

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF PENNSYLVANIA**

KEYSTONE CHEMICAL CO.,	)	CIVIL ACTION
	)	
	)	NO. 92-6000
	)	
Plaintiff	)	
	)	
vs.	)	
	)	
MAYER POLLOCK STEEL CORPORATION	)	
as successor to POLLOCK-	)	
READING, INC., RCA CORPORATION,	)	
TYLER PIPE INDUSTRIES, INC.,	)	
TRW INC., JULIUS SIMON,	)	
SAMUEL SIMON, and JOHN DOE	)	
#1-100, fictitious persons,	)	
companies or corporations,	)	
	)	
Defendant	)	

**TROUTMAN, S.J.**

**M E M O R A N D U M**

Keystone Chemical Company commenced this action pursuant to 42 U.S.C. §9607(a), the Comprehensive Environmental Response Compensation and Liability Act of 1980 (CERCLA), to secure contribution for costs it expended to remedy an environmental hazard. Mayer Pollock Steel Corporation, RCA Corporation<sup>1</sup>, Tyler Pipe, TRW, Inc., and the John Doe defendants (Generator Defendants) are identified as producers of hazardous wastes which contaminated, or threatened to contaminate, property

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1. Although RCA Corporation is the named defendant, the true party in interest is now General Electric Company, successor by merger to RCA. For the sake of convenience, this defendant will be referred to as RCA in the memorandum, but for the sake of clarity, it will be designated RCA Corporation (General Electric Company) in the accompanying order.

leased by Keystone. Julius and Samuel Simon, former owners of Keystone, and the City of Philadelphia, Trustee under the Will of Stephen Girard, Acting by the Board of Directors of City Trusts, (Girard Trust), owner of the property in issue, (Owner Defendants), are likewise alleged to be potentially responsible parties under CERCLA from whom Keystone may seek contribution for its response costs.

#### Factual Background

Beginning in 1979, Keystone leased a property, located in Butler Township, Schuylkill County, PA, from the Girard Trust in order to operate a chemical recycling plant. (Amended Complaint, Doc. #58, ¶¶10--12). In 1981, Keystone began accepting chemical wastes for storage and disposal from RCA Corporation facilities in Mountaintop and Dunmore, PA. (Id., ¶¶15, 16; Affidavit of Craig S. Povorney, ¶¶3, 4 and Exh. C, D thereto). Likewise, in 1981 and 1982, Keystone accepted wastes from Tyler Pipe, TRW Compressor Components Division of TRW, Inc. and 100 additional companies, designated as John Doe #1--100. (Amended Complaint, ¶¶17--19).

In October, 1982, Keystone notified the Pennsylvania Department of Environmental Resources (PADER) of a threatened release of hazardous substances resulting from a cracked asphalt liner in an impoundment for hazardous wastes at its facility. (Id., ¶23; Brief in support of Plaintiff's Motion for Summary Judgment, Doc. #85). Thereafter, Keystone entered into

negotiations with PADER which ultimately resulted in a consent order obligating Keystone to remove the wastes from the property in accordance with a plan approved by PADER. (Id.). Keystone incurred significant costs to comply with the PADER order and approved plan.

Subsequently, plaintiff attempted to persuade the defendants to enter into negotiations for allocation of at least part of the response costs under CERCLA, but all refused. Keystone then brought this action for contribution and indemnification against the Generator Defendants and the Simons, and later received leave of court to file an amended complaint joining the City of Philadelphia as Trustee of the Girard Trust.<sup>2</sup>

#### Factual and Legal Contentions

Although all defendants agree that the CERCLA statute provides for indemnification and contribution in the usual environmental hazard case, the defendants contend that this case is most unusual. The Generator Defendants assert, generally, that since plaintiff solicited their business by advertising and

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2. Early in the pendency of this action, defendants filed a joint motion to dismiss Counts III--VIII, X and XII, which was granted by order entered March 11, 1993 (Doc. #50). Soon thereafter, Mayer Pollock Steel filed for bankruptcy protection, necessitating a stay of this action. Subsequently, plaintiff's claims against Mayer Pollock were dismissed to permit this action to proceed. A settlement of Keystone's claims against Julius and Samuel Simon was reported to the Court on September 3, 1996.

promising that its facility was safe for storage and disposal of hazardous wastes, Keystone knew, understood and accepted the nature of the wastes and the potential environmental problems which could ensue. Consequently, the Generator Defendants argue that the substantial fees they paid plaintiff to collect, transport, and store/treat the hazardous wastes they produced discharged any liability they might otherwise have had for contributing to the clean-up costs. Moreover, the Generator Defendants contend that Keystone represented and agreed by contract that it was able to treat and store such wastes in a way that did not present an environmental hazard. Thus, the Generator Defendants contend that having relied upon Keystone's promises, they have no responsibility under CERCLA for contributing to Keystone's response costs.

In addition, RCA contends that the Waste Transportation and Disposal Agreements it had with plaintiff for disposal of its wastes provide that Keystone will indemnify and hold it harmless for environmental hazard/damage. Similarly, the remaining Owner Defendant, Girard Trust, asserts that it got specific assurances from plaintiff that, pursuant to the indemnity provision in the lease executed on May 1, 1979, by Kent L. Roberts, chairman of the Board of Directors of City Trusts, the Girard Trust would not be held responsible for CERCLA claims arising out of the use of the land by Keystone.

Although plaintiff agrees that it is permissible for potentially responsible parties under CERCLA to enforce indemnity

clauses between and among themselves, Keystone contends, with respect to the Girard Trust, that the indemnity clause in its lease is not broad and encompassing enough to cover CERCLA liability. See, Smithkline Beecham Corp. v. Rohm and Haas Co., 89 F.3d 154 (3rd Cir. 1996). In addition, with respect to RCA, Keystone argues that contractual indemnity for environmental hazard claims is limited to damage arising from specific conduct on the part of Keystone which did not occur.

In order to resolve the legal issues arising from the competing contract claims, plaintiff Keystone and defendants RCA and Girard Trust have filed motions for summary judgment. All moving parties agree that there are no material issues of fact in dispute and that there are no ambiguities in the indemnity clauses in issue. Thus, the moving parties assert that the Court need only determine the proper construction of the indemnity clauses.

#### Applicable Legal Standards

The standards governing our evaluation of indemnity clauses in environmental hazard actions were set forth in detail in Beazer East, Inc. v. Mead Corp., 34 F.3d 206 (3rd Cir. 1994). The court noted, first, that pursuant to 42 U.S.C. §9607(e)(1), the federal courts had long permitted indemnity clauses covering liability for CERCLA response costs to be enforced between and among parties potentially responsible for such costs. Although an apparently contradictory provision in the same section of the statute prohibits indemnity clauses from relieving a party of

CERCLA liability, the court harmonized the principles found in §9607(e) by concluding that "hold harmless" or indemnity agreements may not operate to relieve a potentially responsible party of joint and several liability for cleaning up an environmental hazard, but may be used to allocate liability for response costs among the responsible parties.

An additional question then arose concerning the effect of indemnity clauses in contracts which became effective prior to the enactment of CERCLA, since, in that event, the parties could not have specifically contemplated indemnification for CERCLA claims. In Beazer, the court considered that issue for the first time, and concluded that if "a pre-CERCLA indemnification agreement is either specific enough to include CERCLA liability or general enough to include any and all environmental liability," such agreement is enforceable with respect to CERCLA claims. 34 F.3d at 211; Smithkline Beecham Corp. v. Rohm and Haas Co..

The final issue resolved in Beazer is the substantive law applicable to the contract or contracts at issue. The court held that state law, not federal common law, provides the appropriate rule of decision. See, also, Fisher Development Co. v. Boise Cascade Corp., 37 F.3d 104 (3rd Cir. 1994); Hatco v. W.R. Grace & Co., 59 F.3d 400 (3rd Cir. 1995).

Thus, in order to determine whether Keystone agreed with defendants RCA and the Girard Trust to indemnify them for CERCLA response costs for which those defendants would otherwise

be liable, we are required to ascertain whether the indemnity clauses included in Keystone's contracts with each of the moving defendants fairly encompass indemnity for Keystone's CERCLA contribution claims by assessing the effect of such clauses under the applicable state law and in light of the facts of this case.

Plaintiff Keystone and the Girard Trust agree that the law of Pennsylvania applies to the 1979 lease between them, and we likewise agree, since both parties are Pennsylvania residents and the leased premises is located in Pennsylvania. In addition, the Waste Transportation and Disposal Agreement between Keystone and RCA contains a choice of law provision which specifies that their contracts are to be interpreted according to the law of Pennsylvania. See, Exh. C to Affidavit of Craig S. Povorney at ¶18. To resolve all of the pending summary judgment motions, therefore, we look to Pennsylvania's substantive legal standards governing construction of indemnity clauses.

Under Pennsylvania law, an indemnity or "hold harmless" clause requires the indemnitor to bear the consequences of liability which may arise from the contractual relationship between indemnitor and indemnitee, including the cost of damages resulting from their joint undertaking for which the indemnitee would be liable absent the indemnity clause. Valhall Corp. v. Sullivan Associates, Inc., 44 F.3d 195 (3rd Cir. 1995). An indemnity provision is interpreted narrowly "in light of the parties' intentions as evidenced by the entire contract," Fox Park Corp. v. James Leasing Corp., 641 A.2d 315, 318 (Pa. Super.

1994). Moreover, ambiguities in an indemnity clause are construed against the party seeking to avoid liability, and the scope of such a provision is limited to matters expressly covered by it. Valhall; Fulmer v. Duquesne Light Co., 543 A.2d 1100 (Pa. Super. 1988). Finally, the party seeking indemnity bears the burden of demonstrating that all prerequisites to enforcing the clause have been met. Topp Copy Products, Inc. v. Singletary, 626 A.2d 98 (Pa. 1993); Valhall.

Thus, a court considering whether an indemnity provision governed by Pennsylvania law is enforceable with respect to liability for contributing to CERCLA response costs must determine whether the party seeking indemnity has established, from the clear and express language of the indemnity clause itself, and from construction of the entire agreement, that the parties intended to include environmental hazard claims within the scope of the indemnity clause at issue.

We will, therefore, examine the indemnity provisions found in the Girard Trust lease with Keystone and in the Waste Transportation and Disposal Agreements between RCA and Keystone in light of the legal standards applicable, generally, to construction of such provisions under CERCLA and the legal standards specifically applicable under Pennsylvania law.

#### Girard Trust Lease

The indemnity clause in Keystone's lease with the Girard Trust provides as follows:

9. (a) The Lessee agrees to indemnify the Lessor from any demands or actions based upon injuries to person or damage to property suffered upon the demised premises, including demands or actions of the Lessee's officers and employees, whether the injury or damage results from the operations of the Lessee, any condition subsisting in the plant of the Lessee, or on the other parts of the demised premises.

(b) The Lessee further agrees to indemnify the Lessor from any demands or action based upon injuries to person or damage to property suffered off the demised premises but arising from, growing out of or caused by any act or omission of Lessee, its officers and employees thereon.

(c) The Lessee executes this lease with knowledge that there has been extensive mining of the coal beneath the demised premises. The Lessee agrees to indemnify the Lessor from any demands or actions, which it or any person entering with its permission may have, because of injury to person or property suffered because of any breaking or subsidence of the surface, or any failure of subjacent or lateral support of the demised premises.

(d) During the term of this lease and that of any extension or renewal thereof, the Lessee shall maintain in effect a policy or policies of insurance, in which the Lessor shall be named as one of the insured, to protect the parties hereto against the demands or actions set forth in this clause. The policy or policies shall be in the form, content and amount approved by the Lessor's General Manager.

Keystone contends that this provision is not broad enough to provide indemnity for CERCLA response costs or other environmental hazards since it does not include indemnification for damages to the leased property itself. According to Keystone, the phrase "damage to property" is limited by the next phrase, "suffered upon the demised premises," to claims for damage to personal property which is found on or brought to the leasehold.

Girard Trust, however, contends that the language of the ¶9(a) of the contract clearly covers all damage to property arising out of Keystone's operations, including damage to the leased property itself, and, therefore, encompasses environmental hazard claims as well as typical tort claims.

In the alternative, Girard Trust suggests that an April 1, 1985, letter from Mark Alsentzer, Vice-President and General Manager of Keystone, to Kent L. Roberts, who was then General Manager of the Girard Estate, forecloses Keystone's attempt to limit the scope of the indemnity clause to tort claims. (See, Reply Memorandum in support of the Girard Trust Motion for Summary Judgment, (Doc. #90), Exh. D to Affidavit of Kent L. Roberts). The letter purports to reassure the Girard Trust that a proposed amendment to the 1979 lease sought by Keystone to permit it to operate a waste treatment/recycling facility on the leased property would not subject the Girard Trust to financial responsibility for potential environmental damage arising out of the new activity. Id. In the letter, Alsentzer notes that,

Keystone has agreed to indemnify the Girard Estate under the terms of its lease "from any demands or actions based upon injuries to person or damage to property suffered upon the demised premises...whether the injury or damage results from the operations of the Lessee, any conditions (sic) subsisting in the plant of the Lessee, or on the [other] parts of the demised premises." This indemnification is further evidence of our commitment to stand behind our legal obligations to insure that our facility is run in a responsible and environmentally safe manner.

In sum, we feel that the likelihood that Girard Trust will ever incur any liability associated with the

operation of our facility is minimized as a result of...the indemnification contained in our lease.

Id.

Although we cannot agree with the Girard Trust that such letter prevents Keystone from seeking contribution from Girard Trust based upon principles of promissory estoppel, the letter does serve to clarify the understanding of the parties concerning the scope of the indemnity provision in the lease.<sup>3</sup> Alsentzer unequivocally assured Roberts that Keystone considered the indemnity provision of the 1979 lease broad enough to cover liability for environmental claims. Moreover, it is significant that the April 1, 1985 letter was sent to the Girard Trust well after Keystone became aware of the threatened release of pollutants from its impoundment and was negotiating the consent decree in which it ultimately agreed to be responsible for clean-up of the site. It is obvious, therefore, that Keystone did not believe, at the time the lease was executed, and for a long time after it became aware of its potential liability for CERCLA

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3. Since Keystone is not seeking contribution from the Girard Trust for response costs arising out of the proposed expansion of its operations, we do not believe that promissory estoppel applies to Keystone's claims in this action. In the first instance, this case arose from the operations originally permitted by the lease, but the letter was not directed toward such operations. Moreover, the environmental damage to the leasehold from which this action arose occurred prior to the April 1, 1985 letter. Thus, the letter was not intended to, and did not, induce action or forbearance on the part of Girard Trust with respect to Keystone's claim for contribution to response costs resulting from the problem involved in this case, a crack in the asphalt liner of an existing impoundment for hazardous wastes.

response costs, that the parties intended to limit the indemnity clause to tort claims, as Keystone now asserts. Rather, as demonstrated by the Alsentzer letter, Keystone and the Girard Trust clearly intended an indemnity provision broad enough to encompass any damage to the property itself, including that which might give rise to liability for remedying environmental hazards.

Such conclusion is in accord with the more sensible and reasonable reading of the contract language itself, i.e., that the scope of ¶9(a) of the lease extends to all property damage which occurs as a result of Keystone's operations, including damage to the land itself, such as that resulting from release, or threatened release, of hazardous wastes.

Thus, the parties' intention to include liability for environmental hazards within the scope of the indemnity clause in the 1979 lease between Keystone and the Girard Trust is clear from the plain language of their contract itself, and the Court's construction of that language is confirmed by additional and uncontradicted evidence in the record. We ultimately conclude, therefore, that there are no material issues of fact in dispute and that, as a matter of law, Keystone agreed in the 1979 lease to indemnify the Girard Trust for the type of claim asserted in this action, i.e., contribution for costs arising out of environmental damage for which the Girard Trust might be liable under CERCLA. Thus, we will grant the Girard Trust motion for

summary judgment and deny Keystone's motion for summary judgment with respect to its claims against the Girard Trust.<sup>4</sup>

RCA Waste Transportation and Disposal Agreements

The contracts between RCA and Keystone contain the following indemnity provision:

10. Indemnification Contractor agrees to indemnify, save harmless and defend Generator, its directors, officers and employees from and against any and all liabilities, claims, penalties, forfeitures, suits, and the costs and expenses incidental thereto (including costs of defense, settlement, and reasonable attorney's fees), which any of them may hereafter suffer, be subjected to, incur, become responsible for or pay out as a result of death or bodily injuries to any person, destruction, damage to any property (including loss of use), contamination of or adverse effects on the environment, or any violation or alleged violation of any governmental laws, regulations or orders, caused,

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4. We note, in addition, that pursuant to another section of the indemnity clause in the Girard Trust lease, ¶9(c), Keystone agreed to indemnify the Girard Trust for claims, including its own, arising out of property damage which resulted from "any breaking or subsidence of the surface, or any failure of subjacent or lateral support of the demised premises."

Since this case is in its very early stages as a result of the long stay required by the Mayer Pollock bankruptcy, there is no evidence in the record concerning the cause of the crack in the asphalt liner which produced the environmental hazard and the resulting remediation efforts for which Keystone here seeks contribution. Thus, it is presently impossible to determine whether Keystone's claim against the Girard Trust might be covered by ¶9(c) of the lease.

Clearly, however, if we did not grant the Girard Trust motion for summary judgment based upon ¶9(a) of the lease, we could not grant Keystone's motion for summary judgment without giving the Girard Trust the opportunity to prove that it is nevertheless entitled to indemnity under ¶9(c) by establishing that the crack in the liner which created the environmental damage to the leasehold resulted from, e.g., "failure of subjacent or lateral support of the demised premises."

directly or indirectly, in whole or in part, by (i) Contractor's breach of any term or provision of this Agreement; or (ii) any negligent or wilful act or omission of the Contractor, its employees, subcontractors or disposal contractors in the performance of this Agreement.

Generator agrees to indemnify, save harmless and defend Contractor, its directors, officers and employees from and against any and all liabilities, claims, penalties, forfeitures, suits and costs and expenses incidental thereto (including costs of defense, settlement and reasonable attorneys' fees) which any of them may hereafter suffer, be subjected to, incur, become responsible for, or pay out as a result of death or bodily injuries to any person, destruction or damage to any property (including loss of use), contamination of and adverse effects on the environment or any violation or alleged violation of any government laws, regulations orders caused, directly or indirectly, in whole or in part, by Generator's breach of any term or provision of this Agreement.

There is no question, in light of the foregoing language, that the parties intended to include indemnity for environmental hazard liability in their contract. As Keystone notes, however, it is just as clear that such indemnity does not broadly extend to damage arising out of any and all operations of Keystone, as in the Girard Trust lease. Rather, Keystone agreed to indemnify RCA only for property damage, or for Keystone's violation of law, regulation or order, resulting from Keystone's breach of the Waste Transportation and Disposal Agreement or from Keystone's negligent or willful act or omission in connection with performance under the contract.

Thus, in order to establish that the indemnity provision applies to the claims that Keystone has asserted against RCA in this action, RCA is required to prove that the

response costs incurred by Keystone were caused by Keystone's breach of contract or by its negligence or willful conduct arising from Keystone's performance of the contractual obligations imposed by the Waste Transportation and Disposal Agreement.

RCA ignores the limitations of the indemnity clause, perhaps assuming that the very fact that a crack developed in the liner of a hazardous waste impoundment at Keystone's facility is sufficient evidence of negligence or breach of contract, thereby triggering the protection afforded to RCA by the indemnity clause. If RCA expects to have the indemnity provision enforced to its benefit, however, RCA must demonstrate that Keystone's conduct caused the environmental damage for which RCA seeks indemnity from Keystone. Since RCA appears oblivious to this requirement, it has not come forward with such evidence.

On the other hand, however, both Keystone and RCA first sought a ruling from the Court on the purely legal issue of the proper interpretation of the indemnity clause in their contract before proceeding with discovery into potentially relevant factual issues. Consequently, we conclude that it would be unfair to RCA to grant Keystone's motion for summary judgment without giving RCA the opportunity to prove that it is entitled to the benefit of the indemnity clause. Just as we cannot assume that the cracked asphalt liner of the hazardous waste impoundment resulted from negligence or breach of contract by Keystone, we likewise cannot assume that RCA, if given the opportunity to do

so, could not adduce sufficient evidence to prevail on its claim that, pursuant to the indemnity clause of the Waste Transportation and Disposal Agreement, RCA is entitled to be relieved of liability for contribution to Keystone's response costs.

We conclude, therefore, that due to the undeveloped factual record, summary judgment for either Keystone or RCA is inappropriate at this juncture. Although there are presently no material issues of fact in dispute, there are simply insufficient facts of record from which the Court can conclusively determine whether either Keystone or RCA is entitled to judgment as a matter of law with respect to the indemnity clause in their contract. We will, therefore, deny both Keystone's and RCA's motions for summary judgment.

#### Conclusion

Having determined that the lease between Keystone and the Girard Trust contains an indemnity provision broad enough to relieve the Girard Trust of liability to Keystone for contribution to CERCLA response costs, we will grant the Girard Trust's pending motion for summary judgment against Keystone.

Since there was no discussion in the Girard Trust motion concerning disposition of its counterclaim and of the cross claims asserted by and against it in the event its motion was granted, we will not presently enter judgment in favor of the City of Philadelphia as Trustee under the Will of Stephen Girard.

Rather, we will await the advice of counsel for the Girard Trust concerning the nature and extent of its expected future participation in this matter, if any.

Having further concluded that summary judgment cannot be granted in favor of either Keystone or RCA concerning the effect of the indemnity clause in their contract on RCA's potential liability to Keystone for contribution to CERCLA response costs, we will deny their cross motions for summary judgment.

Finally, in the order which follows, we will direct counsel for all parties remaining in this action to meet in the near future and thereafter advise the Court, in writing, concerning how they propose to bring this matter, as expeditiously as possible, into a posture for final disposition.

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#1-100, fictitious persons,	)	
companies or corporations,	)	
	)	
Defendant	)	

**TROUTMAN, S.J.**

**O R D E R**

And now, this 1st day of July, 1997, upon consideration of the motions for Summary Judgment of plaintiff, Keystone Chemical, Inc, defendants, City of Philadelphia, and RCA Corporation, (General Electric Company), and the responses thereto by each moving party, **IT IS HEREBY ORDERED** that, for the reasons stated in the accompanying Memorandum:

1. The motion of plaintiff, Keystone Chemical, Inc. (Doc. #84) is **DENIED**;
2. The motion of defendant, City of Philadelphia/Girard Trust, (Doc. #85), is **GRANTED**;
3. The motion of defendant, RCA Corporation, (General Electric Company), (Doc. #86), is **DENIED**.

**IT IS FURTHER ORDERED** that within **thirty (30) days** of the entry of this order upon the record, all parties not previously dismissed from this action shall confer and advise the Court in writing of their proposal for further proceedings, and the timing thereof, directed toward moving the above-captioned action to final resolution. Said conference among the remaining parties shall include RCA Corporation (General Electric Company), and said written report shall include the parties' advice concerning whether a status/scheduling/settlement conference is necessary or advisable prior to any further discovery or formal proceedings in this matter.

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S.J.