IN THE CIRCUIT COURT OF ST. LOUIS COUNTY
STATE OF MISSOURI

MALLINCKRODT INC., et al.,

Plaintiffs,

vs.

THE CONTINENTAL INSURANCE COMPANY, et al.,

Defendants.

Cause No. 05CC-001214

Division 5

JUDGMENT AND ORDER

This matter is before the Court on Plaintiff Mallinckrodt US LLC and Mallinckrodt Inc. ("Mallinckrodt") and Defendants[1] Cross-Motions for Summary Judgment. The Motions were called, heard and submitted on July 13, 2012. The Court, having heard the arguments of counsel, having read the memoranda and case law submitted by the parties, and being now fully advised, hereby makes the following findings.

Mallinckrodt is an amalgamation of three main corporations: Mallinckrodt, International Minerals & Chemicals Corporation ("IMC") and Commercial Solvents Corporation ("CSC"). The original Mallinckrodt Chemical was

[1] Defendant Insurers included in this Motion are: Maryland Casualty Company, Munich Re America, Inc., Affiliated FM Insurance Company, Nationwide Indemnity on Behalf of Employers Mutual Liability Insurance Company of Wisconsin, f/k/a Employers Insurance of Wausau, A Mutual Company, n/k/a Employers Insurance of Wausau, Associated international Insurance Company, Century Indemnity Company, as successor to CIGNA Specialty Insurance Company, f/k/a California Union Insurance Company, Central National Insurance Company of Omaha, United States Fire Insurance Company, First State Insurance Company, Travelers Casualty and Surety Company, f/k/a The Aetna Casualty and Surety Company and St. Paul Surplus Lines Insurance Company, North Star Reinsurance Corporation, Allstate Insurance Company, solely as successor in interest to Northbrook Excess and Surplus Insurance Company, f/k/a Northbrook Insurance Company, and Brittany Insurance Company, Ltd.

incorporated in Missouri over a century ago as the Mallinckrodt Chemical Works, but changed its name to Mallinckrodt, Inc. and reincorporated in Delaware in 1972. In 1986, it became a Delaware corporation but remains headquartered in Missouri, where it has been from inception. IMC was incorporated in New York a century ago. It acquired the shares of Commercial Solvents Corporation ("CSC") in 1975. IMC maintained its principal place of business in Chicago, Illinois from the 1940's to 1994. In 1994, IMC became known as Mallinckrodt, Inc., and moved from Illinois to Missouri.

Mallinckrodt obtained primary and excess insurance policies from several insurers to protect against certain losses incurred as a result of their operations. Mallinckrodt now seeks coverage for environmental claims against them at over twenty sites located throughout the United States. All of these sites involve long-term soil and/or groundwater contamination. This phase of the litigation involves Mallinckrodt's claims for insurance coverage for environmental contamination-related damages resulting from occurrences at three sites: 1) Spanish Fork, Utah; 2) Raleigh, North Carolina; and 3) Hayford Bridge in St. Charles, Missouri.

These Cross-Motions for Summary Judgment are unique in that they request a precise determination of a question of law prior to resolving the issue of the controlling state law. Moreover, the parties have stated that this ruling does not require the Court to determine any issue of fact; does not ask the Court to determine when property damage, if any, took place; does not require the Court to rule on the extent of resultant monetary damages; and does not require the Court to determine whether a finding of pro rata allocation can be rebutted under

the facts pertinent to each site.[2]

Instead, this Court has been asked to determine the manner in which liability for covered losses should be allocated across the years of coverage at issue. Courts confronted with similar facts have adopted either a "pro rata" time-on-the-risk allocation or the "all sums" approach.[3]

The pro rata approach distributes a covered loss across all years in which damage took place, and the liability of the insurers within each policy period is for the portion of the loss allocated to the time their policy was in place. This approach recognizes the inherent difficulty of proving the exact amount of timing and damages under these facts. As a result, it emphasizes that insurers are on the risk for only a specified period of time and prorates total damages in relation to the policy periods insured. In contrast, the all sums approach directs the insurers to pay all sums for which the policyholder shall become liable, up to the policy limits. This approach emphasizes the total policy limit and allows the insured access to up to the full policy amount ("all sums") but does not take into account that a given insurer is likely to pay for damages incurred outside of its policy period. The recourse for such an insurer is to sue in a separate action for any inequity that occurs. This approach also places an inordinate amount of power in the hands of the insured by allowing the insured to choose the policy period in which to recover.

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[2] See, Memorandum of Law in Support of Defendants CNA Companies' and EMCC's Motion for Summary Judgment regarding Allocation, 3, Apr. 7, 2011.

[3] The parties stipulate that the property damage at issue took place continuously over time and cannot be temporally defined. See, Mem. in Supp. Of Pls.' Cross-Mot. for Partial Summary J. on the issue of Allocation, 3, Feb. 8, 2012; and Statement of Uncontroverted Material Facts in Supp. of Defs. CNA Companies' and EMCC's Mot. for Summ. J. Regarding Allocation, ¶8, April 7, 2011.

The parties agree that the Court need not look at the policy language of each individual contract to determine this issue.[4] Instead, the parties have presented representative policies for consideration. For example, London Insurers' policies include or incorporate the following or substantially similar language:

INSURING AGREEMENTS

I. COVERAGE
Underwriters hereby agree, subject to the limitations, terms and conditions hereinafter mentioned, to indemnify the Assured for all sums which the Assured shall be obligated to pay by reason of the liability

(a) imposed upon the Assured by law...

for damages, direct or consequential and expenses on account of –
(i) Personal Injuries..(or)

(ii) Property Damage...

Caused by or arising out of each occurrence happening anywhere in the world.

THIS POLICY IS SUBJECT TO THE FOLLOWING DEFINITIONS

5. OCCURRENCE –

The term "Occurrence" wherever used herein shall mean an accident or a happening or event or a continuous or repeated exposure to conditions which unexpectedly and unintentionally results in personal injury, property damage or advertising liability during the policy period. All such exposure to substantially the same general conditions existing at or emanating from one premises location shall be deemed one occurrence.

Summary judgment is appropriate when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. *ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. banc 1993). Summary judgment serves "to avoid the expense and delay of

[4] See, Tr. of Mot. Hr'g, 91, July 13, 2012.

meritless claims or defenses and to permit the efficient use of scarce judicial resources." *Id.*

Ordinarily, the Court would utilize Missouri's choice of law doctrine to determine which substantive law governs the insurance policies at issue. However, the parties urge the Court to forego a choice of law analysis as unnecessary. Under Missouri law, a court need not conduct a choice of law analysis where there is no actual conflict on a given legal issue. See, *Hartford Acc. & Indem. Co. v. Travelers Ins. Co.*, 525 S.W.2d 612, 616 (Mo.App. 1975)

Mallinckrodt states, "...the policies at issue here will likely be governed by the laws of either Missouri or Illinois. Contrary to the Insurers' assertion, however, the laws of either jurisdiction support an all sums allocation."[5] Not surprisingly, Defendants posit the opposite: "....(c)ourts in Illinois, Missouri and New York all apply pro rata allocation."[6] In any event, the parties agree that Missouri and Illinois are potentially applicable. While Defendants have remained steadfast that New York law may apply to the CSC policies, Mallinckrodt has primarily argued that Illinois law applies, only suggesting potential applicability of Indiana law.[7] Consequently, the Court will analyze both Missouri and Illinois law on the issue of allocation. If these two state laws are not in conflict, then a choice of law analysis is unnecessary at this time.

Missouri and Illinois Courts interpret insurance contracts similarly. For example, the construction of an insurance policy is a question of law. See, *State*

[5] See, Mem. in Supp. of Pls' Cross-Mot. 8-9, February 8, 2012.
[6] See, Mem. in Supp. of London Insurers' Mot. for Partial Summ. J. on the Issue of Pro Rata Allocation, 10, April 8, 2011.
[7] See, Mem. in Supp. of Pls.' Cross-Mot., 8-11.

Farm Mut. Aut. Ins. Co. v. Villicana, 692 N.E.2d 1196, 1199 (Ill. 1998); and *Jones v. Mid-Century Ins. Co.*, 287 S.W.3d 687, 690 (Mo. 2009). To ascertain the meaning of terms in the policy, a court must construe the policy as a whole, reading its provisions according to their plain and ordinary meaning. *Nicor, Inc., v. Associated Elec. and Gas Ins. Services, Ltd.*, 860 N.E.2d 280, 286 (Ill. 2006); and *Gavan v. Bituminous Cas. Corp.*, 242 S.W.3d 718, 720 (Mo. 2008).

Each method for allocation is a direct recognition of the evidentiary quagmire and resulting compromises inherent in this set of facts. It is this precise set of circumstances that led Courts to develop the all sums and pro rata theories for allocation. The parties submit that, in all likelihood, they will not be able to prove damages utilizing conventional methods. However, the policy language provided in the representative policies is fairly conventional, including the following key terms: "all sums;" "occurrence;" and "during the policy period."

Many states have encountered fact patterns similar to the case at bar; unfortunately, to date Missouri Courts have not.[8] For that reason, the Court will begin its analysis with Illinois law. The Court relies on the following Illinois cases: *Outboard Marine Corp. v. Liberty Mutual Ins. Co.*, 283 Ill.App.3d 630 (2d Dist. 1996) and *Zurich Ins. Co., v. Raymark Indus.*, Inc., 514 N.E.2d 150 (Ill. 1987).

Zurich Ins. Co., v. Raymark Indus., Inc. was a declaratory judgment action that involved the construction of various comprehensive general liability insurance policies issued to the defendant Raymark Industries, Inc.. Zurich filed a declaratory judgment to determine its obligation to defend and indemnify

[8] In *Monsanto Co. v. C.E. Heath Compensation & Liability Ins. Co.*, 652 A.2d 30 (Del.1994) as clarified on denial of re'g (Del. Jan. 10, 1995) (en banc), the Delaware Supreme Court applied Missouri law to similar facts.

Raymark in thousands of underlying actions by individuals alleging injuries from exposure to asbestos-containing products manufactured by Raymark. The *Zurich* Court found that asbestos-related injuries have three discrete triggers that are not necessarily continuing. *Id.* Thus, unlike the instant case, continuing damages incapable of temporal definition were not found.

Mallinckrodt argues that *Zurich* is an explicit rejection of pro rata allocation in favor of the all sums approach. This Court does not read *Zurich* as a generalized rejection of pro rata allocation. *Zurich,* in the Court's view, applies all sums to asbestos related bodily injuries that were found to be certain and divisible. As stated in a later opinion, "The *Zurich* court did not have to contend with the murkiness of proof that marks this and other environmental pollution cases." *Maremont Corp. v. Continental Cas. Co.,* 326 Ill.App.3d 272, 279 (2001).

The case at bar is substantially similar to *Outboard Marine Corp. v. Liberty Mutual Ins. Co.*, 283 Ill.App.3d 630 (2d Dist. 1996) which addressed the issue, termed one of first impression, of how to apportion damages between Outboard Marine Corp. ("OMC") and various insurers in an environmental pollution context. *Id.* at 748.

Outboard Marine involved a claim of property damage from PCB contamination. The insured, Outboard Marine Inc. ("Outboard Marine,") sought coverage from its excess insurers for continuous pollution of Waukegan Harbor and Lake Michigan from 1953 through 1958. *Id.* The Court in *Outboard Marine,* distinguishing *Zurich,* clearly adopted the pro rata approach. Based on the foregoing, the Court finds that Illinois law would adopt the pro rata approach to

allocation of damages in the case at bar.

Next, the Court considers Missouri law, which has never considered the analysis requested in this instance. The cases most apposite to the case at bar are: *Continental Casualty Co. v. Medical Protective Co.*, 859 S.W.2d 789 (1993); *Nationwide Insurance Company v. Central Missouri Electric Cooperative, Inc.*, 278 F.3d 742 (2001); and *Monsanto Company v. C.E. Heath Compensation and Liability Insurance Company*, 652 A.2d 30 (1994).

In *Continental Casualty*, the court considered allocation of damages to successive dental malpractice insurers arising from long-term injuries. The court applied a pro rata, "time on the risk" approach and allocated damages accordingly. The Court stated,

> "Paraphrasing the insuring clauses of the policies issued by the parties to this action, each company agreed to pay on behalf of Dr. Winter **all sums** he shall become legally liable to pay as damages because of the rendering or failure to render professional services **during the term of each policy**. None of the companies agreed to pay damages for injuries resulting from acts or omissions which occurred before the inception of coverage or after the termination of coverage. Yet, that is what each of the companies would be forced to do under the trial court's order." *Id.* at 791. (emphasis added)

The Court went on to state, "...proration among the three companies on the basis of the proportionate period of each company's exposure is the fairest method of apportioning the settlement." *Id.* at 792.

Continental Casualty was followed by *Nationwide Ins. Co. v. Central Missouri Elec. Co-op., Inc.*, 278 F.3d 742 (2001) wherein the 8th Circuit applied Missouri law. In *Nationwide*, the underlying action involved a faulty transformer installed by CMEC that damaged a dairy operation from 1982 to 1991. After the

underlying suit settled, one of CMEC's insurers filed a declaratory judgment seeking, among other things, determination of its duty to indemnify for damages sustained during another insurer's coverage period.

The relevant policies from both insurers included the following substantially similar language:

> "Federated (Insurer) will pay on behalf of the policyholder **all sums**...which the policyholder shall become legally obligated to pay as damages because of personal injury, or property damage, to which this insurance applies, caused by an **occurrence**." The policies defined "occurrence" as "an accident **occurring within the policy period**, including continuous or repeated exposure to conditions, which result in Personal Injury or Property Damage neither expected or intended from the standpoint of the insured."" *Id.* at 746. (emphasis added)

In analyzing the allocation of damages, the *Nationwide* Court held, "...given the complexities involved in determining the precise timing of the multiple injuries....a time on the risk analysis was appropriate." *Id.* at 748. Thus, in this situation where damages could not be allocated temporally, the Court found the time on the risk approach appropriate.[9]

In contrast to this line of cases, Mallinckrodt offers *Monsanto Company v. C.E. Heath Compensation and Liability Ins. Co.*, 652 A.2d 30 (1994). *Monsanto* was decided after *Continental Casualty* but before *Nationwide*. In *Monsanto*, the policyholder sought a declaratory judgment that it had coverage under the terms of CGL insurance policies for third-party claims for bodily injury or property damage relating to pollution at various sites throughout the United States. The Delaware Supreme Court held that Missouri courts would utilize the all sums

[9] The Court notes that the policy language in the above cited cases is substantially similar to the representative policy in the case at bar.

approach. *Id.*

Despite *Monsanto* having been decided well before *Nationwide*, the *Nationwide* Court failed to cite it or rely upon it. In fact, *Monsanto* has not been cited by any subsequent case. In this instance, this Court elects to follow the better reasoning of the Missouri Supreme Court and the 8th Circuit in *Continental Casualty* and *Nationwide, supra.*

Accordingly, this Court finds that Missouri and Illinois law apply the pro rata method of allocation to damages in these circumstances. Thus, Defendants' Motion for Partial Summary Judgment on the issue of Allocation is GRANTED. Plaintiff's Cross-Motion for Partial Summary Judgment Regarding Allocation of Damages is DENIED.

SO ORDERED:

November 9, 2012 Thea A. Sherry

Date Thea A. Sherry, Judge