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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Delaware,
IN AND FOR NEW CASTLE COUNTY.

MINE SAFETY APPLIANCES COMPANY, Plaintiff,
v.
AIU INSURANCE COMPANY, et al., Defendants.

C.A. No. N10C–07–241 MMJ
|
Submitted: June 29, 2015
|
Decided: August 10, 2015
|
Redacted: October 1, 2015 *

* Opinion was originally Filed Under Seal. The Confidential material contained herein has been redacted.

AIG Insurers' Motion For Partial Summary Judgment Declaring That There Is No Obligation To Reimburse Or Indemnify MSA For Defense Costs **GRANTED IN PART, DENIED IN PART**

Hartford Defendants' Motion For Partial Summary Judgment That Certain Policies Exclude Coverage For Defense Costs **GRANTED**

North River's Motion For Partial Summary Judgment Regarding No Duty To Pay Defense Costs Policy XS 2526 And The 1978–79, Annual Period Of Policies JU 0158 And JU 0171 **GRANTED**

Travelers' Motion For Partial Summary Judgment That Travelers Is Not Obligated To Contribute To Defense Costs **GRANTED**

North River's Motion For Partial Summary Judgment Regarding No Duty To Pay Defense Costs In Addition To Limits Under The First Annual Period Of JU 0010, **GRANTED**

AIG Insurers' Motion For Partial Summary Judgment Of Certain AIG Insurers Declaring That Defense Costs Are "Within Limits" **DENIED AT THIS TIME AS NOT YET RIPE FOR DETERMINATION**

Travelers' Motion For Partial Summary Judgment That The XN Policies Do Not Pay Or Reimburse Defense Costs **GRANTED**

MSA's Motion For Partial Summary Judgment On American Home's Duty To Pay Defense Costs For The 1967–1970 Periods Under Two Of Its Policies **DENIED**

American Home's Motion For Partial Summary Judgment Declaring That MSA Has Failed To Meet Its Burden Of Proof As Regards To Indemnification For Defense Costs **GRANTED**

MSA's Motion For Partial Summary Judgment Against American Home Regarding The Amount Required To Exhaust The Underlying Policies **GRANTED**

American Home's Motion For Partial Summary Judgment Declaring That MSA Has Failed To Prove Exhaustion Of The Policies Underlying American Home Policies CE 35–11–17 And CE 355791 **DENIED**

Hartford Defendants' Motion To Strike The Affidavit Of William J. Berner In Support Of MSA's Motion For Partial Summary Judgment On The Ambiguity Of Its Excess Policies' Follow-Form Provisions **DENIED**

Hartford Defendants' Motion To Strike The Affidavit Of William J. Berner In Support Of MSA's Motions For Partial Summary Judgment That Certain Policies Exclude Coverage For Defense Costs **DENIED**

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MEMORANDUM OPINION

JOHNSTON, J.

***1** This is an insurance coverage case involving several layers of excess coverage. Plaintiff Mine Safety Appliances Company ("MSA") manufactured, distributed and sold products designed to protect miners from inhaling asbestos, silica and coal dust. Mine Safety purchased general liability and excess insurance policies from numerous insurers. MSA filed this declaratory judgment action seeking coverage for tort actions alleging bodily injuries from the use of MSA products.

On June 29, 2015, the Court heard argument on thirteen separate motions. The analysis involves certain common legal authorities and public policy considerations. The parties agree that Pennsylvania law governs the disputes that are the subject of these motions.

FOLLOW–FORM

Follow-form provisions in excess insurance policies incorporate underlying policy language. The obligations of the excess insurer are defined by the language of the underlying policy. However, where the terms of a follow-form excess policy differ from the terms in the underlying policy, the excess policy's terms will control. [1]

[1] *Home Ins. v. Am. Home Prods. Corp.,* 902 F.2d 1111, 1113 (2d Cir.1990); *Kropa v. Gateway Ford,* 974 A.2d 502, 506 n.3 (Pa.Super.Ct.2009).

The insurers argue that the potential for confusion arises when an excess policy specifies that the excess policy will follow form to more than one underlying policy. If the provisions of the underlying policies are inconsistent with each other, the excess insurer must determine which policy to follow.

It appears to the Court that the most simple solution would be for the excess policy to follow form to the policy that is immediately underlying it in the vertical sequence of coverage. Unfortunately, in this case, the layers of excess coverage often are not neatly aligned vertically ***or*** horizontally. [2] Additionally, there does not appear to be clear legal precedent establishing a uniform rule for the order of follow-form policies where terms conflict.

[2] The parties provided the Court with charts visually demonstrating the coverage relationships among underlying and excess policies. Policies are arrayed horizontally by time periods of coverage. The vertical stacking reflects excess coverage on top of underlying policies.

In many instances in this case, the declarations page of the excess policy specifically designates the underlying follow-form policy. Certain insurers contend that even this designation does not always resolve the issue.

The Court has been presented with the argument that course-of-conduct and custom-and-usage extrinsic evidence should be admitted to resolve the follow-form issues. Such proposed evidence is in the form of expert testimony or a corporate Rule 30(b)(6) witness.

The motions have raised certain questions. For example, if the underlying follow-form policy covers 1966 to 1967, but the excess policy covers 1966 to 1969, and the claim arose in 1968—does the excess policy follow form? Can an excess policy follow form regarding a claim that arose after the date coverage expired for the underlying policy? If the expired underlying policy is the only designated follow-form policy, then would the excess policy follow form to an unspecified underlying policy—simply because that unspecified policy happens to be directly vertically beneath the excess policy for 1968? For purposes of follow-form policy ***language*** outlining the contracting parties' rights and obligations, does it matter when any individual claim arose?

***2** Words in an insurance policy must be given their natural, plain and ordinary meaning. [3] Evidence of custom and usage

is only relevant and admissible if the words have a special meaning or usage in the insurance industry. [4]

3 *Madison Constr. Co. v. Harleysville Mut. Ins. Co.*, 735 A.2d 100, 108 (Pa.1999).

4 *Sunbeam Corp. v. Liberty Mut. Ins. Co.*, 781 A.2d 1189, 1193 (Pa.2001).

The Court finds that if clear policy language specifically designates an underlying follow-form policy, that language controls. In other words, if the excess policy itself, or the declarations page, lists one or more controlling underlying policies, the excess policy must follow form to the underlying policies. The policy or declaration terms—as presented by the parties in this litigation—which specifically designate a follow-form policy, are unambiguous.

The fact that a claim potentially covered by the excess policy may have arisen following the expiration of a designated underlying policy is irrelevant. The purpose of follow-form provisions is incorporation of contract language. The incorporated policy language is the functional and legal equivalent of an addendum to the excess policy. Whether or not the underlying policy term overlaps with the excess policy's coverage period, is incidental for follow-form purposes.

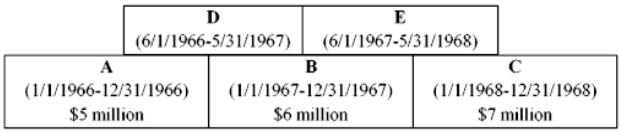
The Court has found that the policy and declarations page designations of follow-form policies are unambiguous in this case. Therefore, no extrinsic custom-and-usage, or course-of-conduct, evidence will be necessary or admitted for the purpose of determining to which designated underlying policies the excess policies follow form. Interpretation of these policy terms is a legal issue. There are no genuine issues of material fact under these circumstances.

In the instance where the provisions of two or more underlying policies are inconsistent, other principles of contract interpretation apply. The Court will address this situation in the context of the policy terms implicated in individual motions.

EXHAUSTION

Many of the issues in this case arise from the lack of uniform vertical alignment of the excess policies with the immediately underlying excess policies or with the underlying primary policies. Additionally, the policies are not consistently aligned horizontally for each excess layer.

One question is whether ***all*** underlying policies, touching on the same time period, must be exhausted before ***any*** excess coverage is triggered. By way of example:



Assume Policies A and C are exhausted. Is coverage under Policies D and E triggered, or must Policy B be exhausted as well?

American Home relies upon the following policy terms:

> If ***other collectible insurance*** with any other insurer is available to the Insured covering a loss also covered hereunder, this insurance shall be in excess of, and shall not contribute with such ***other insurances***. Excess insurance over the limits of liability expressed in this policy is permitted without prejudice to this insurance and the existence of such insurance shall not reduce any liability under this policy.

Another policy provides:

> If, with respect to loss and ultimate net loss covered hereunder, the insured has ***other insurance***, whether on a primary, excess or contingent basis, there shall be no insurance afforded hereunder as respects loss and ultimate net loss, provided, that if the limit of liability of this policy is greater than the limit of liability provided by the other insurance, this policy shall afford excess insurance over and above such other insurance in an amount sufficient to give the insured, as respects the layer of coverage afforded by this policy, a total limit of liability equal to the limit of liability afforded by this policy.
>
> ***3** This condition does not apply to the underlying insurance or excess insurance purchased specifically to be in excess of this policy.

American Home argues that MSA must demonstrate exhaustion of ***all*** non-concurrent underlying policies (primary, umbrella, first layer excess, second layer excess) before the next excess layer attaches to provide coverage.

In a case interpreting Pennsylvania law, the United States Court of Appeals for the Third Circuit considered the implications of an "other insurance" clause.[5] The *Koppers* court held:

> [The insurers] argue that all applicable primary coverage must be exhausted before *any* excess insurer will be obligated to pay. This argument is predicated on the policies' "other insurance" clauses, which state essentially that all other available insurance must be exhausted first. Under *J.H. France,* however, a policy which promises to pay "all sums" must provide for *full* coverage once triggered, without regard for such "other insurance" clauses. The court held that it was irrelevant whether other policies were also triggered, concluding that, "The insurer in question must bear potential liability for the entire claim." Here, the [insurers] agreed to pay "all sums" in excess of the specified limits of the *directly* underlying policies. Once the directly underlying coverage has been exhausted, then, each excess policy must indemnify the insured for the full excess loss up to policy limits. Under *J.H. France,* the insured gets indemnified first (pursuant to the insuring agreements) and *then* the insurers may seek to redistribute the burden among themselves. It is only at this latter stage that the "other insurance" clauses become relevant, so the [insurers'] exhaustion argument based on the "other insurance" clauses must be rejected.[6]

5 *Koppers Co., Inc. v. Aetna Cas. and Sur. Co.,* 98 F.3d 1440 (3d Cir.1996).

6 *Id.* at 1454.

All parties have relied on *Koppers.* This Court finds that *Koppers* is the settled authority governing the issue of interpretation of "other insurance" clauses under Pennsylvania law. Therefore, the insurers' horizontal exhaustion contentions must be rejected.

Obviously, if the policies were consistently and carefully aligned vertically, there would be no contract interpretation issue. The coverage charts provided to this Court demonstrate a patchwork of misaligned policies. There is no reason why the parties to these insurance contracts could not have arranged for precise alignment of the policies—both vertically and horizontally.

It is not the responsibility of the trial court to rewrite or interpret policies to correct the imprecise drafting of the insurers.[7] As the drafters of the policies, the insurers easily could have refused to issue policies that were inconsistently aligned. In that way, the insurers would have eliminated the risk caused by overlapping policies. It is a well-established rule that if policy provisions are ambiguous, the terms of an insurance contract will be construed against the insurer, as the drafter of the policy.[8] Placing the burden on the insurer—to eliminate unpredictability in coverage—is consistent with the beneficial public policy of encouraging careful alignment in the first instance, rather than expending judicial resources to sort out needless confusion. Further, "coverage clauses are interpreted broadly so as to afford the greatest possible protection to the insured."[9] "[L]anguage that limits coverage of an insurance policy must, under Pennsylvania law, be clear and unambiguous to be enforceable."[10]

7 *See 401 Fourth Street, Inc. v. Investors Ins. Grp.,* A.2d 177, 179 (Pa.Super.Ct.2003).

8 *Steele v. Statesman Ins. Co.,* 607 A.2d 742, 743 (Pa.1992); *Bateman v. Motorists Mut. Ins. Co.,* 590 A.2d 281, 283 (Pa.1991).

9 *Eichelberger v. Warner,* 434 A.2d 747, 750 (Pa.Super.Ct.1981).

10 *Giant Eagle, Inc. v. Federal Ins. Co.,* 884 F.Supp. 979, 985 (W.D.Pa.1995).

***4** Rejection of the necessity for horizontal exhaustion does not place insurers in an untenable position. Insurers may negotiate with each other as to how to allocate claims. Should informal discussions fail, insurers have a right to assert claims against each other for contribution.

Further, when an excess policy, by its terms, provides that coverage will begin when the specifically-enumerated underlying policy limits have been exhausted, those terms must be given their plain meaning. In other words, if the excess policy states that coverage is triggered by exhaustion of the [REDACTED] limits of an underlying policy, that number would have no meaning if ***all*** underlying policies were aggregated for exhaustion purposes. Specific contract terms prevail over general language.[11] A specific dollar

amount trigger only can be given effect when the excess policy is triggered upon exhaustion of that amount—regardless of whether other overlapping underlying insurance has not yet been exhausted.

11 *Trombetta v. Raymond James Fin. Servs. Inc.*, 907 A.2d 550, 560 (Pa.Super.Ct.2006) ("[T]he specific controls the general when interpreting a contract.").

In this case, MSA is not prevented by unambiguous policy terms from making claims against excess insurers upon the exhaustion of any directly underlying policy. MSA is permitted to allocate claims among insurers in its discretion. For example, there is no legal prohibition against MSA electing to seek coverage against those insurers who are solvent, and avoiding insurers threatened with insolvency.

In sum, if ***any*** of the directly underlying policy limits are exhausted, MSA may seek coverage from the excess policy covering the relevant time period.

ULTIMATE NET LOSS

Several policies limit coverage to payment of "Ultimate Net Loss." Although specific policy language is not identical in every policy in this litigation, the Court will examine the following as exemplars substantially similar to the Ultimate Net Loss provisions at issue. The Court finds that these terms are unambiguous.

"Ultimate Net Loss" is sometimes defined to mean the sums paid in settlement of losses for which the insured is liable, after making certain enumerated deductions. In this example, Ultimate Net Loss "shall ***exclude*** all ***'Costs'***." ***"Costs"*** is defined to ***include*** "investigation, adjustment and legal expenses including taxed court costs." Therefore, legal fees are not included as part of Ultimate Net Loss.

In contrast, certain policies define Ultimate Net Loss to ***include*** defense costs. Payment of included defense costs erodes policy limits. Thus, legal expenses are to be paid within policy limits, and not in addition to policy limits.

EXCESS NET LOSS

Certain policies define ***"Excess Net Loss"*** to mean:

> The total of all sums which the insured becomes legally obligated to pay or has paid, as damages on account of any one accident or occurrence, and which would be covered by the terms of the Controlling Underlying insurance, if written without any limit of liability, less realized recoveries and salvages,
>
> which is in excess of:
>
> any self-insured retention and the total of the applicable limits of liability of all policies described in Section 3. Schedule of Underlying Insurance: whether or not such policies are in force.
>
> ***Loss shall not include any costs or expense in connection with the investigation or defense of claims or suits, or interest on any judgment which accrues after entry of the judgment.***

5** Where "Loss" is not a defined term, the above language must be given its ordinary meaning. In the context of the paragraph defining "Excess Net Loss," it is clear that "Loss" relates back to "Excess Net Loss." The fact that the policy does not repeat "Excess Net Loss," in the context of the paragraph, does not create an ambiguity. There is no other possible meaning or interpretation that can be given to this policy language than that "Loss" means "Excess Net Loss." Therefore, under these policy terms, "Excess Net Loss" ***excludes defense costs.

Of course, in policies where "Loss" is defined separately, that definition controls.

DUTY TO DEFEND AND INDEMNIFICATION

Generally, the insurer's duty to defend attaches to potential claims. The question raised by certain pending motions is whether an excess insurer is obligated to pay defense costs when underlying policies are ***potentially*** exhausted.

In order to resolve this issue, the Court must determine when the duty to indemnify is triggered. Relatively recent case law has clarified the distinction between advancement of defense costs and indemnification. The main difference is that defense costs may be advanced prior to the end of a matter, while indemnification occurs at the conclusion of litigation. [12] "It is generally premature to consider indemnification prior to the final disposition of the underlying action." [13]

12 William Johnston et al., *Indemnification and Insurance for Directors and Officers,* 54–3rd Corporate Practice Portfolio Series (BNA).

13 *Paolino v. Mace Sec. Int'l, Inc.,* 985 A.2d 392, 397 (Del. Ch.2009) (citing *Sun–Times Media Grp., Inc. v. Black,* 954 A.2d 380, 401–08 (Del. Ch.2008)).

Many of the policies in this case provide that once the underlying insurance is exhausted, the insurer shall ***either***:

(A) ***defend*** the insured against suits ***seeking*** damages covered by the policy; or

(B) ***indemnify*** the insured for the costs and expenses of investigating and defending suits ***seeking*** damages covered by the policy.

Pennsylvania courts have considered this issue. In *Regis Insurance Company v. All American Rathskeller, Inc.,* [14] the Pennsylvania Superior Court contrasted the duty to defend with the duty to indemnify: "Unlike the duty to defend, the duty to indemnify cannot be determined merely on the basis of whether the factual allegations of the complaint potentially state a claim against the insured." [15]

14 976. A.2d 1157 (Pa.Super.Ct.2009).

15 *Id.* at 1161.

Interpreting Pennsylvania law, the United States District Court for the Western District of Pennsylvania confirmed that the duty to defend is triggered "if the underlying complaint avers any facts that potentially could support a recovery under the policy, and once that obligation is triggered, the insurer has a duty to defend until the claim is confined to a recovery that the policy does not cover. The duty to defend thus carries with it a conditional obligation to indemnify in the event the insured is held liable for a covered claim." [16] The District Court continued: "In contrast, the actual duty to indemnify stands on separate footing. An insurer is required to indemnify only where the insured is held liable for a claim actually covered by the policy. **Thus, the duty to indemnify does not arise until the liability imposed against the insured is conclusively established.**" [17]

16 *USX Corp. v. Adriatic Ins. Co.,* 99 F.Supp.2d 593, 611 (W.D.Pa.2000) (internal citations omitted).

17 *Id.* at 611–12 (emphasis added) (internal citations omitted).

The duty to defend is an obligation distinct from the insurer's duty to provide coverage. In the typical liability policy, the insurer agrees to defend the insured even if the suit arising under the policy is groundless, false or fraudulent. Thus, the duty to defend arises whenever the complaint alleges injury that may ***potentially*** be covered by the policy. [18] Other jurisdictions have found that indemnification does "not contemplate unconditional payment of defense costs for potentially covered claims...." [19]

18 *Erie Ins. Exch. v. Transamerica Ins. Co.,* 533 A.2d 1363, 1368 (Pa.1987); *Gedeon v. State Farm Mut. Auto. Ins. Co.,* 188 A.2d 320, 321–22 (Pa.1963).

19 *Stonewall Ins. Co. v. Asbestos Claims Mgmt. Corp.,* 73 F.3d 1178, 1219 (2d Cir.1995), *modified by,* 85 F.3d 49 (2d Cir.1996); *Uniroyal, Inc. v. American Re–Insurance Co.,* 2005 WL 4934215, at *17–19 (N.J.Super.Ct.App.Div.2005).

***6** The cases relied upon by MSA are distinguishable. Because the duty to defend is legally distinct from the duty to indemnify, rulings determining the timing and potentiality of the duty to defend are inapposite. [20] Additionally, while the court in *J.H. France* [21] referred to "duty to defend" in the same sentence as "pay the costs of defense," in the context of the entire paragraph, it is clear that the court conflated defense and payment of defense costs as part of the same duty, while distinguishing indemnification. By citing *Erie,* [22] the *J.H. France* court's ruling is consistent with the principle that the duty to indemnify, *i.e.,* the payment of defense costs without undertaking actual defense obligations, is not triggered by potential coverage for asserted claims.

20 *See ConAgra Foods, Inc. v. Lexington Ins. Co.,* 21 A.3d 62, 72–73 (Del.2011) (potential for coverage sufficient to impose duty to defend); *Air Prods. & Chems., Inc. v. Hartford Accident & Indem. Co.,* 25 F.3d 177, 179 (3d Cir.1994) (finding that "under Pennsylvania law, the issuer of a general liability insurance policy has a duty to defend its insured when the allegations in the complaint against it could potentially fall within the coverage of the policy.").

[21] 626 A.2d at 510.

[22] 533 A.2d at 1368.

The policies at issue must be viewed in light of applicable case law. The language enabling the insurer to elect to "***indemnify*** the insured for the costs and expenses of investigating and defending suits ***seeking*** damages covered by the policy" must be given its plain meaning. The Court finds that this policy term is unambiguous and may be interpreted as consistent with Pennsylvania precedent. Should the insurer choose not to provide a defense, the duty to indemnify is triggered with regard to all suits that sought damages covered by the policy. Once coverage is determined, the indemnification obligation arises. The term "seeking" clarifies that even if liability ultimately is not found (or if the case was resolved through settlement), the insurer still has the duty to indemnify if the claim fell within policy coverage.

In sum, the duty to defend is distinct from indemnification. Coverage must be resolved before the duty to indemnify arises. When coverage is in question because of the potential for exhaustion, indemnification has not been triggered. Further, the Court finds that there is no duty to pay defense costs, under the enumerated policy terms, separate and apart from indemnification. The duty to defend is just that—active participation in the defense of a covered, or potentially covered, claim.

CONSENT TO DEFENSE

This Court Previously Has Held:

> The Court finds that the Policies do not create a duty that AIC indemnify MSA for defense costs. The Policies only require AIC to pay the defense costs to which it consents. AIC has not consented to pay any defense costs and the Court will not read that duty into the Policies. [23]

The Court relied on *AstenJohnson,* [24] in which that court interpreted nearly identical "Defense Costs" policy terms. The *AstenJohnson* Court held that the policy only required the insurer to pay the defense costs to which it consents. [25]

[23] *Mine Safety Appliances Co. v. AIU Ins. Co.,* 2014 WL 605490, at *5 (Del.Super.) (citations omitted).

[24] *AstenJohnson v. Columbia Cas. Co.,* 483 F.Supp.2d 425 (E.D.Pa.2007), *aff'd in part, rev'd in part on other grounds,* 562 F.3d 213 (3d Cir.2009).

[25] *Id.* at 480.

This Court further considered MSA's argument that extrinsic expert testimony should be admitted on the issue of interpretation of the "Defense Costs" provisions. The Court denied MSA's request.

> The Court finds the Policies' terms are clear and unambiguous. Therefore, the Court will not consider extrinsic evidence, such as expert testimony on "custom and usage." MSA argues that when interpreting contracts, "custom in the industry or usage in the trade is always relevant and admissible in construing commercial contracts and does not depend on any obvious ambiguity in the words of the contract. However, unless a usage is "certain, continuous, uniform, and notorious," it will not be denominated a custom. Custom and usage "must be a rule ... so certain and uniform as to be, not only valid and enforceable in a court of law, but the parties must be presumed to have known it and acted in reference to it."
>
> ***7** Courts have interpreted similar "Defense Costs" provisions as an obligation conditioned on the consent of the insurer. The Court finds that these cases refute MSA's argument that "Defense Costs" provisions have a special meaning in the insurance industry rising to the level of "custom and usage." The Court finds no reason to permit expert testimony on "custom and usage." [26]

[26] *Mine Safety,* 2014 WL 605490, at *4.

COURSE OF CONDUCT

In order for course-of-conduct evidence to be relevant, the conduct must involve the same parties and the same contract. [27] The conduct of a non-party does not bind the parties to a different contract, even if the terms of the separate contract are identical.

27 *Diener Brick Co. v. Mastro Masonry Contractor,* 885 A.2d 1034, 1040–41 (Pa.Super.Ct.2005).

For example, Party A and B enter into an insurance contract. Party A erroneously or mistakenly interprets the policy terms and acts accordingly. Party B and Party C execute an identical insurance contract. Party A's actions neither bind nor necessarily inform the conduct of Party C. The unambiguous policy terms control the duties and obligations of Party B and Party C. The directly contradictory course of conduct between Party A and B is irrelevant.

SUMMARY JUDGMENT STANDARD

Summary judgment is granted only if the moving party establishes that there are no genuine issues of material fact in dispute and judgment may be granted as a matter of law. [28] All facts are viewed in a light most favorable to the non-moving party. [29] Summary judgment may not be granted if the record indicates that a material fact is in dispute, or if there is a need to clarify the application of law to specific circumstances. [30] When the facts permit a reasonable person to draw only one inference, the question becomes one for decision as a matter of law. [31] If the non-moving party bears the burden of proof at trial, yet "fails to make a showing sufficient to establish the existence of an element essential to that party's case," then summary judgment may be granted against that party. [32]

28 Super. Ct. Civ. R. 56(c).

29 *Hammond v. Colt Indus. Operating Corp.,* 656 A.2d 558, 560 (Del.Super.1989).

30 Super. Ct. Civ. R. 56(c).

31 *Wootten v. Kiger,* 226 A.2d 238, 239 (Del.1967).

32 *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986).

AIG Insurers' Motion For Partial Summary Judgment Declaring That There Is No Obligation To Reimburse Or Indemnify MSA For Defense Costs

The AIG Insurers assert that certain policies obligate the insurer to indemnify MSA for "loss" and/or "ultimate net loss." Those terms are defined to ***exclude*** "Costs." "Costs" is a defined term ***including*** legal expenses. Thus, AIG contends that there is no obligation to reimburse MSA for legal expenses.

The Court finds the policy terms at issue in this motion to be unambiguous. Either the excess policy, or the underlying policy to which the excess policy follows form, contain the equivalent of the above language. Because legal expenses are Costs, and Costs are excluded from recoverable loss or ultimate net loss, the AIG Insurers have no duty to reimburse or indemnify MSA for defense costs under these policies. [33]

33 National Union CE 115 68 94; Birmingham SE 6073490; Lexington 5510588; Lexington 5514176; Lexington 5522049; Lexington 5524816; Lexington 5524866.

One policy, however, has conflicting underlying policy language. American Home CE 2692407, by way of specific endorsement, designates two underlying policies to which it follows form. One policy includes defense costs, and the other excludes defense costs. This conflict creates an ambiguity, preventing summary judgment on this policy.

***8 AIG Insurers' Motion For Partial Summary Judgment Declaring That There Is No Obligation To Reimburse Or Indemnify MSA For Defense Costs is hereby GRANTED, except as to American Home CE 2692407.**

Hartford Defendants' Motion For Partial Summary Judgment That Certain Policies Exclude Coverage For Defense Costs

The issue presented by this motion previously has been decided by the Opinion in this case dated January 21, 2014. As set forth in the section of this Opinion discussing Consent to Defense, policies at issue in this motion only require the insurer to pay the defense costs to which the insurer consents. The Hartford Defendants have not consented.

Hartford Defendants' Motion For Partial Summary Judgment That Certain Policies Exclude Coverage For Defense Costs is hereby GRANTED.

North River's Motion For Partial Summary Judgment Regarding No Duty To Pay Defense

Costs Policy XS 2526 And The 1978–79 Annual Period Of Policies JU 0158 And JU 0171

MSA has asserted that the policies subject to this motion require North River to pay defense costs in addition to policy limits.

Policies JU 0158 and JU 0171 do not define Ultimate Net Loss. However, the policies follow form to a policy defining Ultimate Net Loss as "the amount payable in settlement of the liability of the Insured after making deductions for all recoveries and for other valid and collectible insurances, excepting however the policy(ies) of the primary Insurer(s) and ***shall exclude all expenses and Costs***." Costs are defined to include legal expenses. These policies follow form to underlying policies that require that "***no Costs shall be incurred by the Insured without the written consent of the Company***."

Policy XS 2526 defines Ultimate Net Loss as excluding Costs. Costs are defined to include legal expenses. The policy also provides:

> Costs incurred by the Insured, with the written consent of the Company, shall be apportioned as follows: ... in the event of claim or suit arising which appears likely to exceed the underlying insurance limit or limits, ***no Costs shall be incurred by the Insured without the written consent of the Company.***

These terms are clear and unambiguous. North River did not give written consent to the expenditure of costs. As previously discussed in the Consent to Defense section of this Opinion, MSA is not entitled to payment of defense costs under these policies.

North River's Motion For Partial Summary Judgment Regarding No Duty To Pay Defense Costs Policy XS 2526 And The 1978–79 Annual Period Of Policies JU 0158 And JU 0171 is hereby GRANTED.

Travelers' Motion For Partial Summary Judgment That Travelers Is Not Obligated To Contribute To Defense Costs

Travelers submits that the language of the policy at issue in this motion requires its written consent before Travelers is obligated to contribute to MSA's defense costs. The policy states that Costs include legal expenses. Additionally: "Costs incurred directly by the insured with the written consent of the company, and for which the insured is not covered by the underlying insurers because of the exhausting of the underlying limits, shall be apportioned as follows."

***9** Travelers did not provide consent to MSA. For the reasons set forth in the Consent to Defense section of this Opinion, Travelers is not obligated to pay MSA's defense costs.

Travelers' Motion For Partial Summary Judgment That Travelers Is Not Obligated To Contribute To Defense Costs is hereby GRANTED.

North River's Motion For Partial Summary Judgment Regarding No Duty To Pay Defense Costs In Addition To Limits Under The First Annual Period Of JU 0010

North River argues that the clear and unambiguous provisions of policy JU 0010, and the incorporated definition of "ultimate net loss" expressly provide that any defense costs erode the limits of liability. JU 0010 limits policy liability to "ultimate net loss." That term is not defined in JU 0010. One of the policies underlying JU 0010 defines "ultimate net loss," while other policies of listed insurers do not.

The umbrella policy issued by Home Insurance Company defines "Ultimate Net Loss" as the: "total sum which the Insured ... becomes obligated to pay by reason of personal injury ... either through adjudication or compromise, and shall also include ... all sums paid as ... fees, charges and law costs...." Other underlying policies specifically exclude expenses and costs.

In paragraph 1. COVERAGE, JU 0010 provides: "Underwriters hereby agree ... to indemnify the Assured for all sums which the Assurred shall be obligated to pay by reason of the liability ... for damages, direct or consequential and expenses on account of ... [p]ersonal injuries...." Liability is limited to Ultimate Net Loss.

The section concerning "Maintenance of Underlying Umbrella Insurance" states: "This Policy is subject to the same terms, definitions, exclusions and conditions (except as regards the premium the amount and limits of liability and except as otherwise provided herein) as are contained in or as may be added to the Underlying Umbrella Policies...."

Generally, an excess policy is bound by the terms of the policy or policies to which it follows form. However, when the explicit language of the excess policy conflicts with the follow-form policy, the wording of the excess policy will control. [34]

34 *Howden N. Am. Inc. v. ACE Prop. & Cas. Ins.* Co., 875 F.Supp.2d 478, 492 (W.D.Pa.2012); *Kropa v. Gateway Ford,* 974 A.2d 502, 506 (Pa.Super.Ct.2009).

JU 0010 specifically provides that the policy covers "all sums" including "expenses." The "Maintenance" section, considered in the context of Pennsylvania law, requires that the terms in JU 0010 trump any inconsistent provisions in the underlying policies.

The Court finds that any underlying policy that excludes expenses conflicts with JU 0010. The only underlying policy that does not exclude legal expenses from Ultimate Net Loss is the 1973–74 Home umbrella policy. Thus, JU 0010 must follow form to this policy. JU 0010 limits liability to Ultimate Net Loss.

Therefore, the Court holds that under JU 0010, Ultimate Net Loss includes defense costs, up to policy limits. Legal expenses are not in addition to policy limits. No genuine issues of material fact exist which would prevent judgment as a matter of law.

North River's Motion For Partial Summary Judgment Regarding No Duty To Pay Defense Costs In Addition To Limits Under The First Annual Period Of JU 0010 is hereby GRANTED.

AIG Insurers' Motion For Partial Summary Judgment Of Certain AIG Insurers Declaring That Defense Costs Are "Within Limits"

***10** Analysis of this motion necessarily involves examination of the meaning of the policy language "within limits." The AIG Insurers argue that defense costs paid under Coverage A policies are "within limits." That is, the payments erode the applicable limits of liability. AIG Insurers contend that Coverage B insures Ultimate Net Loss in excess of the retained limit. Additionally, defense costs will be paid in addition to limits for occurrences "not covered" by underlying insurance.

MSA counters that the relevant follow-form provisions are ambiguous, requiring the admission of extrinsic evidence on industry custom and practice.

The group of motions heard on June 29, 2015, has been styled the Phase I Motions. By agreement of the parties, these motions should not include any issues pending in Pennsylvania as of that time. While there is some disagreement as to the scope of the Pennsylvania motion on this issue, it appears to this Court that the Pennsylvania court presently is considering whether "not covered" could mean "exhausted."

Therefore, the Court will hold this motion in abeyance until presentation of the Phase II motions. **AIG Insurers' Motion For Partial Summary Judgment Of Certain AIG Insurers Declaring That Defense Costs Are "Within Limits" is hereby DENIED AT THIS TIME AS NOT YET RIPE FOR DETERMINATION.**

Travelers' Motion For Partial Summary Judgment That The XN Policies Do Not Pay Or Reimburse Defense Costs

The XN Policies define "Excess Net Loss" in part as the "total of all sums which the INSURED becomes legally obligated to pay or has paid, as damages on account of any one accident or occurrence...." The last sentence of this definition states: "Loss shall not include any costs or expenses in connection with the investigation or defense of claims or suits, or interest on any judgment which accrues after entry of the judgment."

The plain reading of the insurance contract clearly demonstrates that the word "Loss" refers to, and is an abbreviated version of, "Excess Net Loss." Both terms are in the same paragraph. There is no other reasonable interpretation.

The Court finds the policy language unambiguous. Excess Net Loss excludes defense costs and legal expenses. AIG has no duty to pay or reimburse defense costs under the XN Policies.

The Court finds *Viking Pump, Inc. v. Century Indemnity Company*[35] to be distinguishable. The policies at issue in that case contained an endorsement that the terms of the follow-form policies would prevail, even when in conflict with the excess policy. Based upon that endorsement, the *Viking Pump* Court found that the excess policies had a defense obligation.[36] There is no such endorsement in the XN Policies in this case.

35 2013 WL 7098824 (Del.Super).

36 *Id.* at *25.

Travelers' Motion For Partial Summary Judgment That The XN Policies Do Not Pay Or Reimburse Defense Costs is hereby GRANTED.

MSA's Motion For Partial Summary Judgment On American Home's Duty To Pay Defense Costs For The 1967–1970 Periods Under Two Of Its Policies

and

American Home's Motion For Partial Summary Judgment Declaring That MSA Has Failed To Meet Its Burden Of Proof As Regards To Indemnification For Defense Costs

MSA has submitted defense costs to American Home for payment. MSA's position is that the underlying policies have been exhausted. American Home has declined to pay defense costs, asserting that MSA has not exhausted the underlying policies.

MSA argues that the American Home Policies follow form to certain Continental Policies. Continental has paid defense costs under its policies. Further, MSA asserts that Continental paid defense costs notwithstanding its dispute with the primary insurer about exhaustion.

***11** For the reasons set forth in the Duty to Defend and Indemnification section of this Opinion, the Court finds that coverage must be resolved before the duty to indemnify arises. When coverage is in question because of the potential for exhaustion, the duty to pay defense costs has not been triggered. The duty to indemnify does not arise until liability against the insured has been established, or the case has settled. For the reasons discussed in the Course of Conduct section of this Opinion, the Court finds that Continental's conduct is irrelevant.

MSA's Motion For Partial Summary Judgment On American Home's Duty To Pay Defense Costs For The 1967–1970 Periods Under Two Of Its Policies is hereby DENIED.

American Home's Motion For Partial Summary Judgment Declaring That MSA Has Failed To Meet Its Burden Of Proof As Regards To Indemnification For Defense Costs is hereby GRANTED. The duty to indemnify and to pay defense costs will be triggered upon resolution of the issues of exhaustion, as well as liability or settlement of covered claims.

MSA's Motion For Partial Summary Judgment Against American Home Regarding The Amount Required To Exhaust The Underlying Policies

and

American Home's Motion For Partial Summary Judgment Declaring That MSA Has Failed To Prove Exhaustion Of The Policies Underlying American Home Policies CE 35–11–17 And CE 355791

Each of the American Home policies states that it is in excess of a specified amount of underlying insurance. MSA argues that once MSA or the underlying insurers have paid that amount, the American Home policy must begin paying for covered claims against MSA.

American Home CE 35–11–17 covers May 12, 1966 to May 12, 1969. American Home CE 355791 covers May 12, 1969 to May 12, 1972. These policies overlap with underlying policies for the period from May 12, 1967 to May 12, 1968. MSA has presented evidence that it has exhausted [REDACTED] in underlying insurance from May 12, 1967 to May 12, 1968; May 12, 1968—May 12, 1969; and May 12, 1969 to May 12, 1970.

American Home disputes MSA's exhaustion claims through expert opinions that: (1) over [REDACTED] in underlying umbrella limits remain beneath the American Home policies; (2) MSA has failed to document over [REDACTED] in costs allocated to certain underlying excess policies; and (3) MSA has failed to provide sufficient documentation for 391 out of 585 claims, that the claimant was exposed to a toxicant while using an MSA product.

For the reasons set forth in the Exhaustion section of this Opinion, the Court finds that when an excess policy, by its terms, provides that coverage will begin when the specifically-enumerated underlying policy limits have been exhausted, those terms must be given their plain meaning. An excess policy is triggered upon exhaustion a specific dollar amount–regardless of whether other overlapping underlying insurance has not yet been exhausted.

MSA is permitted by unambiguous policy terms to make claims against excess insurers upon the exhaustion of any directly underlying policy covering the relevant time period. MSA is permitted to allocate claims among insurers in its discretion. No expert testimony or other extrinsic evidence will be necessary or admitted on the issue of whether MSA must prove complete horizontal exhaustion of ***all*** underlying non-concurrent policies. MSA only need demonstrate that the enumerated dollar limits have been exhausted for one or more of the underlying policies covering the relevant time period.

American Home has challenged MSA regarding the degree of proof necessary to meet the dollar amounts contained in the excess policies. American Home's experts have audited MSA's claim documentation. The experts concluded that, in their opinion, there is insufficient evidence produced to corroborate MSA's loss runs and costs allocations.

***12** During discovery, MSA was required to produce a sampling of the underlying claim files. In exchange for being relieved of the extraordinary burden and expense of producing thousands of relevant claims files, MSA assumed "the risk of underestimating the amount of source documentation that will be required to demonstrate exhaustion through the testimony of its experts and documentary evidence."[37]

37 *Mine Safety Appliances, Co. v. AIU Ins. Co.,* Trans. ID 49500320, at *11 (Del.Super. 2013).

The issue—whether the sampling, combined with MSA's loss runs and costs allocations, will be sufficient proof to determine the validity of all claims—looms large. The Court cannot resolve the propriety of the sampling at this juncture. It is likely that the parties will need to present argument as to whether the sampling is statistically significant, and thus reliable for extrapolating reasonable assumptions concerning the claims as a whole. Further, the Court may need to review MSA's loss run and costs allocation evidence, and hear argument from counsel for all parties on this issue.

Nevertheless, when the coverage limits of a policy have been exhausted by actual payment, the terms of an excess policy generally do not require an inquiry whether the payments were proper.[38] The insured under an excess policy should not be forced to relitigate the underlying claims.[39] The insured only need prove that the excess policy covers the claim and that the limits of the underlying policy have been paid.[40] Loss runs have been held to be sufficient proof of exhaustion under Pennsylvania law.[41]

38 *See In re Integrated Health Servs., Inc.,* 375 B.R. 730, 738–39 (D.Del.2007).

39 *See Dow Corning Corp. v. Cont'l Cas. Co.,* 1999 WL 33435067, at *5–6 (Mich.Ct.App.).

40 *Ins. Co. of N. Am. v. Kayser–Roth Corp.,* 770 A.2d 403, 416–17 (R.I.2001).

41 *Cont'l Cas. Co. v. Peerless Indus., Inc.,* 2008 WL 4058698, at *2 (E.D.Pa.).

MSA's Motion For Partial Summary Judgment Against American Home Regarding The Amount Required To Exhaust The Underlying Policies is hereby GRANTED. MSA is permitted by unambiguous policy terms to make claims against excess insurers upon the exhaustion of any directly underlying policy covering the relevant time period. Complete horizontal exhaustion of all non-concurrent underlying policies is not required.

American Home's Motion For Partial Summary Judgment Declaring That MSA Has Failed To Prove Exhaustion Of The Policies Underlying American Home Policies CE 35–11–17 And CE 355791 is hereby DENIED. Factual issues remain unresolved concerning the statistical significance of the claim sampling produced in discovery,

as well as the sufficiency of MSA's loss runs and cost allocations.

Hartford Defendants' Motion To Strike The Affidavit Of William J. Berner In Support Of MSA's Motion For Partial Summary Judgment On The Ambiguity Of Its Excess Policies' Follow–Form Provisions

and

Hartford Defendants' Motion To Strike The Affidavit Of William J. Berner In Support Of MSA's Motions For Partial Summary Judgment That Certain Policies Exclude Coverage For Defense Costs

The Berner Affidavit has been submitted for the Court's review in conjunction with MSA's partial summary judgment motions. No jury will see the Affidavit. Therefore, these motions to strike are not necessary as a practical matter.

The real question is whether Berner's testimony will be permitted on the topics covered in the Affidavit. The testimony of a Superior Court Civil Rule 30(b)(6) witness is admissible on "matters known or reasonably available to the organization." The corporate witness may testify on matters outside the witness' personal knowledge, where the witness relies on corporate documents or other corroborating testimony. Whether or not the witness is sufficiently familiar with the offered evidence is for the Court to decide. The witness must have gained knowledge of facts and subjective opinions through the witness' corporate responsibilities.

***13** The Court will not strike the Berner Affidavit on the basis of the witness' qualifications. Hartford's objections in this regard go to the weight to be given to the evidence. The foundation objections will be addressed individually, should Berner be permitted to testify.

In light of the other rulings in this Opinion, it is likely that Berner's testimony ultimately will be ruled inadmissible at trial. Nevertheless, the Court sees no need to strike the Affidavit as part of these pending motions.

Hartford Defendants' Motion To Strike The Affidavit of William J. Berner In Support Of MSA's Motion For Partial Summary Judgment On The Ambiguity Of Its Excess Policies' Follow–Form Provisions is hereby DENIED.

Hartford Defendants' Motion To Strike The Affidavit Of William J. Berner In Support Of MSA's Motions For Partial Summary Judgment That Certain Policies Exclude Coverage For Defense Costs is hereby DENIED.

* * * * *

The following shall apply to all Phase II motions.

1. Each Defendant may file only one Phase II brief. Obviously, the brief may contain argument on more than one motion.

2. The page limitations as provided in the Superior Court Civil Rules shall apply. Because of the numerical disparity between one Plaintiff and several Defendants, Plaintiff may request page extensions to equal the number of pages filed by Defendants collectively.

3. The parties are strongly encouraged to confer to avoid motions involving duplicative legal issues. The parties may incorporate by reference the arguments of other parties.

4. Appendices should contain only materials necessary for the Court's consideration of the motions. For example, if only a few pages of a policy are at issue, it is not necessary to provide the entire policy.

* * * * *

IT IS SO ORDERED.

All Citations

Not Reported in Atl. Rptr., 2015 WL 5829461