IN THE SUPERIOR COURT OF THE STATE DELAWARE

IN AND FOR NEW CASTLE COUNTY

CNH AMERICA, LLC, a Delaware limited liability company f/k/a Case Corporation Plaintiff, v. AMERICAN CASUALTY COMPANY OF READING, PENNSYLVANIA, a Pennsylvania corporation, et al Defendants.	)	C.A. No. N12C-07-108 JTV
AMERICAN CASUALTY COMPANY OF READING, PENNSYLVANIA, a Pennsylvania corporation; and The CONTINENTAL INSURANCE COMPANY, a Pennsylvania corporation, Third-Party Plaintiffs, v. EPEC EQUIPMENT CORPORATION, a Delaware corporation, Third-Party Defendant.	)	

Submitted: September 6, 2013
Decided: January 6, 2014

CNH America v. American Casualty, et al.
C.A. No. N12C-07-108 JTV
January 6, 2014

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Upon Consideration of Plaintiff's Motion for Partial Summary Judgment Regarding the Duty to Defend
Granted

VAUGHN, President Judge

OPINION

On July 11, 2012, Plaintiff CNH America, LLC ("CNH") filed this action for declaratory relief and breach of contract against a number of insurance companies. The complaint alleges that the defendants have failed to honor defense and coverage obligations arising from asbestos-related lawsuits filed against CNH.

CNH has filed a *Motion for Partial Summary Judgment Regarding the Duty to Defend* which is directed against three of the defendants. Those three defendants are: The Continental Insurance Company and Centre Insurance Company, as successors-in-interest to some or all of the relevant insurance obligations of London Guarantee and Accident Company, Ltd.; and American Casualty Company of Reading, Pennsylvania (collectively, the "CNA Defendants"). The motion seeks a ruling that the CNA Defendants are obligated to defend CNH in the asbestos related lawsuits

under three insurance policies.

This opinion addresses only the issue of the CNA Defendants' duty to defend in connection with the three policies. It does not address and is without prejudice to the rights or liabilities of any other party or any other policies.

FACTUAL BACKGROUND

In 1842, J.I. Case Company was established.[1] It manufactured agricultural and construction equipment. In 1970 J.I. Case Company merged into 700 State Corporation;[2] 700 State Corporation merged into Newcase Corporation,[3] and Newcase Corporation was renamed J.I. Case Company.[4] Thus, the surviving corporation took the original J.I. Case Company name.

Also in 1970, J.I. Case Company became a subsidiary of Tenneco, Inc ("Tenneco"). In 1990, J.I. Case Company changed its name to Case Corporation.[5] At all times, Case Corporation and its predecessors continued to manufacture agricultural and construction equipment.

In 1994, Tenneco underwent a reorganization involving itself and its subsidiaries, including Case Corporation, and a new company called Case Equipment

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[1] J.I. Case was first incorporated in 1880 as J.I. Case Threshing Machine Company. On May 31, 1929, J.I. Threshing Machine Company changed its name to J.I. Case. *Pl's Decl. of Diane L. Scialabba,* Ex. A.

[2] Pl's Decl. of Diane L. Scialabba, Ex. B.; *Id.*, Ex. C.

[3] *Id.*, Ex. D-2.

[4] *Id.*, Ex. D-2, at 2.

[5] *Id.*, Ex. D-3.

Corporation, sometimes referred to as "Newco." The purpose of the reorganization was to transfer the farm and construction equipment businesses then owned by Tenneco and its subsidiaries, including Case Corporation, to Case Equipment Corporation. The documents that effectuated the reorganization were the 1994 reorganization agreement[6] (the "1994 Agreement") and a general conveyance agreement[7] (the "Conveyance Agreement"). Under the 1994 Agreement, the assets transferred to Case Equipment Corporation were referred to as the "Case Assets." Case Equipment Corporation assumed certain liabilities of Tenneco and its subsidiaries, which were referred to as the "Case Liabilities." Tenneco and its subsidiaries retained certain assets, known as "Retained Assets," and certain liabilities, known as "Retained Liabilities." In addition, Case Corporation changed its name to Tenneco Equipment Corporation ("Tenneco Equipment").[8]

The 1994 Agreement defined Case Assets as:

> [A]ll of the assets of Tenneco and its subsidiaries used or held for use in the Case Business and the assets previously held for use in the Case Business that are not used in any other business of Tenneco, including without limitation the permits, licenses and authorizations relating to the use of any such assets.[9]

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[6] *Id.*, Ex. E.

[7] *Id.*, Ex. F.

[8] *Id.*, Ex. G-1.

[9] *Id.*, Ex. E, at 2.

The term Case Liabilities was defined as follows:

> [A]ll of the Liabilities arising out of or in connection with the ownership or operation by Tenneco and its subsidiaries of the Case Business, as heretofore, currently or hereafter conducted, including without limitation (I) all Liabilities of Tenneco and its subsidiaries relating to, arising out of or in connection with, any businesses, assets or operations owned, managed or operated by, or operationally related to, the Case Business which have been sold or otherwise disposed of or discontinued prior to the Reorganization Date and (ii) those Liabilities listed on Schedule 1.01.[10]

The 1994 Agreement defined Retained Assets as:

> (I) the United States retail receivables held by Tenneco Credit Corporation that arose from the retail sale of farm and construction equipment or otherwise relating to the Case Business (other than receivables arising from the sale of equipment held by dealers for rental to third parties) and
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> (ii) any and all assets (including those held by the Tenneco Inc. General Employee Benefit Trust) associated with the Retained Liabilities.[11]

The term Retained Liabilities was defined as:

> (I) the Case Liabilities for pension benefits accrued by United States Newco Employees and former Untied States employees of the Case Business, both salaried and hourly, through the Reorganization Date as more fully described in

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[10] *Id.*

[11] *Id.*, Ex. E, at 6.

> the Benefits Agreement,
>
> (ii) the Case Liabilities for postretirement health and life insurance benefits (to the extent that Case[12] is obligated on the Reorganization Date) of retirees of the Case Business in the United States and current employees of the Case Business in the United States who retire on or before July 1, 1994 and their dependents as more fully described in the Benefits Agreement,
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> (iii) certain Liabilities for United States federal, state, local and foreign income and franchise taxes as more fully described in the Tax Sharing Agreement,
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> (iv) debt of Tenneco's finance subsidiaries not sold to Newco arising from the wholesale and retail financing programs historically offered by Case, and
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> (v) the remaining cash advances from affiliated companies to Subsidiaries of Tenneco that will transfer net assets to Newco but which remain as subsidiaries of Tenneco after the Reorganization Date.[13]

After Case Corporation changed its name to Tenneco Equipment, but still in 1994, Case Equipment Corporation changed its name to Case Corporation.[14]

Two years later, in 1996, Tenneco Equipment, which continued to be a subsidiary of Tenneco, changed its name to EPEC Equipment Corporation

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[12] "Case" is used in the 1994 Agreement to represent Case Corporation.

[13] Pl's Decl. of Diane L. Scialabba, Ex. E, at 6.

[14] *Id.*, Ex. H-2.

("EPEC").[15] At the same time, El Paso Corporation ("El Paso"), a Texas corporation, acquired Tenneco. In 2002, Case Corporation became a subsidiary of New Holland N.V. ("New Holland"). In 2004, Case Corporation changed its name to CNH, the plaintiff.[16]

The three insurance policies involved with this motion were issued to J.I. Case Company (the "CNA policies").[17] One covered the period from 10/31/1953 to 10/31/1959.[18] The second covered the period from 10/31/1968 to 10/31/1969.[19] The third covered the period from 01/01/1971 to 01/01/1972.[20] These policies contain anti-assignment clauses, which read in substantial form, in pertinent part, as follows:

> Assignment of interest under this policy shall not bind the company [the insurer] until its consent is endorsed hereon;. . . .[21]

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[15] *Id.*, Ex. G-2.

[16] *Id.*, Ex. H-5.

[17] They are policy numbers CED 12204, CCP 504-70-00, and CCP 853-44-23. *Pl's Op. Br. in Supp. Mot. for Partial Summ. J. Regarding Duty to Defend,* at 8.

[18] Pl's Decl. of Diane L. Scialabba, Ex. I. The original policy period was from 10/31/1953 - 10/31/1956. *Id.* The policy was extended to 10/31/1959 by way of an "Extension Endorsement." *Id.*

[19] *Id.*, Ex. J.

[20] An incorrect copy of this policy was included in *Plaintiff's Declaration of Diane L. Scialabba,* Exhibit. K. CNH attached the correct copy of this policy to *Plaintiff's Affidavit of Emily E. Garrison in Support of its Motion for Partial Summary Judgment Regarding the Duty to Defend,* Exhibit A. CNH discussed this error in *Plaintiff's Reply Brief in Support of its Motion for Partial Summary Judgment Regarding the Duty to Defend,* at 3, n. 1.

[21] Pl's Decl. of Diane L. Scialabba, Ex. I, at § 16 (emphasis omitted); *Id.*, Ex. J, at § 9 (emphasis omitted); Pl's Aff. of Emily E. Garrison in Supp. Mot. for Partial Summ. J. Regarding

The underlying lawsuits allege bodily injury from alleged exposure to asbestos that was contained in products allegedly manufactured, sold, supplied, and/or distributed by J.I. Case Company, and/or from alleged exposure to asbestos located on J.I. Case's premises.[22] As of the time of briefing for this motion, CNH had identified 117 suits which it contends allege bodily injury that occurred during the periods covered by the above-described three policies resulting from exposure to products allegedly manufactured, sold, supplied and/or distributed by J.I. Case Company.[23]

STANDARD OF REVIEW

Summary judgment should be granted when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.[24] "[T]he moving party bears the burden of establishing the non-existence of material issues of fact."[25] If a motion is properly supported, the burden shifts to the non-moving party to establish the existence of material issues of fact.[26] In considering the motion, the

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the Duty to Defend, Ex. A, at § 9 (emphasis omitted).

[22] Pl's Op. Br. in Supp. Mot. for Partial Summ. J. Regarding Duty to Defend, at 1.

[23] When CNH filed this motion, CNH stated that 117 Asbestos Suits were pending. *Pl's Op. Br. in Supp. Mot. for Partial Summ. J. Regarding Duty to Defend,* at 1. In oral argument held on September 6, 2013, counsel for CNH contended that some of the Asbestos Suits had been resolved and 94 Asbestos Suits remained pending. *Hr'g. Tr.*, 12:7-11, Sept. 6, 2013.

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

[25] *Gray v. Allstate Ins. Co.*, 2007 WL 1334563, at *1 (Del. Super. May 2, 2007).

[26] *Id.*

facts must be viewed in the light most favorable to the non-moving party.[27] Thus, the court must accept all undisputed factual assertions and accept the non-movant's version of any disputed facts.[28] Summary judgment is inappropriate "when the record reasonably indicates that a material fact is in dispute or if it seems desirable to inquire more thoroughly into the facts in order to clarify the application of law to the circumstances."[29] On the other hand, "[w]hen the facts permit a reasonable person to draw only one inference, the question becomes one for decision as a matter of law."[30]

DISCUSSION

CNH contends that under the chain of corporate events described above it is the current owner of the insured's rights under the CNA policies.

The CNA Defendants contend that CNH is not the owner of the insured's rights under the CNA policies; that the CNA policies were issued to J.I. Case Company, not CNH; that EPEC, not CNH, is J.I. Case Company's corporate successor; that the 1994 Agreement did not assign the rights under the CNA policies to Case Equipment Corporation; that only some of the assets held by Tenneco and its subsidiaries were transferred to Case Equipment Corporation; that provisions in Sections 5.02 and 5.03 of the 1994 Agreement contain indemnification provisions under which Case

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[27] *Merrill v. Crothall-American, Inc.*, 606 A.2d 96, 99 (Del. 1992).

[28] *Id.* at 99-100.

[29] *Mumford & Miller Concrete, Inc. v. New Castle Cnty.*, 2007 WL 404771, at *1 (Del. Super. Jan. 31, 2007).

[30] *Tyson Foods, Inc. v. Allstate Ins. Col.,* 2011 WL 3926195, at *4 (Del. Super. Aug. 31, 2011).

Equipment Corporation agreed to indemnify Tenneco and its subsidiaries, including EPEC, for all claims arising out of pre-closing occurrences related to the farm and construction equipment businesses, and which provided that the obligation to indemnify would be reduced dollar for dollar by any insurance proceeds received by Tenneco and its subsidiaries, which shows that Tenneco and its subsidiaries were to retain their insurance policies; that Section 9.01of the 1994 Agreement, relating to insurance, shows, or may show, that the CNA policies were not assigned; that under Section 6 of the Conveyance Agreement no asset was assigned which required the consent of a third party, unless such consent was obtained; that under the anti-assignment clauses in the CNA policies the consent of the insurers was required for any assignment of the CNA policies, and no such consent was given; that the definition of "Case Assets" is ambiguous because it limits assets to only those that are not used in any other business; and that discovery is needed in order to resolve these issues.

The interpretation of a contract is purely a determination of law.[31] When interpreting a contract, the court will give priority to the parties' intentions and will construe the contract as a whole, giving effect to all provisions therein.[32] Clear and unambiguous language will be given its ordinary and usual meaning.[33] A contract is

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[31] *O'Brien v. Progressive Northern Ins. Co.,* 785 A.2d 281, 286 (Del. 2001).

[32] *GMG Capital Invs., LLC v. Athenian Venture Partners I, L.P.*, 36 A.3d 776, 779 (Del. 2012).

[33] *Id.* at 780.

not rendered ambiguous simply because the parties do not agree upon its proper construction.[34] Rather, a contract is ambiguous only when the provisions in controversy are reasonably or fairly susceptible to two or more different interpretations.[35]

After reviewing the documents involved, I find that the terms of the 1994 Agreement and the Conveyance Agreement are not ambiguous.

Sections 3.01 and 3.02 of the 1994 Agreement read, in pertinent part:

> Section 3.01 *Reorganization of the Case Business*. The parties hereto undertake to reorganize the Case Business so that, as of the Reorganization Date, neither Newco nor any Newco Subsidiary shall have any interest in any business of Tenneco and its Subsidiaries other than the Case Business, and neither Tenneco nor any Tenneco Subsidiary shall have any interest in the Case Business. . . .

Section 3.02 *Transfer of Newco Assets*.

> (a) Tenneco shall, and shall cause its Subsidiaries to, sell, assign, transfer, convey, grant, bargain, set over, release, deliver and confirm in the manner described in Exhibit O, to Newco or a Newco Subsidiary, as appropriate, all right, title and interest of Tenneco and its Subsidiaries in the Newco Assets.[36]

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[34] *Id.* (citing *Rhone-Poulenc Basic Chems. Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192, 1195 (Del. 1992)).

[35] *Id.* (citing *Eagle Indus., Inc. v. DeVilbiss Health Care, Inc.,* 702 A.2d 1228, 1232 (Del. 1997)).

[36] Pl's Decl. of Diane L. Scialabba, Ex. E, at 9.

As mentioned, Case Equipment Corporation was also referred to as Newco. "Newco Assets" was defined as "all Case Assets other than the Retained Assets."[37]

After considering Sections 3.01 and 3.02, the other provisions of the 1994 Agreement previously set forth above, the other terms of the 1994 Agreement, and the terms of the Conveyance Agreement, I find that 1994 Agreement was a broad transfer of assets in connection with the farm and construction equipment businesses of Tenneco and its subsidiary, Case Corporation.

I further find that under the 1994 Agreement the definitions of "Retained Assets" and "Retained Liabilities" are narrow and do not include the CNA policies; that the indemnification provisions in Sections 5.02 and 5.03 are not incompatible with a transfer of the CNA policies and do not show that they were not to be transferred; that Section 9.01 regarding insurance applied to current, continuing polices; and that the phrase "not used in any other business of Tenneco" contained in the definition of Case Assets does not create an ambiguity or a genuine issue of fact that is relevant to the issue of assignment of the CNA policies.

As to the Conveyance Agreement, Section 1(t) provided that Case Corporation sold, assigned, transferred, granted and conveyed unto Case Equipment Corporation: "all insurance policies and all rights of every nature and description under or arising out of such insurance policies, including, without limitation, proceeds of any claims thereunder;. . . ."[38] Section 3 of the Conveyance Agreement, which lists excluded

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[37] *Id.*, Ex. E, at 4.

[38] *Id.*, Ex. F, at 3.

assets, does not list any insurance polices.[39] I find that Section 1(t) of the Conveyance Agreement assigned the CNA policies to Case Equipment Corporation, unless the anti-assignment clauses in the polices and Section 6 in the Conveyance Agreement prevented their transfer.

The anti-assignment clause involves a choice of law question. When the first two of the CNA policies were issued to J.I. Case Company, it was a Wisconsin corporation.[40] It would appear that when the third policy was issued, after the 1970 merger, it was a Delaware corporation.[41] It would further appear that until the 1994 reorganization, when Case Corporation was divested of the agricultural and construction equipment business, J.I. Case Company until 1990 and Case Corporation from then until 1994 had its principal place of business in Wisconsin. Case Equipment Corporation, now CNH, was a Delaware corporation.[42] Tenneco is a Delaware corporation having its principle place of business in Texas.

CNH contends that the law of either Wisconsin or Delaware applies, and that under the laws of either of those states, the anti-assignment clause does not prevent assignment of the CNA policies for claims for injuries which occurred prior to the 1994 reorganization.

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[39] *Id.*, Ex. F, at 4.

[40] *Id.*, Ex. A; *Id.*, Ex. I; *Id.*, Ex. J.

[41] Pl's Aff. of Emily E. Garrison in Supp. Mot. for Partial Summ. J. Regarding the Duty to Defend, Ex. A; Pl's Decl. of Diane L. Scialabba, Ex. C; *Id.*, Ex. D-2.

[42] Pl's Decl. of Diane L. Scialabba, Ex. H-1.

The CNA Defendants contend that there are significant fact questions regarding which state's law should apply to insurance policies issued over decades to J.I. Case and Tenneco (all the policies in the case, including the three involved with this motion), and that the CNA Defendants and other parties to this case require time for discovery on these issues; that Tenneco, which owned J.I Case Company from 1970 to 1994 was a Texas-based corporation; that all of the insurance policies issued by the other carriers in this case were issued to Tenneco in Houston, Texas; that an application of the standards set forth in Section 188 of the *Restatement (Second) Conflict of Laws* (the "*Restatement*") might well result in the application of Texas law to this case; that under Texas, Wisconsin, and Delaware law the anti-assignment clause prevented assignment of the CNA polices to Case Equipment Corporation; that there is authority that strongly suggests that the law of the state with the most significant contacts to all of the policies in the case should be applied; that the face of the polices show that there are relevant contacts with at least Delaware, Wisconsin, and Texas; that that list of states has been identified without even considering the location of the various insured risks, negotiation of the policies, prior litigation between the parties, or the location where the underlying claimants alleged they were injured; that all of these factors should be considered by the court in its inquiry under Section 188 of the *Restatement* after the parties have had the opportunity to develop the facts properly following an appropriate period of discovery; and that none of the cases cited by CNH in its brief involve the application of anti-assignment provisions in the third-party context under Delaware, Wisconsin, or Texas law.

It is well established that Delaware decides choice of law questions based upon

the "most significant relationship test" set forth in the *Restatement*.[43] General principles concerning choice of law in insurance coverage disputes are set forth in *Restatement* Sections 188 and 193.[44] Section 193 provides that the court should apply the "local law of the state which the parties understood was to be the principal location of the insured risk during the term of the policy" unless another state has a more significant relationship.[45] Where the insured risks are spread throughout two or more states, which I infer is the case here, Section 193 assumes less significance than Section 188.[46]

Section 188 provides, in pertinent part, that:

> In the absence of an effective choice of law by the parties, the contacts to be taken in account . . . include (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 the place of business of the parties.[47]

The contacts and factors set forth above are not to be applied simply by counting up the interests on each side, but rather "evaluated according to their relative

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[43] *Liggett Group Inc. v. Affiliated FM Ins. Co.,* 788 A.2d 134, 137 (Del. Super. May 15, 2001) (citations omitted).

[44] Restatement (Second) of Conflict of Laws § 188 (1971); *Id.* § 193 (1971).

[45] Restatement (Second) of Conflict of Laws § 193.

[46] *Id.* § 193 cmt. b.

[47] *Id.* § 188.

importance with respect to the particular issue."[48] This Court has previously observed that "the most significant factor for [a] conflict of laws analysis in a complex insurance case with multiple insurers and multiple risks is the principle place of business of the insured because it is 'the situs which link[s] all the parties together.'"[49] In addition, if warranted, the law of one state may be found to apply to some issues, while the law of another state may be found to apply to others.[50] In this motion, I address choice of law only as it applies to the anti-assignment clause.

Here, two of the policies were issued to J.I. Case Company while it was a Wisconsin corporation, having its principal place of business in Wisconsin. There was no Texas connection when the policies were issued. While it appears that the third policy was issued the year after Tenneco had acquired J.I. Case Company, it was issued directly to J.I. Case Company, and J.I. Case Company, then a Delaware corporation, still had its principal place of business in Wisconsin. Under these circumstances and taking into account the factors set forth above, the contention that the law of Texas (or some state other than Wisconsin or Delaware) may be found to apply to the anti-assignment clause through further discovery is unpersuasive.

Moreover, the contention that the three policies involved here should be part of an over-all conflict of law analysis concerning all the policies involved in the case

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[48] *Travelers Indem. Co. v. Lake*, 594 A.2d 38, n.6 (quoting Restatement (Second) of Conflicts § 145).

[49] *Liggett Group Inc.,* 788 A.2d at 138 (citations omitted).

[50] *Pittman v. Maldania, Inc.,* 2001 WL 1221704, at *3 (Del. Super. July 31, 2001); *Marks v. Messick & Gray Const., Inc.*, 2000 WL 703657, at *2 (Del. Super. Apr. 18, 2000).

is also unpersuasive, in this case. Before engaging in a conflict of law analysis between Wisconsin and Delaware, the court should first "compare the laws of the competing jurisdictions to determine whether the laws actually conflict."[51] More specifically, "[a] 'true conflict' exists if the laws of the competing jurisdictions produce different results when applied to the facts of the case.[52] If the result would be the same under the laws of the competing jurisdictions, then "there is no real conflict and a choice of law analysis would be superfluous."[53]

I find that there is no conflict between the laws of Wisconsin and Delaware on the issue of whether insurance rights can be assigned post-loss when there is an anti-assignment clause. I find that under the laws of both states, an anti-assignment clause does not operate to prevent the assignment of a policy where the alleged loss occurred prior to the assignment.

In Wisconsin it is "well established that after an insurance loss occurs, the claim is similar to a debt or any other chose in action and may be assigned."[54]

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[51] *Valley Forge Ins. Co. v. National Union Fire Ins. Co. of Pittsburgh, PA,* 2012 WL 1432524, at *7 (Del. Super. Mar. 15, 2012) (quoting *Mills LP v. Liberty Mut. Ins. Co.,* 2010 WL 8250837, at *4 (Del. Super. Nov. 5, 2010)).

[52] *Valley Forge Ins. Co.,* 2012 WL 1432524, at *7 (citing *Travelers Indem. Co.,* 594 A.2d at 46-47).

[53] *Id.* (quoting *Great Am. Opportunities v. Cherrydale Fundraising, LLC,* 2010 WL 338219, at *8 (Del. Ch. 2010)).

[54] *Stratz v. Kansas Bankers Sur. Co.,* 986 F.Supp. 563, 569 (E.D. Wis. 1997) (citing *Max L. Bloom Co. v. U.S. Cas. Co.,* 210 N.W. 689, 693-94 (Wis. 1926)); *see also Gimbels Midwest, Inc. v. Northwestern Nat. Ins. Co. of Milwaukee,* 240 N.W.2d 140, 145 (Wis. 1976) (holding "[a]s a general rule . . . there appears to be no impediment to the assignment of claims . . . after

The CNA Defendants contend, however, that in Wisconsin, such a chose in action cannot be assigned when there is an anti-assignment clause, relying upon *Red Arrow Products v. Employers Insurance Company of Wausau.*[55] *Red Arrow*, however, is distinguishable. The issue there was whether an assignment which assigned identified policies carried with it an assignment of omitted policies by operation of law.[56] The court held that it did not and the omitted policies were not transferred.[57] I have concluded that the 1994 Agreement and the Conveyance Agreement did assign the CNA polices. The CNA Defendants also rely upon *Loewenhagen v. Integrity Mut. Ins. Co.*[58] However, that case is also distinguishable. There, an insurance policy was not assigned, and the loss occurred after the asset which the policy insured was transferred.[59]

In Delaware, an anti-assignment provision in an insurance contact is meant to "protect the insurer against the possibility of increased risks that might attend a

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the loss has occurred.").

[55] 607 N.W.2d 294, 299 (Wis. Ct. App. 2000).

[56] The agreement at issue in the *Red Arrow* case assigned "Insurance Policies," a term defined as "all of the insurance policies owned by [Old Red Arrow] and which are listed on Exhibit 9." *Red Arrow,* 607 N.W.2d at 296. According to the *Red Arrow* opinion, Exhibit 9 listed Old Red Arrow's policies but did not list the Wausau policies, which were the policies on which Red Arrow claimed it had rights. *Id*.

[57] *Red Arrow,* 607 N.W.2d at 303.

[58] 473 N.W.2d 574 (Wis. Ct. App. 1991).

[59] *Id.* at 575.

change in the identity of the insured if the policy were assigned before the insured-against loss has occurred."[60] An anti-assignment provision "intends only to limit the assignability of an interest in the policy before the insured-against loss has occurred."[61] Such a provision does not preclude an assignment if the assignment takes place after the loss has occurred.[62] This approach "protect[s] the insurer from increased liability, and after events giving rise to the insurer's liability have occurred, the insurer's risk cannot be increased by a change in the insured's identity."[63]

Here, it is undisputed that the alleged losses pertain to policy years preceding the 1994 reorganization. I conclude that under the law of either state, assignment of the polices after the loss occurred was not a violation of the anti-assignment clause and that the CNA Defendants' consent was not required. Since the anti-assignment clauses did not prevent the assignment of the CNA policies, Section 6 of the Conveyance Agreement does not apply because the insurer's consent was not required. The CNA Defendants contention regarding first-party insurance versus third-party insurance is also unpersuasive and is rejected.

The CNA Defendants next contend that any claims under the CNA policies

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[60] *Intern. Rediscount Corp. v. Hartford Acc. & Indem. Co.,* 425 F.Supp. 669, 672 (D. Del. 1977) (citations omitted).

[61] *Id.* at 673 (citations omitted).

[62] *Clark v. Simon,* 1992 WL 354098, at *3 (Del. Super. Nov. 9, 1992) (citing *Intern. Rediscount Corp.,* 425 F.Supp. at 669).

[63] *In re Federal-Mongul Global Inc.,* 385 B.R. 560, 569 (Bankr. D.Del. 2008) (citations omitted).

were waived and released in a 2002 confidential settlement agreement entered into by the CNA Insurance Companies and El Paso. They contend that in the agreement, El Paso, the parent of EPEC, waived and released any claims under the CNA policies. However, I have concluded that the CNA policies were assigned to Case Equipment Corporation, now CNH, in 1994. Since CNH was not a party to the agreement, this contention must fail.

The CNA Defendants next contend that CNH's action against them is barred by the statute of limitations. The authorities upon which the CNA Defendants rely are unpersuasive. CNH has filed this action within three years of the assertion against it of the earliest asbestos-related suit at issue in this motion. No breach of the insurance contract could have occurred outside the period of the statute of limitations. Thus, the CNA Defendants contention that the statute of limitations bars CNH's action against them is rejected.

Finally, the CNA Defendants contend that material issues of fact remain concerning the underlying asbestos-related suits because some of them appear to involve International Harvester products, New Holland products or products of other companies not related to J.I. Case Company. It appears that CNH has acquired rights and assets previously belonging to International Harvester and New Holland companies having no relationship to J.I. Case Company. In their answering brief, the CNA Defendants identify a number of underlying complaints which name other such CNH-related entities as defendants.

Whenever there is a potential or possible liability to pay based on the

allegations in the complaint, the duty to defend arises.[64] The duty to defend is not dependent on the probable liability to pay based on the facts ascertained through trial.[65] When determining whether an insurer has a duty to defend, a court looks at the allegations contained in the complaint to decide whether the underlying action states a claim covered under the insurance policy, thereby triggering the duty to defend.[66] The court looks to the underlying complaint, reading it in its entirety, and determines whether it alleges a risk within the coverage of the policy.[67] Three principles guide this analysis: (1) where there is some doubt as to whether the complaint against the insured alleges a risk insured against, that doubt should be resolved in favor of the insured; (2) any ambiguity in the pleadings should be resolved against the carrier; and (3) even if one count or theory alleged in the complaint lies within the policy coverage, the duty to defend arises.[68]

In its reply brief, CNH states that it seeks a defense only for those asbestos-related complaints which either refer to a J.I. Case Company product or do not refer

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[64] *Liggett Group Inc. v. Affiliated FM Ins. Co.,* 2001 WL 1456774, at *3 (Del. Super. Sept. 12, 2001) (quoting *St. Paul Fire & Marine Ins. Co. v. Vigilant Ins. Co.,* 724 F.Supp. 1173, 1177 (M.D.N.C 1989)).

[65] *Id.*

[66] *Pacific Ins. Co. v. Liberty Mut. Ins. Co.,* 956 A.2d 1246, 1254-55 (Del. 2008) (quoting *American Ins. Group v. Risk Enterprise Management, Ltd.,* 761 A.2d 826, 829 (Del. 2000)).

[67] *Id.* at 1254 (citing *Cont'l Cas. Co. v. Alexis I. duPont Sch. Dist.,* 317 A.2d 101, 103, 105 (Del. 1974)).

[68] *Id.* at 1254-55 (citing *Cont'l Cas. Co.,* 317 A.2d at 103, 105).

to a brand name. It does not seek a defense for a complaint which only refers to International Harvester, New Holland, or another non-J.I. Case Company brand. I am satisfied that the duty to defend applies to such suits. A suit which makes a claim without referring to a brand name may be a claim arising from a J.I. Case Company product. The grant of this motion for summary judgment is limited to the duty to defend for underlying asbestos-related suits which refer to a J.I. Case Company product, or do not refer to a brand name, and which allege exposure to asbestos during the periods covered by the CNA policies; not to suits which refer only to a non-J.I. Case Company brand.

For the foregoing reasons, CNH's motion for Partial Summary Judgment on the Duty to Defend is ***granted***.

IT IS SO ORDERED.

/s/ James T. Vaughn, Jr.

oc: Prothonotary
cc: Order Distribution
File