STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT
CASE NO.: 2020-CP-40-01226

COVIL CORPORATION, by and through its duly appointed Receiver, Peter D. Protopapas, Plaintiff, v. PENNSYLVANIA NATIONAL MUTUAL CASUALTY INSURANCE COMPANY, Defendant.	)	**ORDER GRANTING COVIL CORPORATION'S MOTION FOR PARTIAL SUMMARY JUDGMENT**

On February 28, 2020, the Receiver for Covil Corporation filed this lawsuit, *Covil Corporation v. Pennsylvania National Mutual Insurance Co.*, in the Court of Common Pleas for the Fifth Judicial Circuit against Pennsylvania National Mutual Insurance Company ("Penn National"). Covil alleges that Penn National breached one of the two insurance contracts it has with Covil when it refused to participate in the settlement of the *David D. Rollins* matter pending against Covil. Complaint at ¶¶ 11-18.

On April 22, 2020, the Receiver moved for partial summary judgment on the ground that Penn National breached its insurance contract with Covil that it issued and which was in effect during the relevant time period, Penn National policy number 515 5028 537, for the policy period March 31, 1986 to March 31, 1987, when it attended the court-ordered mediation in the *Rollins* case, but declined to contribute any dollar amount to settle *Rollins*, even though the $50,000 required to settle the case was within the limits of the insurance policy Penn National issued to

Covil. Penn National opposed the motion, arguing that an exclusion in its policy, the "completed operations hazard" and the "products hazard," bars coverage for *Rollins*.

Viewing the Motion for Partial Summary Judgment in the light most favorable to the non-moving party, it is evident that it must be granted, as there is no genuine issue as to any material fact, and it is clear that the moving party is entitled to judgment as a matter of law. Having considered the plaintiff's motion and the applicable response and reply, together with the exhibits submitted with these pleadings, the Court hereby decides the matter on the filings and rules as follows:

I. FINDINGS RELATED TO CORONAVIRUS EMERGENCY PROCEDURES

On April 3, 2020, the South Carolina Supreme Court issued an Order providing guidance to the courts of South Carolina to help ensure the continued operation of the courts during the Coronavirus emergency. *See Re: Operation of the Trial Courts During the Coronavirus Emergency,* S.C. Sup. Ct. Order dated Apr. 3, 2020. In the Order, the Supreme Court noted the impossibility of continuing the practice of conducting hearings on virtually all motions during this unprecedented time. *Id.* The Supreme Court indicated South Carolina trial judges, after allowing all parties the opportunity to file responses to a motion, "may elect to not hold a hearing when the judge determines the motion may readily be decided without further input from the lawyers." *Id.*

The Court finds these motions have been fully and comprehensively briefed, and after reviewing all submissions, the Court further finds that hearings on these motions are not necessary and the motions may readily be decided without further input from the lawyers.

II. LEGAL ANALYSIS

1. Jurisdiction

Preliminarily, this case is properly before this court because not only did this Court supervise the *Rollins* case, but also this Court has jurisdiction over a breach of contract case involving an

amount in controversy of $50,000. Furthermore, as is clear from the face of the insurance contract, the Penn National policy was issued to Covil at its address in Greenville, South Carolina. The exposure took place in South Carolina. The *Rollins* case was brought in this Court and settled in South Carolina. There is no dispute that South Carolina substantive law applies to this action, and Penn National does not suggest otherwise.

Penn National attempts to benefit from the protection of an injunction established by the federal district court for the District of South Carolina in a proceeding to which it is not a party. The Receiver for Covil has not been enjoined from seeking the construction of policies issued to Covil and this Court faces no impediment in deciding any issue of fact or law related to the insurance policies that Penn National issued to Covil. There is no just cause to delay the Receiver's right to adjudicate this dispute with Penn National in this Court.

2. The Receiver's Motion for Summary Judgment

This breach of contract case arises out of the asbestos personal injury action against Covil and others in the case styled *David D. Rollins v. Air & Liquid Systems Corp*., C/A No. 2019-CP-25-00118 pending in Hampton County, South Carolina. Neither party disputes that the *Rollins* case involves bodily injury to David D. Rollins, which took place between March 11, 1986 and January 25, 1987, when Covil was performing operations at the Bowater paper mill in Catawba, South Carolina. The parties agree that the exposure to asbestos resulting from Covil's operations took place during the period of Penn National's policy number 515 5028 537, in effect during the policy period of March 31, 1986 to March 31, 1987. The parties further agree that the policy covers bodily injury resulting from the conduct of Covil's operations, with a $1,000,000 policy limit for each "occurrence."

The principal dispute between Covil and Penn National is whether an exclusion in the Penn National policy applies to bar coverage for the *Rollins* action. This Court already has considered the application of the "product liability hazard" and the "completed operations hazard" in the specific context of Covil and this Court's supervision of the Receiver and the Receivership. Rulings made in this Court's Order for Rule to Show Cause of January 8, 2020 apply equally here and govern the disposition of this case.

In the January 8, 2020 Order, this Court made the following determinations regarding South Carolina insurance law, which govern this case and which are hereby declared and entered as rulings in this case:

1. The "completed operations hazard" and "product liability hazard" apply *only* when a plaintiff is exposed to asbestos products *after* Covil completed its installation or removal operations or work at a particular jobsite;

2. As to this individual asbestos law suit, it is Penn National's burden to prove that the suit seeks the recovery of damages that are subject to the exclusion applicable to the "completed operations" or "product liability" provisions of the policy;

3. Every asbestos insulation contracting, or "operations," claim against Penn National results from a separate "occurrence", thus entitling Covil to multiple "per occurrence" limits of liability to satisfy its asbestos liabilities;

4. As to this asbestos "operations" claim against Covil, Penn National is obligated to pay "in full" up to its "per occurrence" limit of liability; and

5. Penn National bears the burden of proving the applicability of its exclusion for product liability and completed operations claims.

As to the issue of burden of proof, the South Carolina Supreme Court has recognized that insurers bear the burden of proving the applicability of a coverage provision that limits their liability to their insured: "Insurance policy exclusions are construed most strongly against the insurance company, which also bears the burden of establishing the exclusion's applicability." *Owners Ins. Co. v. Clayton,* 364 S.C. 555, 560 614 S.E.2d 611, 614 (2004) (citing *Boggs v. Aetna*

Cas. and Sur. Co., 272 S.C. 460, 252 S.E.2d 565 (1979)); see also *Auto Owners Ins. Co. v. Benjamin*, 415 S.C. 137, 144–48, 781 S.E.2d 137, 141–44 (2015) (upholding circuit court decision to construe an ambiguous terms in favor of coverage, and noting that "ambiguous terms are to be construed strictly against the insurer"). Courts have held that this basic principle also applies to "limitations" on coverage. *Ins. Co. of N. Am. v. Kayser-Roth Corp.*, 770 A.2d 403 (R.I. 2001) ("[o]nce the insured makes a prima facie showing of coverage, 'the insurer then bears the burden of proving the applicability of policy exclusions and limitations in order to avoid an adverse judgment.'" (quoting *Gen. Accident Ins. Co. v. Am. Nat'l Fireproofing, Inc.*, 770 A.2d 403, 416 (R.I. 1998))); *Koppers Co. v. Aetna Cas. & Sur. Co.*, 98 F.3d 1440, 1446 (3d Cir. 1996) ("[T]he insurer bears the burden of proving the applicability of any exclusions or limitations on coverage, since disclaiming coverage on the basis of an exclusion is an affirmative defense").

Penn National has not met its burden in this case. Having agreed that the insurance policy it issued to Covil covers the injury at the center of the *Rollins* action, Penn National asserts that bodily injury resulting from Covil's operations at Bowater in 1986 and 1987 is excluded under the insurance contract because Covil must have supplied asbestos-containing materials to Bowater. To establish this position, Penn National points to language in a 1986 subcontract that required Covil to "[f]urnish all supervision, labor, equipment and tools, materials (except as noted), and incidentals required to supply and install all insulation on requiring piping systems." Although the argument is not clearly articulated, it appears that Penn National takes the position that this language indicates that Covil itself supplied the asbestos insulation to which Mr. Rollins was exposed.

This allegation was never established in the *Rollins* action, and Penn National has done nothing more than imply that it was the case. Instead, the evidence from the *Rollins* action

demonstrates that while Mr. Rollins' stepfather, Robert Ashworth, performed pipefitting work at the Bowater facility between 1986 and 1987, Covil employees also were at the site at the same time performing insulation work. Covil's operations at the Bowater facility were not complete at the time that Mr. Ashworth worked at Bowater—they were ongoing, and happening simultaneously with, Mr. Ashworth's work.

Additionally, no evidence in this case or in the underlying *Rollins* action suggests that Covil supplied asbestos insulation to the Bowater facility between 1986 and 1987. As a result, this case cannot be characterized as a "product liability" exposure that would exclude it from coverage under the insurance policy Penn National issued to Covil.

Indeed, the undisputed facts in this case confirm the position asserted by Covil. It is undisputed that Mr. Rollins alleged "take home" exposure to asbestos via his stepfather, Robert Ashworth, with whom he lived between 1980 and 1991; that Mr. Ashworth came home from work covered in dust; that the dust filled the family home and family vehicles; that Mr. Ashworth performed pipe, pump and boiler work at Bowater between 1986 and 1988; and that Mr. Ashworth died of asbestos-related cancer in November 2018. Penn National has not disputed any of these facts.

Covil performed insulation work at Bowater when Mr. Ashworth worked at the facility. On February 26, 1986, Covil entered a subcontract with BE&K Construction Company, denominated as "Contract No. 4192-F-6410," to "[f]urnish all supervision, labor, equipment and tools, materials (except as noted), and incidentals required to supply and install all insulation on required piping systems" at Bowater, as Penn National concedes. The contract required Covil to maintain at least $1,000,000 in liability insurance coverage to respond to claims seeking the

recovery of damages for bodily injury and property damage during Covil's work. Covil worked on the Bowater pipe insulation project at least between March 11, 1986 and January 25, 1987.

Penn National does not dispute these facts, nor does it dispute that Mr. Rollins' exposure to asbestos took place during the period of Penn National's policy number 515 5028 537, in effect during the policy period of March 31, 1986 to March 31, 1987. The parties agree that the Penn National policy indemnifies Covil against the payment of damages when bodily injury happens during the period of the policy, subject to a $1,000,000 per occurrence limit of liability.

The parties also agree that there is a "products hazard" exclusion and a "completed operations hazard" exclusion in the policy. Although the two exclusions may apply in different factual scenarios depending upon the individual case, it is established that the risk insured by the "products hazard" and the "completed operations hazard" is "the possibility that the goods, products or work of the insured, once relinquished or completed, will cause bodily injury or damage to property other than the product or completed work itself . . . ." Roger C. Henderson, *Insurance Protection For Products Liability And Completed Operations – What Every Lawyer Should Know*, 50 Neb. L. Rev. 415, 441 (1971). Penn National asserts that it need not cover the *Rollins* action because exposure to asbestos during the policy period took place after Covil either completed its work on the Bowater contract or after Covil relinquished possession of the products it installed at Bowater.

The undisputed evidence, however, is that Rollins was exposed to asbestos *during* the period in which Covil performed Contract No. 4192-F-6410 at Bowater. Penn National acknowledges this undisputed fact. It argues instead that Covil "relinquished possession" of the products it installed at Bowater *as they were installed during Covil's work*, as opposed to at the time that Covil completed its work at Bowater in or about January 1987. Penn National therefore

asserts that Rollins' exposure during the period of the Penn National policy took place after Covil relinquished possession of each of its individually installed products at Bowater such that the products hazard in the policy bars coverage for the *Rollins* action.

Courts have rejected this argument. The case law holds that the products hazard exclusion applies in a contracting situation only if bodily injury or property damage first occurs after the insured completed *all of its work* under the contract:

> Regardless of the involvement of the insured's products, so long as an accident occurs on the insured's business premises or away from his premises, but while he has the jobsite under his control, the premises operations clause obtains and coverage is afforded thereunder. It is only after he has relinquished control of a jobsite that the products hazard or completed operations hazard exclusions will operate to deny coverage.

Friestad v. Travelers Indem. Co., 260 Pa.Super. 178, 186, n.5 (1978). Other courts have held similarly that the "products hazard" applies only when an injury is caused after a defective product has been placed into the stream of commerce. See, e.g., *B & R Farm Servs., Inc. v. Farm Bureau Mutual Ins. Co*., 483 N.E.2d 1076, 1077 (Ind.1985). A federal decision applying South Carolina law held more than sixty years ago that an exclusion for "Products Liability" did not apply because the insured had not completed *all of its work* on a construction project, even though the insured previously completed all of its work on the occupied unit where an explosion occurred. *Heyward v. American Cas. Co. of Reading, Pa*., 129 F.Supp. 4, 10 (E.D. S.C. 1955).

Most importantly, Penn National has not proven that any of the materials subject to the 1986 contract contained asbestos. By 1986 asbestos was not found in pipe insulation. Penn National has not suggested otherwise, let alone proven its case. Penn National has not met its burden of establishing that this action falls within either the "product liability hazard" or the "completed operations hazard." The Receiver's partial motion for summary judgment is granted.

3. Penn National's Late Notice Defense

Finally, Penn National asserts that it is not responsible for breach of its insurance contract with Covil because it did not receive timely notice of the *Rollins* action. Penn National argues that because Covil did not make Penn National aware of the *Rollins* action until close to the time of the mediation, Covil breached its obligations to Penn National. As a result, Penn National did not believe that it had to participate in, or indemnify Covil for, the *Rollins* action.

At the same time, however, Penn National admits that "a representative of Penn National attended the mediation and expressed a willingness to contribute toward settlement on behalf of Covil." Defendant Penn National's Memorandum of Law in Opposition to Covil's Motion for Partial Summary Judgment at 17. Penn National engaged the same defense counsel as all other Covil insurers to defend Covil's interests for Penn National in the *Rollins* action and other Covil asbestos personal injury claims. *Id.* at 7. It had access to all of the same materials as the insurers that elected to resolve the *Rollins* action at mediation. Yet, Penn National alone states that "Penn National was not in a position to contribute the amount requested by Covil at the mediation." *Id.* at 17.

Penn National had access to all available information related to the *Rollins* action, attended the *Rollins* mediation with a "willingness to contribute toward settlement," and then made the deliberate decision not to resolve *Rollins*, presumably because it believe that its policy exclusion barred coverage. Penn National's deliberate choice to decline to settle the *Rollins* action within its policy limit is not equivalent to the late notice defenses established in the cases it cites. Penn National's alleged late notice of the *Rollins* action is not a valid defense to breach of its insurance contract with Covil.

* * *

The Receiver has set forth that Penn National issued a contract of insurance with coverage that applies directly to the facts of the *Rollins* action against Covil. Penn National could not overcome the burden of proving the applicability of policy exclusions to create a bar to coverage in this case. Construing the facts in the light most favorable to the nonmoving party, the Court finds that there is no triable issue that Penn National was required to defend Covil against the *Rollins* action, and is required to indemnify Covil against the settlement of the *Rollins* action.

III. RULING

For the reasons stated above, the Court hereby **GRANTS** The Receiver's Motion for Partial Summary Judgment.

AND IT IS SO ORDERED this ____ day of _____, 2020.

_____

Jean H. Toal, Chief Justice of the Supreme Court, Retired, acting as Circuit Court Judge

Columbia, South Carolina.

Richland Common Pleas

Case Caption: Covil Corporation , plaintiff, et al vs Pennsylvania National Mutual Casualty Insurance Co

Case Number: 2020CP4001226

Type: Order/Summary Judgment

So Ordered

Jean H. Toal