COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 2009-0826

MUELLER CO. n/k/a MUELLER CO. LTD., et al.,
Plaintiffs,

vs.

COMMERCIAL UNION INUSURANCE COMPANY n/k/a ONEBEACON AMERICA INSURANCE COMPANY, et al.,
Defendants

MEMORANDUM OF DECISION AND ORDER ON DEFENDANT ONEBEACON AMERICA INSURANCE COMPANY'S MOTION FOR SUMMARY JUDGEMENT

Plaintiff Mueller Company, Ltd. (Mueller) began this action seeking defense and indemnity coverage under two umbrella policies issued by defendant Commercial Union Insurance Company, now known as OneBeacon America Insurance Company (OneBeacon), in connection with several lawsuits brought against Mueller for asbestos-related injuries. Although the parties have settled most of their disputes, they still disagree as to the applicable limits of liability under the two policies. OneBeacon now moves for summary judgment, seeking a determination that the asbestos lawsuits against Mueller arise out of a single "occurrence" as defined by the two policies, so that its liability is capped at $22 million. For the reasons that follow, this Court concludes that the motion must be **Allowed**.

BACKGROUND

For several years, Mueller manufactured and sold fire hydrants and valves that contained asbestos. Mueller is now a defendant in numerous lawsuits filed throughout the country seeking damages for asbestos-related injuries. Nearly all of these lawsuits involve these hydrants and

valves, generally described as "flow products."[1] As a consequence of these lawsuits, Mueller sought defense and indemnity coverage from its insurers, among them OneBeacon. When OneBeacon refused to provide the coverage, this lawsuit followed.

In September 2012, OneBeacon and Mueller entered into a settlement agreement which resolved most of the disputes between them. The remaining issue now before this Court concerns two umbrella policies issued by OneBeacon that cover the time period between March 1966 and February 1972. The earlier policy (the 1966 Policy) ran from March 15, 1966 to November 30, 1968. The later one (the 1968 Policy) covered the time period of November 30, 1968 to February 11, 1972. Neither party has been able to locate the 1966 Policy, but they agree that, at least as to the issues before the Court, it is essentially identical to the 1968 Policy. Specifically, the parties agree that each policy contains an overall limit of $11 million on OneBeacon's liability for "ultimate net loss as a result of any one occurrence." In the event of multiple "occurrences," each policy has a total annual limit of $11 million, so that coverage under both policies would be approximately $66 million for the six years.

The 1968 Policy defines "ultimate net loss" to be the "total sum which the insured...becomes legally obligated to pay as damages because of personal injury, property damages, or advertising liability claims...which are paid as a consequence of any occurrence covered hereunder..." Section II, ¶5 of the 1968 Policy. An "occurrence" is defined to be: "(a) an accident, or (b) an event, or continuous or repeated exposure to conditions, which unexpectedly results in personal injury, property damage or advertising liability (either alone or in any combination) during the policy period." Section II, ¶9. Following this definition is

[1] Some of the lawsuits involve "tapping machines" manufactured by Mueller. OneBeacon concedes that those claims should be analyzed differently and does not seek a declaration that they fall within the same aggregate limits of liability which apply to the flow control product litigation.

language commonly referred to as a "batch clause" or "one lot" provision stating that: "all personal injury and property damage (either alone or in combination) arising out of the Products –Completed Operations Hazards shall be deemed to be one occurrence if arising out of one lot of goods or product prepared or acquired by the named insured or other trading under his name." "Products—Completed Operations Hazards" is defined to be liability which arises out of "goods or products manufactured, sold, handled or distributed by the named insured…if the occurrence happens after possession of such goods or products has been relinquished to others…." Section II, ¶8.

DISCUSSION

In moving for summary judgment, OneBeacon seeks a declaration from this Court that the asbestos litigation involving the fire hydrants and valves was the result of a single "occurrence" -- specifically, Mueller's decision to manufacture, distribute, and sell asbestos-containing flow control products. In opposing the motion, Mueller argues that the "occurrence" was each claimant's exposure to asbestos, and that, under the batch clause, that would constitute a single "occurrence" only if the exposure was to flow control products coming from the same lot or batch. Both parties agree that Illinois law applies. This Court is persuaded that OneBeacon's position is the correct one – at least under Illinois law.

In answering the question of whether the asbestos-related claims arise out of multiple occurrences or from a single occurrence, this Court begins its analysis with the policy language. Insurance policies, like other contracts, are to be interpreted in a manner which gives effect to the intention of the parties, with the words of the policy accorded their plain and ordinary meaning. Continental Cas. Co. v. McDowell & Colanti, Ltd., 282 Ill. App. 3d, 236, 241 (1996). Where the provisions of the policy are unambiguous, the court applies them as written without the need for

any fact findings. Illinois Farmers Ins. Co. v. Marchwiany, 222 Ill. 2d 472 (2006) (in affirming allowance of summary judgment, court rejected claim that language of policy was ambiguous). That is not to say, however, that insurance contracts are issued in a vacuum: they are to be interpreted in the context of the particular factual setting in which they have been issued, taking into account governing legal authority. Accordingly, a policy term that appears unclear on its face may be considered unambiguous where it has acquired an established legal meaning as applied to a particular set of facts. See, e.g., Glidden v. Farmer's Auto Ins. Assn., 57 Ill. 2d 330, 336 (1974) ("what at first blush might appear unambiguous in the insurance contract might not be such in the particular factual setting in which the contract was issued"); see also U.S. Fire Ins. Co. v. Schnackenberg, 88 Ill. 2d 1, 7 (1981) (court looked to decisions interpreting particular phrase in insurance contract to conclude that it had a clear and unambiguous meaning at the time the parties entered into the policy).

Not surprisingly, the definition of what constitutes an "occurrence" has been infused with some established legal meaning, since courts throughout the country have had to interpret policy provisions the same or similar to that present in the 1968 Policy. Although the decisions are far from uniform, two basic approaches have developed, one described as the "cause" theory and the other as the "effects" theory. Under the former, the number of occurrences is determined with reference to the cause of the damage. As to the latter, the number of occurrences is decided by looking at the effect -- in other words, the individual injuries that resulted. Neither approach inevitably favors one party over the other. For example, in the instant case, it would clearly benefit OneBeacon if this Court were to conclude that the asbestos-related claims constituted a single occurrence. On the other hand, if the fight were over deductibles, then a finding that the claims constituted a single occurrence would favor the insured. Thus, to fall back on the general

proposition that insurance contracts should be interpreted against the drafter (the insurer) is of no assistance here. Moreover, those courts that have adopted the cause theory differ as to how they define cause: is it the wrongful act of the insurer that gave rise to liability or is it the exposure to the defective product that led to the injury?

In line with the majority of jurisdictions, Illinois courts have adopted the cause theory. See Nicor, Inc. v. Associated Elec. and Gas, 223 Ill. 2d 407, 420 (2006). Their reasoning in part stems from the fact that the insurance policy, like the OneBeacon policies, usually refers to an "accident" or "event" which results in injury during the policy period, thus creating a distinction between the accident and event constituting the occurrence, and the injuries that subsequently take place. In determining precisely what that event is, the Illinois courts have also considered the factual context, specifically the circumstances that give rise to the insured's liability as well as the nature of the product involved. Particularly in the area of asbestos exposure, the Illinois courts have concluded that the insured's liability arises from its decision to manufacture and sell products containing asbestos – a single "occurrence" – even though that decision had the effect of injuring hundreds of people exposed to those products.

Particularly instructive in this regard is the Illinois Appeals Court's decision in U.S. Gypsum Co. v. Admiral Ins. Co., 268 Ill. App. 3d 598, 647-651 (1994). In that case, the insured, U.S. Gypsum Company (Gypsum), sought coverage for lawsuits brought by property owners who alleged that asbestos-containing building materials manufactured by Gypsum had damaged their property. The trial court had focused on the date upon which each owner discovered that the building materials contained asbestos, and therefore concluded that there were multiple occurrences. The Appeals Court held that this was error, since that approach would implement the minority rule "effect" theory, which focuses on the number of injuries or claims in question

(discovery of the injury being incident thereto). Pointing out that Illinois courts adhered to the majority rule which looks to the cause of the damage, the Appeals Court concluded that there was a single occurrence, namely the "continuing process of the manufacture and sale of asbestos-containing products." 268 Ill. App. at 649. It specifically rejected the insurer's argument that the cause was the installation of the product, reasoning that it would be "unwise and without support in the case law" to adopt that position, since Gypsum's liability was predicated on its involvement in the manufacture and sale of the products, not on their installation. Finally, the nature of the product itself was important: where the product is intrinsically harmful and causes similar injuries, the Illinois Appeals Court noted that courts are more likely to conclude that there was a single occurrence for purposes of insurance coverage. See, e.g., Uniroyal Inc. v. Home Ins. Co., 707 F. Supp. 1368 (E.D.N.Y. 1988) (delivery of Agent Orange to military constituted single "occurrence" that led to injuries to Vietnam veterans exposed to it).

Mueller argues that U.S. Gypsum does not apply because the policy there did not contain a so called "batch" clause, and that the addition of such a provision in the 1968 Policy shows that the parties here intended to limit the circumstances under which claims may be aggregated. The batch clause in the 1968 Policy states in effect that, where the damage arises out of "one lot" of goods, the claims that result are deemed to constitute one occurrence. Because there is no indication that the asbestos-related injuries here arose from the same lot of goods, then (Mueller argues) it necessarily follows that these asbestos claims constitute multiple occurrences. OneBeacon responds that the batch clause is irrelevant, since it applies only in the circumstance of manufacturing as opposed to design defects. See Diamond Shamrock Chem. Co. v. Aetna Cas. & Surety Co., 609 A.2d 440, 479, 480 (N.J. Super. Ct. App. Div. 1992); see also Gibson & McLendon, Commercial Liability Insurance, XII.E.7 (Int'l Risk Mgmt Inst. 2004). Although

there is no Illinois case on point and the case law in other jurisdictions on the significance of batch clauses defies broad categorization, this Court is not convinced that Mueller's interpretation is a sound one, at least in the context of asbestos-related litigation.

In support of its position, Mueller relies on a single case out of California, London Market Insurers v. Superior Court, 146 Cal. App. 4th 648 (2007) (Kaiser). There, as here, the court was addressing the issue of whether claimants' asbestos-related injuries arose from a single "occurrence" or constituted multiple occurrences for purposes of determining insurance coverage. The insureds contended (as the trial court had concluded) that the relevant "occurrence" was the manufacture and distribution of asbestos products. The insurer LMI, argued that the relevant occurrence was instead the injurious exposure to asbestos. The Kaiser court sided with the insurer, but not because of the "batch" clause in the policies. Instead, it looked to that provision of the insurance policy that, like the policies in the instant case, defined "occurrence" as an "event" or "continuous or repeated exposure to conditions." The court reasoned that the manufacture and distribution of asbestos products was not so much an "event" as an ongoing course of conduct. Neither could it be said to constitute a "continuous or repeated exposure to conditions" since that would strain the plain language of the policies. Reading the policies as a whole, the Kaiser court concluded that the relevant "occurrence" was each claimant's exposure to asbestos – the immediate cause of injury rather than the remote cause. Given that each claimant was necessarily exposed to asbestos at a different times, the court then looked to the batch clause in the policies to see if these multiple exposures could be aggregated. It concluded that they could not, since there was no evidence that all of the asbestos claims derive from a single lot of asbestos products.

Although the Kaiser decision does (at least in this Court's view) appear to be well reasoned, it cannot dictate the result in the instant case for two reasons. First and foremost, the basis for its holding is directly contrary to the Illinois Appeals Court's holding in U.S. Gypsum, and it is Illinois law that this Court must apply. In U.S. Gypsum, the court did consider the relevant "event" to be the decision to use asbestos in the product –the remote cause of the injury, not the more immediate cause or the exposure to the substance. Second, the Kaiser court emphasized that its conclusion was rooted in the policy language and cited other provisions in support of that conclusion which are not present in the 1968 Policy. For example, one of the policies had a "deemer" clause which stated that, where the accident or event giving rise to liability occurs after the goods have left the hands of the insured manufacturer, then the "occurrence" shall be deemed to have taken place at the time of the injury and not at the time of the act by the insured. This clause would make no sense if the relevant occurrence is the manufacture of the injury-causing product. In the instant case, there is no deemer clause with that language.

CONCLUSION AND ORDER

For all the foregoing reasons and for other reasons articulated in OneBeacon's Memoranda, its Motion for Summary Judgment is **ALLOWED.** The parties shall submit a proposed form of judgment.

Janet L. Sanders
Justice of the Superior Court

Dated: November 25, 2013

Notice sent 11.25.13 (md)