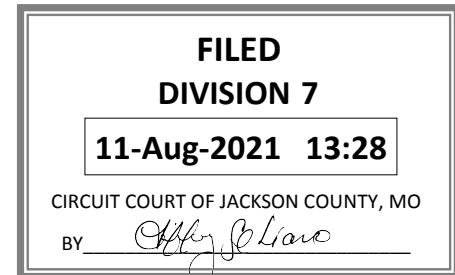


IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI
AT KANSAS CITY

THE TRAVELERS INDEMNITY COMPANY)
OF AMERICA, et al.)
Plaintiffs,)
vs.)
UNIVERSAL MANUFACTURING COMPANY)
A/K/A UNIVERSAL MANUFACTURING, INC.,)
BOTH INDIVIDUALLY AND AS SUCCESSOR)
IN INTEREST TO WERTS NOVELTY)
COMPANY AND BEE JAY PRODUCTS, INC.,)
Defendants,)
and)
FIREMAN'S FUND INSURANCE COMPANY,)
GREAT NORTHERN INSURANCE COMPANY,)
HARTFORD ACCIDENT AND INDEMNITY)
COMPANY, ARROWOOD INDEMNITY)
COMPANY, f/k/a AMERICAN AND FOREIGN)
INSURANCE COMPANY, and ARROWOOD)
INDEMNITY COMPANY, f/k/a ROYAL)
INDEMNITY COMPANY, f/k/a ROYAL)
INSURANCE COMPANY OF AMERICA,)
Interested Party Defendants,)
and)
1500 5th STREET PARTNERS, LLC,)
Intervenor.)

Case No. 1916-CV01196
Division 7



JUDGMENT REGARDING ALL PENDING SUMMARY JUDGMENT MOTIONS

This insurance coverage dispute arises out of an underlying lawsuit brought by Intervenor 1500 5th Street Partners, LLC (“5th Street Partners”) against Defendant, Universal Manufacturing Company (“Universal”), alleging environmental contamination at a site located in Indiana that was previously owned and operated by Universal (the “Underlying Lawsuit”). Plaintiffs and each of the Interested Party Defendants (collectively, the “Insurers”) have filed motions for summary

judgment asserting that Missouri law applies to their respective general liability policies at issue, and therefore, under settled Missouri law, they owe no duty to defend or indemnify Universal with respect to the Underlying Lawsuit based on the pollution exclusions in each of the Insurers' policies. Universal has cross-moved for partial summary judgment against each of the Insurers, asserting that Indiana law should be applied to all of the Insurers' policies, and 5th Street Partners has filed memoranda in support of Universal's motions and in opposition to the Insurers' motions.

The Court finds that there are no disputed issues of material fact between the parties that would preclude entry of summary judgment. Having reviewed and considered the cross-Motions for Summary Judgment, and having heard oral argument on the choice of law issue via the WebEx platform on June 8, 2021, the Court finds that Missouri law applies to all insurance policies at issue in this action. Accordingly, the Court hereby **GRANTS** each of the Insurers' respective motions for summary judgment, **DENIES** Universal's motions for summary judgment, and enters final Judgment in favor of the Insurers for the reasons set forth below.

FACTUAL BACKGROUND

This action stems from an underlying lawsuit captioned: *1500 5th Street Partners, LLC v. Universal Manufacturing Company et al.*, pending in the United States District Court for the Southern District of Indiana, Indianapolis Division, Case No. 1:18-cv-1242 (“Underlying Lawsuit”). The plaintiff in the Underlying Lawsuit, 5th Street Partners, alleges that Universal owned and operated a manufacturing business from approximately 1979 to 2003 at 1520 W. 5th Street, Muncie, Indiana (the “Site”).

The Underlying Lawsuit asserts two claims against Universal: the first under Indiana's Environmental Legal Action Statute, Indiana Code §§ 13-30-9-1 et seq., and the second under the federal Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §

9607(a)(4)(B) et seq. (“CERCLA”). In relevant part, the Underlying Lawsuit alleges that Universal is liable for the costs to investigate and remediate any existing contamination at the Site based on Universal’s historic manufacturing operations there.

The Underlying Lawsuit further alleges that 5th Street Partners has incurred and will continue to incur costs in responding to the contamination at the Site for which it contends Universal is liable. 5th Street Partners seeks varied relief from Universal, including a judgment in “an amount that will fully and fairly compensate 5th Street Partners for its past and prospective damages.”

Universal now seeks insurance coverage, including payment of defense costs plus any future costs owed to 5th Street Partners, from each of the Insurers, under all of the insurance policies at issue in this action. 5th Street Partners has intervened as a party in this action.

The parties stipulated that discovery is complete on issues related to choice of law with respect to application of the pollution exclusion and threshold issues related to whether Universal is a named insured or otherwise entitled to seek coverage under certain policies at issue in this action. Each Insurer moved for summary judgment, seeking a determination that Missouri law applies to all of the insurance policies at issue, and that, under Missouri law, summary judgment should be granted in their favor based upon the pollution exclusions contained in those insurance policies. National Surety Corporation, The American Insurance Company, The Travelers Indemnity Company of America, Travelers Property Casualty Company of America F/K/A The Travelers Indemnity Company of Illinois, and United States Fidelity And Guaranty Insurance Company also moved for summary judgment that Universal is not a named insured or otherwise entitled to seek coverage under any insurance policies issued by those insurers to Werts Novelty Co., Inc. and/or Werts Novelty Company, Incorporated (collectively “Werts”) and/or other third

parties (the “Werts Policies”) that are at issue in this action.

In addition, Universal moved for partial summary judgment against each of the Insurers on choice of law and against certain Insurers with respect to the Werts Policies. Specifically, Universal seeks a declaration that Indiana law applies to all of the Insurers’ policies at issue in this action and that it is also entitled to coverage under the Werts Policies. 5th Street Partners filed memoranda requesting that the Court grant Universal’s motions for summary judgment and that the Court deny all of the Insurers’ motions for summary judgment.¹

CHOICE OF LAW ANALYSIS

Missouri has adopted Sections 188 and 193 of the Restatement (Second) of Conflicts of Laws (1971) for choice of law issues in casualty insurance contracts. *Viacom, Inc. v. Transit Cas. Co.*, 138 S.W.3d 723, 724-25 (Mo. 2004). Section 188 provides that the law of the state with the most significant relationship to the transaction and parties shall govern.

Section 188 states:

§ 188. Law Governing in Absence of Effective Choice by the Parties

- (1) The rights and duties of the parties with respect to an issue in contract are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the transaction and the parties under the principles stated in § 6.
- (2) In the absence of an effective choice of law by the parties (see § 187), the contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:

¹The Court’s entry of judgment in favor of the Insurers on the choice of law issue renders moot the parties’ summary judgment motions with respect to whether UMC is entitled to coverage under the Werts Policies. This ruling also renders moot the Insurers’ Motion To Strike Certain Paragraphs And Cited Evidence In UMC’s Combined Statement of Uncontroverted Facts In Support Of Its Separate Motions For Partial Summary Judgment Against All Insurers, and Insurers’ Motion To Strike Certain Refiled Statements Of Uncontroverted Facts And Cited Evidence In Support Of Universal’s Oppositions To Motions For Summary Judgment. Accordingly, the Court declines to rule on those motions.

- (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.

These contacts are to be evaluated according to their relative importance with respect to the particular issue.

- (3) If the place of negotiating the contract and the place of performance are in the same state, the local law of this state will usually be applied, except as otherwise provided in ss 189-199 and 203.

Restatement (Second) of Conflict of Laws § 188 (1971).

The § 188(2) factors are not to be considered in a vacuum. *Dillard v. Shaughnessy, Fickel & Scott Architects, Inc.*, 943 S.W.2d 711, 715 (Mo. App. W.D. 1997). “Rather, they are contacts to be considered ‘in determining the choice of law under the principles of § 6’ of the Restatement (Second) of Conflict of Laws.” *Id.* at 715, quoting *D.L.C. v. Walsh*, 908 S.W.2d 791, 795 (Mo. App. W.D. 1995). “Thus, in weighing and interpreting the five factors set out in Section 188(2) we must be guided by the principles set out in Section 6.” *Id.*

Section 6 sets out seven guiding principles as follows:

§ 6. Choice-of-law Principles

* * *

- (2) When there is no such [statutory] directive, the factors relevant to the choice of the applicable rule of law include

- (a) the needs of the interstate and international systems,
- (b) the relevant policies of the forum,
- (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
- (d) the protection of justified expectations,
- (e) the basic policies underlying the particular field of law,
- (f) certainty, predictability and uniformity of result, and
- (g) ease in the determination and application of the law to be applied.

Restatement (Second) of Conflict of Laws § 6(2).

Restatement (Second) of Conflict of Laws § 193 provides:

The validity of a contract of fire, surety or casualty insurance and the rights created thereby are determined by 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 with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the transaction and the parties, in which event the local law of the other state will be applied.

The principal location of the risk during the term of an insurance policy as set forth under §193 is afforded less weight, where, as here, the policies cover a group of risks scattered throughout two or more states. *Viacom*, 138 S.W.3d at 725.

This Court has reviewed the uncontested fact submissions by the parties with respect to choice of law, and analyzed those facts, as required by *Viacom*, under Restatement (Second) of Conflict of Laws § 188, guided by the principles set forth in §6, and under §193.

Based on the totality of the facts, the Court finds that the Restatement factors weigh heavily in favor of the application of Missouri law. All of the policies at issue were fully or predominantly negotiated, contracted for, delivered, and performed in Missouri. Missouri also was the location of the subject matter of all policies. Universal's principal place of business and the location of its legal and insurance functions were in Missouri. And Missouri was the location of the principal place of business and headquarters for the named insureds to the Werts Policies, one of which was a Missouri corporation and another of which (the owner) worked from and resided in Missouri. Thus, under this § 188 analysis, Missouri is the state with the most significant relationship to the transactions and parties to the insurance contracts, under the principles set forth in §6.

Universal nonetheless argues that under §193 Comment (f), the Court should apply Indiana law to the policies because the Site is located in Indiana. Universal's argument, however, ignores

the controlling decision in *Viacom*. There, the Missouri Supreme Court held that Section 193 is given less weight and does not control a choice of law determination, where, as here, the liability insurance policies covered risks scattered throughout two or more states. 138 S.W. 2d at 725. Like *Viacom*, the subject policies here provided general liability coverage on at least a nationwide basis. Moreover, consistent with *Viacom*, the Court finds that, based on the totality of the circumstances, Missouri is the state which the parties understood to be the principal location of the insured risk during the term of all of the policies at issue.

In sum, after considering the facts and circumstances as they apply to §§ 188 and 193 of the Restatement, it is not a sufficient basis for this Court to choose Indiana law simply because Universal seeks coverage for its alleged liability related to a Site located in Indiana. *Viacom*, 138 S.W.3d at 725. Accordingly, the Court finds that, under both §§ 188 and 193, guided by the principles set forth in § 6, the totality of the circumstances warrants the application of Missouri law to all insurance policies at issue in this action.

APPLICATION OF THE POLLUTION EXCLUSION

Each of the Insurers has moved for summary judgment in their favor under Missouri law, based upon the pollution exclusions contained in each of the insurance policies at issue.

Under Missouri law, the absolute pollution exclusions of the type found in each of the insurance policies at issue (with the exception of the Werts Policies issued between 1976 and 1986), preclude coverage for Universal's claims. *Doe Run Res. Corp. v. Am. Guarantee & Liab. Ins.*, 531 S.W. 3d 508, 512–13 (Mo. 2017); *Cas. Indem. Exch. v. City of Sparta*, 997 S.W. 2d 545, 550 (Mo. App. 1999); *United Fire & Cas. Co. v. Titan Contractors Serv., Inc.*, 751 F.3d 880, 886 (8th Cir. 2014); *Doe Run Res Corp v Lexington Ins Co*, 719 F.3d 868, 876 (8th Cir. 2013

The Court further finds that even if Universal could meet its initial burden of establishing

that it is entitled to seek coverage under any of the Werts Policies issued by United States Fidelity And Guaranty Insurance Company, National Surety Corporation, and/or The American Insurance Company between 1976 and 1986, each of those policies contain a pollution exclusion typically referred to as the “sudden and accidental” pollution exclusion. As with the absolute pollution exclusion discussed above, this exclusion in each of those policies is unambiguous and, under Missouri law, bars coverage for the claims asserted in the Underlying Lawsuit related to the Site, according to its plain meaning. *See, e.g., Aetna Cas. & Sur. Co. v. General Dynamics Corp.* 968 F.2d 707 (8th Cir. 1992); *Liberty Mutual Ins. Co. v. FAG Bearings Corp.*, 153 F.3d 919, 922-923 (8th Cir. 1998); *Trans World Airlines, Inc. v. Assoc. Aviation Underwriters*, 58 S.W.3d 609, 621 (Mo. App. E.D. 2001).

Further, neither Universal nor 5th Street Partners have opposed the Insurers’ request for summary judgment based on the pollution exclusions in any of the policies at issue if Missouri law is found to apply. Accordingly, this Court grants each of the Insurer’s motions for summary judgment in their favor, based upon the pollution exclusions in their policies. This Court, likewise, denies each of Universal’s motions for partial summary judgment against the Insurers.

Wherefore, upon consideration of the submissions of the parties, argument of counsel, and being in all other respects duly advised in the premises, it is hereby **ORDERED, ADJUDGED, and DECREED** as follows:

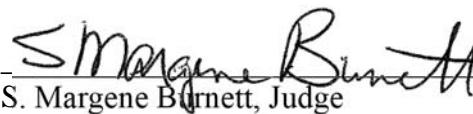
Judgment is entered in favor of The Travelers Indemnity Company of America, Travelers Property Casualty Company of America F/K/A The Travelers Indemnity Company of Illinois, United States Fidelity and Guaranty Insurance Company, National Surety Corporation, The American Insurance Company, Great Northern Insurance Company, Federal Insurance Company, Twin City Fire Insurance Company, Hartford Casualty Insurance Company, and Arrowwood

Indemnity Company and against Universal Manufacturing Company on each pending claim, cross-claim, and/or counterclaim in this action.

This judgment, pursuant to Missouri Court Rule 74.01(b), adjudicates all claims, including all cross-claims and counter-claims, by and between all parties to this action, and otherwise adjudicates all of the claims and the rights and liabilities of all the parties. This judgment is final, and closes this action.

IT IS SO ORDERED.

August 11, 2021
Date


S. Margene Burnett, Judge