined that the applicable choice of law was New York, and upon a clear reading of the policy, INA does not owe Anheuser-Busch a duty to indemnify. The Excess Liability Policy applies to personal injury which occurs anywhere "during the policy period." As discussed previously, New York's allocation law pro-rates the total amount of an insured's losses based upon the length of time for which there was insurance coverage.[23] It was undisputed that Seper's bodily injury occurred over a span of more than thirty years. It was also undisputed that the settlement amount paid by Anheuser Busch was $1,000,000.00. When damages were allocated over the thirty year span, Anheuser-Busch's losses did not trigger the excess liability coverage provided for within the 1981-82 policy.[24] Consequently, a duty to indemnify did not exist. [25]

---

[23] *See* Consol. Edison Co., supra at 624, 630.

[24] The court notes that in Missouri, the place where exposure occurred and the place of incorporation and principal place of business for Anheuser-Busch, a duty to indemnify would not exist, since New York and Missouri have adopted the allocation method. *See* Continental Casualty Co. v. Medical Protective Co., 859 S.W. 2d 789 (Mo. Ct. App. 1993)("Where the loss is caused not by a single event but by a series of cumulative acts or omissions, we believe the fair method of apportioning the loss among consecutive insurers is by application of the exposure theory utilized in cases of progressive disease such as asbestosis.").

B. Bad Faith

In addition to the breach of contract claim, Anheuser-Busch also asserted a claim for bad faith against INA. Since this court has already determined that INA's excess layer of coverage was never reached, it is impossible based on said finding for Anheuser-Busch to demonstrate that INA lacked a reasonable basis to deny coverage. Therefore, Anheuser Busch failed to prove bad faith and summary judgment on the bad faith claim was appropriate. [26]

Moreover, the Pennsylvania Bad Faith Statute, 42 Pa. C. S. À § 8371 was primarily intended to protect residents of Pennsylvania. [27] While there is no Pennsylvania appellate decision concerning the extra territorial application of the Pennsylvania Bad Faith Statute, the legislative purpose behind the Bad Faith Statute is the protection of Pennsylvania insureds. Federal courts have held that the policy behind 42 Pa. C. S. § 8371 is that the Pennsylvania legislature was concerned about protecting its own residents/insureds from overreaching insurance companies.[28]

Here, Anheuser-Busch is a Missouri corporation with its principal place of business in Missouri. As such no Pennsylvania residents are alleging harm. It would be inappropriate to overextend Pennsylvania bad faith law to cover matters in which Pennsylvania has little interest. Accordingly, defendant INA's motion for summary judgment was granted and the claim for bad faith was dismissed.

---

[25] The court does not find persuasive Anheuser-Busch's argument that the principle of allocation does not apply to Excess Liability Policies, especially in light of the fact that the instant excess policy was operating at the same level as a primary policy.

[26] *See*, T.A. v. Allen, 868 A.2d 594 (Pa. Super. 2005), Cresswell v. Nat'l Mut. Cas. Ins. Co., 820 A.2d 172 (Pa. Super. 2003), Frog, Switch & Mfg. Co. v. Travelers Ins. Co., 193 F.3d 742 (3d Cir. 1999).

[27] 821,393 LLC, Microstrategy Services Corp., v. Liberty Mutual Insurance Co., et.al., 2011 Phila. Ct. Com. Pl. Lexis 7 (2011).

[28] *See* Celebre v. Winsdor-Mount Joy Mut. Ins. Co., 1994 U.S. Dist. Lexis 409(E.E. Pa. 1994).

CONCLUSION

For the foregoing reasons, this court's order dated November 1, 2012 granting defendant INA's Motions for Summary Judgment and denying plaintiff Anheuser-Busch's Motion for Summary Judgment as moot should be affirmed.

Date: January 3, 2013

BY THE COURT,

PATRICIA A. McINERNEY, J.