# Brush Wellman, Inc. v. Certain Underwriters at Lloyds, London

State of Ohio, Court of Common Pleas, Ottawa County

August 30, 2006, Decided

Case No. 03-CVH-089

**Reporter**
2006 Ohio Misc. LEXIS 387 *

Brush Wellman, Inc., Plaintiff, v. Certain Underwriters at Lloyds, London, and Certain London Market Insurance Companies, et. al., Defendants.

## Core Terms

brush, duty to defend, coverage, ambiguous, excess policy, trigger, primary policy, insurance policy, exhaust, underwriter, occurrence, policy period, obligation to pay, settlement, beryllium, terminate, policy limit, unambiguous, preamble, lawsuit, summary judgment, subscribe, casualty, insuring agreement, susceptible, expose, duty to indemnify, intentional torts, policy coverage, pay expenses

## Case Summary

**Overview**
In a dispute between plaintiff insured and defendant insurers concerning whether insurers had a duty to defend certain lawsuits, insured's motion for partial summary judgment was granted partly because in the absence of explicit language, the duty to defend survived exhaustion of policy limits and the policies contained no limitation or exception terminating the duty to defend upon exhaustion of the limits of liability for settlements and judgments.

**Outcome**
Plaintiff insured's motion for partial summary judgment was granted.

## LexisNexis® Headnotes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Legal Entitlement

***HN1*** **Summary Judgment, Entitlement as Matter of Law**

Under *Civ. R. 56(C)*, summary judgment is appropriate when the moving party demonstrates that: (1) there is no genuine issue of material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) after construing the evidence most favorably for the party against whom the motion is made, reasonable minds can reach only a conclusion that is adverse to the nonmoving party.

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Movant Persuasion & Proof

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Nonmovant Persuasion & Proof

**HN2 Burdens of Proof, Movant Persuasion & Proof**

In the context of a motion for summary judgment, the moving party bears the initial responsibility of informing the court of the basis for the motion and identifying those portions of the record that support the requested judgment. If the moving party discharges this initial burden, the party against whom the motion is made then bears a reciprocal burden of specificity to oppose the motion. Moreover, it is well settled that the party seeking summary judgment bears the burden of showing that no genuine issue of material fact exists for trial.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Insurance Law > Claim, Contract & Practice Issues > Policy Interpretation > Question of Law

**HN3 Summary Judgment, Entitlement as Matter of Law**

In reviewing a motion for summary judgment, the court must construe the evidence and all reasonable inferences drawn therefrom in a light most favorable to the party opposing the motion. Where the language of an insurance policy is clear and unambiguous, construction of that policy is a question of law properly resolved on summary judgment. Summary judgment is also appropriate if an ambiguity in an insurance policy can be resolved as a matter of law by resort to rules of policy construction and without resort to extrinsic evidence.

Insurance Law > ... > Policy Interpretation > Ambiguous Terms > Construction Against Insurers

Insurance Law > Claim, Contract & Practice Issues > Policy Interpretation > General Overview

Insurance Law > Claim, Contract & Practice Issues > Policy Interpretation > Ordinary & Usual Meanings

Insurance Law > Claim, Contract & Practice Issues > Policy Interpretation > Plain Language

**HN4 Ambiguous Terms, Construction Against Insurers**

A determination of the scope of coverage requires a analysis of the language of the insurance policies. When the language in an insurance policy is clear and unambiguous, a court must enforce the contract as written and give the words their plain and ordinary meaning. If ambiguous language is present, the reading of the contract must be construed strictly against the insurer. Strict construction, however, does not allow a court to change the obvious intent of a provision. A court cannot create an ambiguity when the plain and ordinary meaning of the language is clear.

Insurance Law > Claim, Contract & Practice Issues > Policy Interpretation > Exclusions

Insurance Law > Claim, Contract & Practice Issues > Policy Interpretation > Ordinary & Usual Meanings

Insurance Law > Claim, Contract & Practice Issues > Policy Interpretation > Plain Language

**HN5 Policy Interpretation, Exclusions**

The words and phrases within an insurance policy must be given their natural and commonly accepted meaning, where they in fact possess such meaning, to the end that a reasonable interpretation of the insurance contract consistent with the apparent object and plain intent of the parties may be determined. Exclusions must be interpreted as applying only to that clearly intended exclusion.

Insurance Law > ... > Policy Interpretation > Ambiguous Terms > Coverage Favored

Insurance Law > Claim, Contract & Practice Issues > Policy Interpretation > General Overview

Insurance Law > Claim, Contract & Practice Issues > Policy Interpretation > Exclusions

***HN6*** **Ambiguous Terms, Coverage Favored**

Under Ohio law, an insured is entitled to coverage where any reasonable construction of the contract results in coverage for the insured. And where any ambiguity arises, it must also be resolved in favor of coverage. Exclusions and other limitations that are not "clear and exact" on its face cannot bar or limit coverage.

Insurance Law > Liability & Performance Standards > Good Faith & Fair Dealing > Duty to Defend

***HN7*** **Good Faith & Fair Dealing, Duty to Defend**

An insurance company generally owes its insured a duty to defend actions that have been brought against its insured. The insurance company's implied duty to defend cannot be waived without an explicit provision to that effect. The duty to defend, whether implied or explicit in the policy, is not dependent on the profitability of insuring a class of risks or the specific risk.

Insurance Law > ... > Policy Interpretation > Ambiguous Terms > Coverage Favored

Insurance Law > Liability & Performance Standards > Good Faith & Fair Dealing > Duty to Defend

Insurance Law > Liability & Performance Standards > Good Faith & Fair Dealing > Indemnification

***HN8*** **Ambiguous Terms, Coverage Favored**

An insurance company's duty to defend and its duty to indemnify, i.e., its obligation to pay a judgment, are separate conceptual and legal issues. The insurance company's obligation to defend is broader than its duty to indemnify, because it is not contingent upon the success of the claim. The insurance company has a duty to defend even those claims that may be determined to lack merit by a court judgment or settlement. Any doubt as to the insurance company's duty to defend its insured must be resolved in favor of insured.

Insurance Law > Liability & Performance Standards > Good Faith & Fair Dealing > Duty to Defend

Insurance Law > Liability & Performance Standards > Good Faith & Fair Dealing > Indemnification

***HN9*** **Good Faith & Fair Dealing, Duty to Defend**

Unlike the duty to indemnify, the duty to defend begins at the outset of the case. An insurance company is not entitled to tender the limits of coverage and thereby be relieved of the duty to defend before settlement or final adjudication of the case, or before obtaining the consent of insured.

Insurance Law > ... > Business Insurance > Commercial General Liability Insurance > Indemnification

***HN10*** **Commercial General Liability Insurance, Indemnification**

The primary right of the insured against his liability insurer is the right to reimbursement for loss falling within the coverage defined in the policy, the scope of that right being determined by the construction of the clauses defining the personal injury liability and property damage liability coverages.

Insurance Law > Liability & Performance Standards > Good Faith & Fair Dealing > Duty to Defend

Insurance Law > Liability & Performance Standards > Good Faith & Fair Dealing > Indemnification

***HN11*** **Good Faith & Fair Dealing, Duty to Defend**

Whether the duty to defend terminates upon exhaustion of the indemnity limits depends on the language of the policy.

Insurance Law > Claim, Contract & Practice Issues > Policy Interpretation > Exclusions

Insurance Law > Claim, Contract & Practice Issues > Policy Interpretation > General Overview

***HN12*** **Policy Interpretation, Exclusions**

Pursuant to Ohio law, limitations or exceptions should not be read into an insurance policy.

Insurance Law > ... > Business Insurance > Commercial General Liability Insurance > Duty to Defend

Insurance Law > Claim, Contract & Practice Issues > Reservation of Rights > Notice to Insured Parties

***HN13*** **Commercial General Liability Insurance, Duty to Defend**

In order to withdraw from defense of its insured after payment of the policy liability limit, the insurer must reserve its right to discontinue defense in clear and plain language.

Insurance Law > ... > Business Insurance > Commercial General Liability Insurance > Duty to Defend

***HN14*** **Commercial General Liability Insurance, Duty to Defend**

Ohio limitations on the duty to defend arise by contract, not by operation of law and the duty to defend is properly viewed as a valuable right of the one who purchased it.

Insurance Law > ... > Policy Interpretation > Ambiguous Terms > General Overview

**HN15** **Policy Interpretation, Ambiguous Terms**

Where the language of a clause used in an insurance contract is such that courts of numerous jurisdictions have found it necessary to construe it and in such construction have arrived at conflicting conclusions as to the correct meaning, intent and effect thereof, the question whether such clause is ambiguous ceases to be an open one.

Contracts Law > Contract Interpretation > Ambiguities & Contra Proferentem > General Overview

Contracts Law > Contract Interpretation > Intent

Contracts Law > Contract Interpretation > Parol Evidence > General Overview

**HN16** **Contract Interpretation, Ambiguities & Contra Proferentem**

Where the language in a contract is ambiguous if it is reasonably susceptible of two or more meanings, Courts may consider extrinsic evidence to ascertain the intent of the parties when the contract is unclear or ambiguous, or when circumstances surrounding the agreement give the plain language special meaning. Courts should endeavor to give effect to every part of the contract and therefore if one construction of a doubtful condition in a contract would make that condition meaningless, and it is possible to give it another construction that would give it meaning and purpose, then the latter construction must obtain. Moreover, an ambiguous contract is to be construed against the party who drafted it. As such, where the language is ambiguous, a court must construe the language against the party who prepared the contract.

Insurance Law > Claim, Contract & Practice Issues > Policy Interpretation > Exclusions

**HN17** **Policy Interpretation, Exclusions**

An exclusion within an insurance policy must be interpreted as applying only to that which is clearly intended to be excluded.

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Judicial Estoppel

**HN18** **Estoppel, Judicial Estoppel**

The doctrine of judicial estoppel forbids a party from taking a position inconsistent with one successfully and unequivocally asserted by the same party in a prior proceeding. The rationale of judicial estoppel is that a party should not be allowed to convince one judicial body to adopt certain factual contentions and then subsequently unconscionably assert to another judicial body that these contentions were inaccurate and that a different set of facts should be found.

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Judicial Estoppel

**HN19** **Estoppel, Judicial Estoppel**

The doctrine of judicial estoppel applies only if three factors are met. The party asserting judicial estoppel must prove that its adversary: (1) took a contrary position; (2) under oath in a prior proceeding; and (3) the prior position was accepted by the court.

Evidence > Admissibility > Expert Witnesses > Helpfulness

Insurance Law > Claim, Contract & Practice Issues > Policy Interpretation > General Overview

***HN20*** **Expert Witnesses, Helpfulness**

Expert opinion testimony is admissible to aid the court in arriving at a correct determination of the litigated issue in all proceedings involving matters of insurance, and to restrict expert witnesses to those who were employed by the insurance industry during the contested period would effectively render *Evid. R. 702(A)* hollow.

Evidence > Admissibility > Expert Witnesses

Evidence > ... > Testimony > Expert Witnesses > Qualifications

***HN21*** **Admissibility, Expert Witnesses**

Under *Evid. R. 702*, a witness must be qualified as an expert by knowledge, skill, experience, training, or education before he can render an expert opinion. In Ohio, expert testimony must be: (1) relevant and material; (2) be on the knowledge of the average layman; (3) have acceptable scientific reliability; and (4) have probative value which outweighs its prejudicial impact.

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Nonmovant Persuasion & Proof

***HN22*** **Burdens of Proof, Nonmovant Persuasion & Proof**

In responding to a motion for summary judgment, a non-moving party cannot rest upon the allegations of the pleadings, but must respond with affidavits or similar evidentiary materials demonstrating that a genuine issue of material fact exists for trial.

Insurance Law > ... > Business Insurance > Commercial General Liability Insurance > Duty to Defend

Insurance Law > ... > Business Insurance > Commercial General Liability Insurance > Indemnification

***HN23*** **Commercial General Liability Insurance, Duty to Defend**

The agreement to furnish a defense to a lawsuit is distinct from and in addition to the insuring agreement as to liability. Further, the duty to defend is personal to each insurer. The obligation is several, and the insuring carrier is not entitled to divide the duty to defend nor require a contribution for defending from another carrier without a specific contractual agreement to that effect.

Contracts Law > Contract Interpretation > Parol Evidence > Course of Dealing

Contracts Law > Contract Interpretation > Ambiguities & Contra Proferentem > General Overview

***HN24*** **Parol Evidence, Course of Dealing**

In interpreting a contract, where words are susceptible of more than one meaning, the courts will adopt that interpretation which the parties themselves by their subsequent acts have placed upon such words.

Contracts Law > Contract Interpretation > Ambiguities & Contra Proferentem > General Overview

Insurance Law > ... > Policy Interpretation > Ambiguous Terms > Construction Against Insurers

Contracts Law > Contract Interpretation > Intent

Insurance Law > ... > Policy Interpretation > Ambiguous Terms > Unambiguous Terms

Insurance Law > Claim, Contract & Practice Issues > Policy Interpretation > Question of Law

***HN25*** **Contract Interpretation, Ambiguities & Contra Proferentem**

The mutual intention of the parties is to be inferred, if possible, solely from the written provisions of the contract. Where contractual language is clear and explicit, it governs. When construing the language of an insurance policy, a court's primary objective is to ascertain and give effect to the intentions of the parties as expressed by the words of the policy. An insurance policy, like any contract, is to be construed as a whole, giving effect to every provision, if possible, because it must be assumed that every provision was intended to serve a purpose. However, if the words used in the policy are reasonably susceptible to more than one meaning, they are ambiguous and will be strictly construed against the drafter. Further, vagueness of expression, indefiniteness and uncertainty as to any of the essential terms of an agreement, have often been held to prevent the creation of an enforceable contract. A contract is not rendered ambiguous merely because the parties disagree on its meaning. On the other hand, a contract is not necessarily unambiguous when each party insists that the language unambiguously supports its position. Rather, whether a contract is ambiguous is a question of law.

Contracts Law > Contract Interpretation > Parol Evidence > Course of Dealing

Contracts Law > Contract Interpretation > Ambiguities & Contra Proferentem > General Overview

***HN26*** **Parol Evidence, Course of Dealing**

Where words used in a contract are susceptible of more than one meaning, and the signatories to the contract have by acts done in carrying out the terms thereof placed their own interpretation upon the meaning of the words, courts will adopt the interpretation which the signatories to the contract have themselves made.

Contracts Law > Contract Interpretation > Parol Evidence > Course of Dealing

Contracts Law > Contract Interpretation > General Overview

***HN27*** **Parol Evidence, Course of Dealing**

If the contract is not ambiguous, it must be enforced according to its terms, without regard to the construction heretofore placed upon it by the parties in the course of its performance.

Contracts Law > Contract Interpretation > General Overview

***HN28*** **Contracts Law, Contract Interpretation**

In determining the rights of parties under a written contract, it is not the duty of a court to seek for, or create doubts and ambiguities, but rather to avoid them, and construe and enforce the contract according to its evident meaning, giving force to every word.

Contracts Law > Contract Interpretation > Ambiguities & Contra Proferentem > General Overview

Insurance Law > Claim, Contract & Practice Issues > Policy Interpretation > Plain Language

Contracts Law > Contract Interpretation > General Overview

Contracts Law > Contract Interpretation > Parol Evidence > General Overview

***HN29*** **Contract Interpretation, Ambiguities & Contra Proferentem**

Words used in a contract of insurance are to be given their natural and usual meaning unless otherwise defined in the contract. A court is without authority to construe the terms of a contract when their meaning is unambiguous. Where a term is ambiguous, parol evidence is admissible to interpret, but not to contradict, the express language of the contract. If such an ambiguity is alleged, it must arise from the language of the contract itself and, therefore, courts will not admit parol testimony to construe an ambiguity forced into the contract to strain the apparent meaning of the language.

Insurance Law > ... > Policy Interpretation > Ambiguous Terms > General Overview

Insurance Law > Claim, Contract & Practice Issues > Policy Interpretation > General Overview

***HN30*** **Policy Interpretation, Ambiguous Terms**

A term in an insurance policy is not ambiguous merely because the policy does not define it.

Insurance Law > Claim, Contract & Practice Issues > Allocation

***HN31*** **Claim, Contract & Practice Issues, Allocation**

Allocation deals with the apportionment of a covered loss across multiple triggered insurance policies. The issue of allocation arises in situations involving long-term injury or damage, such as is the case here.

Insurance Law > Claim, Contract & Practice Issues > Allocation

Insurance Law > Claim, Contract & Practice Issues > Coinsurance > Contribution

***HN32*** **Claim, Contract & Practice Issues, Allocation**

Where a continuous occurrence of environmental pollution triggers claims under multiple primary insurance policies, the insured is entitled to secure coverage from a single policy of its choice that covers all sums' incurred as damages during the policy period, subject to that policy's limit of coverage. In such an instance, the insurers bear the burden of obtaining contribution from other applicable primary insurance policies as they deem necessary.

Insurance Law > ... > Business Insurance > Commercial General Liability Insurance > Duty to Defend

Insurance Law > ... > Business Insurance > Commercial General Liability Insurance > Indemnification

***HN33*** **Commercial General Liability Insurance, Duty to Defend**

A liability insurer owes a broad duty to defend its insured against claims that create a potential for indemnity. The carrier must defend a suit which potentially seeks damages within the coverage of the policy. Implicit in this rule is the principle that the duty to defend is broader than the duty to indemnify; an insurer may owe a duty to defend its insured in an action in which no damages ultimately are awarded.

Insurance Law > ... > Obligations of Parties > Insurers > Allegations in Complaints

Insurance Law > ... > Business Insurance > Commercial General Liability Insurance > Duty to Defend

***HN34*** **Insurers, Allegations in Complaints**

The duty to defend is determined by reference to the policy, the complaint, and all facts known to the insurer from any source. The determination whether the insurer owes a duty to defend usually is made in the first instance by comparing the allegations of the complaint with the terms of the policy. Facts extrinsic to the complaint also give rise to a duty to defend when they reveal a possibility that the claim may be covered by the policy. Further, the insured is entitled to a defense if the underlying complaint alleges the insured's liability for damages potentially covered under the policy, or if the complaint might be amended to give rise to a liability that would be covered under the policy. Thus, any doubt as to whether the facts establish the existence of the defense duty must be resolved in the insured's favor.

Insurance Law > ... > Business Insurance > Commercial General Liability Insurance > Duty to Defend

***HN35*** **Commercial General Liability Insurance, Duty to Defend**

To prevail on the issue of the duty to defend, the insured must prove the existence of a potential for coverage, while the insurer must establish the absence of any such potential. In other words, the insured need only show that the underlying claim may fall within policy coverage; the insurer must prove it cannot. Facts merely tending to show that the claim is not covered, or may not be covered, but are insufficient to eliminate the possibility that resultant damages (or the nature of the action) will fall within the scope of coverage, therefore add no weight to the scales. Any seeming disparity in the respective burdens merely reflects the substantive law. The defense duty is a continuing one, arising on tender of defense and lasting until the underlying lawsuit is concluded, or until it has been shown that there is no potential for coverage. Imposition of an immediate duty to defend is necessary to afford the insured what it is entitled to: the full protection of a defense on its behalf. Hence, once the insured establishes the potential of coverage, the insurer must defend the suit unless it conclusively refutes such potential.

Insurance Law > ... > Commercial General Liability Insurance > Coverage > General Overview

Insurance Law > ... > Commercial General Liability Insurance > Exclusions > Intentional Acts

***HN36*** **Commercial General Liability Insurance, Coverage**

Public policy does not prohibit an employer from securing insurance against compensatory damages sought by an employee in tort where the employer's tortious act was one performed with the knowledge that injury was substantially certain to occur. Where the employer's alleged tortious actions were not taken with deliberate intent to injure the employee, and where the damages sought are to compensate for injury rather than to punish wrongdoing, the public policy argument for depriving the employer of insurance protection is not compelling.

Insurance Law > Claim, Contract & Practice Issues > Policy Interpretation > Exclusions

***HN37*** **Policy Interpretation, Exclusions**

The insurer, being the one who selects the language in the contract, must be specific in its use; an exclusion from liability must be clear and exact in order to be given effect.

**Judges: [*1]** Paul C. Moon, Judge.

**Opinion by:** Paul C. Moon

## Opinion

**JUDGMENT ENTRY RE: MOTIONS FOR PARTIAL SUMMARY JUDGMENT OF BOTH PLAINTIFF AND DEFENDANTS**

P1 This cause comes before the Court upon the Motions for Partial Summary Judgment of both Plaintiff Brush Wellman, Inc. and Defendants Certain Underwriters at Lloyds, London and Certain London Market Insurance Companies.[1]

P2 Plaintiff claims that it is entitled to damages for breach of contract and declaratory relief arising out of Defendants Certain Underwriters at Lloyd's of London and Certain London Market Companies' ("London Insurers") failure to meet their obligations under the primary and excess general liability policies that they issued to Brush Wellman, Inc. ("Brush") from August 1, 1956, through January 31, 1986. Defendants assert, however, that they met their obligations **[*2]** under the primary and excess general liability policies.

P3 This Court's disposition of these motions is contingent upon whether the language of the primary and excess policies is *ambiguous* as it pertains to the London Insurers' indivisible duty to (A) defend under the primary policies; (B) pay expenses on behalf of Brush as incurred under the excess policies; (C) whether certain of the excess policies provide for a trigger of coverage requiring not an occurrence, but a judgment during the policy period; and (D) whether all policies provide for an "all sums" allocation.

P4 Finally, Plaintiff claims that the London Insurers breached their obligation to pay expenses in the *Massengale, Baum* and *Jones* lawsuits. In *Massengale, Baum* and *Jones*, the London Insurers refused to defend, asserting that the allegations of the complaint or evidence outside of the complaint did not bring the claims under the coverage of

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[1] Plaintiff Brush Wellman, Inc.'s Motion for Partial Summary Judgment was filed February 22, 2006. Defendants' Memorandum of Law in Opposition was filed March 8, 2006, and Plaintiff's Reply Brief was filed March 15, 2006. Defendants' Motion for Partial Summary Judgment was filed February 22, 2006. Plaintiff's Opposition was filed March 7, 2006, and Defendants' Reply was filed March 15, 2006.

the policy. The threshold issue presented by *Massengale, Baum* and *Jones* is whether the claims are "*arguably or potentially*" within the coverage of the policies issued to Brush.[2]

P5 In addressing Plaintiff's **[*3]** and Defendants' Motions for Partial Summary Judgment, this Court has reviewed the record, all pleadings, exhibits and relevant case law. This Court finds that there are no genuine issues of material fact in dispute and holds that Brush is entitled to judgment as a matter of law. This Court holds that the language of the primary and excess policies is *not* ambiguous and should be enforced in accordance with their terms as are other written contracts. As well, the London Insurers breached their obligation to Brush by failing to pay expenses incurred in the defense of the *Massengale, Baum* and *Jones* lawsuits. Based on the foregoing, this Court holds that Brush has established that these claims may fall within the policy coverage while the London Insurers have failed to prove that these claims cannot fall within the policy coverage.

## I. FACTUAL BACKGROUND

P6 From August 1, 1956, though January 31, 1986, the London Insurers issued policies of primary and excess insurance to Brush. Primary insurance pays first in the case of a loss. When the policy limits of the primary policy are exhausted by the payment of settlements or judgments, the excess policies pay any additional indemnity amounts owed **[*4]** by the insured for the hazards covered by the primary policy.

P7 The London Insurers' policies contain separate paragraphs for liability and defense. The 1956 and 1957-1960 primary policies were based upon the 1947 Comprehensive General Liability ("CGL") form, but were amended by endorsement to respond to "occurrences" rather than "accidents" during the policy period.[3] Thus, Insuring Agreement Nos. 1 and 4 of the 1957-1960 primary policy provided that the London Insurers would "pay on behalf of the Assured all sums which the Assured shall become legally obligated to pay as damages because of bodily injury, sickness, or disease, including death at any time resulting therefrom, sustained by any person []."[4]

P8 All of these policies of insurance, except for certain of excess policies issued in 1967-70 are triggered by an occurrence, *i.e.*, a claimant's exposure to beryllium. The 1967-70 second layer excess policy dropped the five words — "in respect of occurrences occurring."[5] Because of this deletion, the London Insurers claim that these later excess policies are triggered by a **[*5]** judgment instead of an occurrence during the policy period.

## II. STANDARD OF REVIEW

P9 ***HN1*** Under *Civ.R. 56(C)*, summary judgment is appropriate when the moving party demonstrates that (1) there is no genuine issue of material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) after construing the evidence most favorably for the party against whom the motion is made, reasonable minds can reach only a conclusion that is adverse to the nonmoving party.[6]

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[2] *Willoughby Hills v. Cincinnati Ins. Co. (1984), 9 Ohio St.3d 177, 9 Ohio B. 463, 459 N.E.2d 555*.

[3] Appendix in Support of Brush Wellman, Inc.'s Motion for Partial Summary Judgment at 0531 ("App.").

[4] App. 0536.

[5] App. 0757-0765.

[6] *Zivich v. Mentor Soccer Club, Inc. (1998), 82 Ohio St. 3d 367, 369-370, 1998 Ohio 389, 696 N.E. 2d 201*, Citing *Horton v. Harwick Chem. Corp. (1995), 73 Ohio St.3d 679, 1995 Ohio 286, 653 N.E. 2d 1196*, paragraph three of the syllabus; *Temple v. Wean United, Inc. (1977), 50 Ohio St.2d 317, 327, 4 O.O.3d 466, 472, 364 N.E.2d 267, 274*; *Van Fossen v. Babcock & Wilcox Co. (1988), 36 Ohio St.3d 100, 117, 522 N.E.2d 489, 505*.

P10 ***HN2*** The moving party bears the initial responsibility of informing the court of the basis for the motion and identifying those portions of the record that support the requested judgment.[7] If the moving party discharges this initial burden, the party against whom the motion is made then bears a reciprocal **[*6]** burden of specificity to oppose the motion.[8] Moreover, it is well settled that the party seeking summary judgment bears the burden of showing that no genuine issue of material fact exists for trial.[9]

P11 ***HN3*** In reviewing a motion for summary judgment, the court must construe the evidence and all reasonable inferences drawn therefrom in a light most favorable to the party opposing the motion.[10] Where the language of an insurance policy is clear and unambiguous, construction of that policy is a question of law properly resolved on summary judgment.[11] Summary judgment is also appropriate if **[*7]** an ambiguity in an insurance policy can be resolved as a matter of law by resort to rules of policy construction and without resort to extrinsic evidence.[12]

## III. ANALYSIS

P12 ***HN4*** A determination of the scope of coverage requires a analysis of the language of the insurance policies. When the language in an insurance policy is clear and unambiguous, a court must enforce the contract as written and give the words their plain and ordinary meaning.[13] If ambiguous language is present, the reading of the contract must be construed strictly against the insurer.[14] Strict construction, however, does not allow a court to change the obvious intent of a provision.[15] A court cannot create an ambiguity when the plain and ordinary meaning of the language is clear.[16]

P13 ***HN5*** The words and phrases within an insurance policy "must be given their natural and commonly accepted meaning, where they in fact possess such meaning, to the end that a reasonable interpretation of the insurance

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[7] *Vahila v. Hall (1997), 77 Ohio St. 3d 421, 430, 1997 Ohio 259, 674 N.E.2d 1164*; see also *Dresher v. Burt (1996), 75 Ohio St. 3d 280, 293, 1996 Ohio 107, 662 N.E.2d 264* ("the moving party cannot discharge its initial burden under ***Civ.R.56*** simply by making a conclusory assertation that the non-moving party has no evidence to prove its case").

[8] *Vahila v. Hall (1997), 77 Ohio St. 3d 421, 1997 Ohio 259, 674 N.E.2d 1164*; see also *Mitseff v. Wheeler (1988), 38 Ohio St. 3d 112, 526 N.E.2d 798*.

[9] *Celotex Corp. v. Catrett (1987), 477 U.S. 317, 330, 91 L. Ed. 2d 265, 106 S. Ct. 2548*; *Mitseff v. Wheeler (1988), 38 Ohio St. 3d 112, 115, 526 N.E.2d 798*; *Dresher v. Burt (1996), 75 Ohio St. 3d 280, 1996 Ohio 107, 662 N.E.2d 264*.

[10] *Morris v. Ohio Cas. Ins. Co. (1988), 35 Ohio St. 3d 45, 517 N.E.2d 904*; *Harless v. Willis Day Warehousing (1978), 54 Ohio St. 2d 64, 375 N.E.2d 46*; *Murphy v. Reynoldsburg (1992), 65 Ohio St. 3d 356, 358-359, 1992 Ohio 95, 604 N.E.2d 138 (Doubts must be resolved in favor of the nonmoving party)*.

[11] *Davis v. Loopco Indus., Inc. (1993), 66 Ohio St.3d 64, 66, 1993 Ohio 195, 609 N.E.2d 144*.

[12] *King v. Nationwide Ins. Co. (1988), 35 Ohio St.3d 208, 212, 519 N.E.2d 1380*.

[13] See *Cincinnati Indemnity Co. v. Martin (1999), 85 Ohio St. 3d 604, 607, 1999 Ohio 322, 710 N.E.2d 677, 679*, **[*8]** citing *Hybud Equip. Corp. v. Sphere Drake Ins. Co., Ltd. (1992), 64 Ohio St. 3d 657, 665, 597 N.E.2d 1096, 1102*.

[14] See *Faruque v. Provident Life & Acc. Ins. Co. (1987), 31 Ohio St. 3d 34, 38, 31 Ohio B. 83, 508 N.E.2d 949, 952*; *Scott-Pontzer v. Liberty Mut. Fire Ins. Co. (1999), 85 Ohio St. 3d 660, 665, 1999 Ohio 292, 710 N.E.2d 1116, 1119*.

[15] See *Hybud Equip. Corp. v. Sphere Drake Ins. Co., Ltd. (1992), 64 Ohio St. 3d 657, 597 N.E.2d 1096*.

[16] See *Karabin v. State Auto Mut. Ins. Co. (1984), 10 Ohio St. 3d 163, 167, 10 Ohio B. 497, 462 N.E.2d 403, 406*; *Gomolka v. State Auto Mut. Ins. Co. (1982), 70 Ohio St. 2d 166, 167-168, 436 N.E.2d 1347, 1348*.

contract consistent with the apparent object and plain intent of the parties may be determined."[17] Exclusions must be interpreted as applying only to that clearly intended exclusion.[18]

P14 **[*9]** ***HN6*** Under Ohio law, Brush is entitled to coverage where any reasonable construction of the contract results in coverage for the insured. And where any ambiguity arises, it must also be resolved in favor of coverage. Exclusions and other limitations that are not "clear and exact" on its face cannot bar or limit coverage. Applying these principles of contract law, this Court finds that the London Insurers have a duty to (A) defend under the primary policies; (B) pay expenses on behalf of Brush as incurred under the excess policies; (C) that certain of the excess policies provide for trigger of coverage requiring an occurrence, not only a judgment during the policy period; and (D) all policies provide for an "all sums" allocation.

P15 Finally, application of an insurer's broad duty to defend its insured against claims that create potential for indemnity requires that the London Insurers defend claims that are "arguably or potentially" within the coverage of the policies issued to Brush.[19]

**A. The London Insurers Have a Duty to Defend Under the Primary Policy**

P16 ***HN7*** An insurance company generally owes its insured a **[*10]** duty to defend actions that have been brought against its insured.[20] The insurance company's implied duty to defend cannot be waived without an explicit provision to that effect.[21] The duty to defend, whether implied or explicit in the policy, is not dependent on the profitability of insuring a class of risks or the specific risk.[22]

P17 ***HN8*** An insurance company's duty to defend and its duty to indemnify, *i.e*., its obligation to pay a judgment, are separate conceptual and legal issues.[23] The insurance company's obligation to defend is broader than its duty to indemnify,[24] because it is not contingent upon the success of the claim.[25] The insurance company has a duty to

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[17] *Gomolka v. State Auto Mut. Ins. Co. (1982), 70 Ohio St. 2d 166, 436 N.E.2d 1347*.

[18] See *Hybud Equip. Corp. v. Sphere Drake Ins. Co., Ltd. (1992), 64 Ohio St. 3d 657, 665, 597 N.E.2d 1096, 1102*; *Moorman v. Prudential Ins. Co. (1983) 4 Ohio St. 3d 20, 22, 4 Ohio B. 17, 445 N.E.2d 1122, 1124*.

[19] *Willoughby Hills v. Cincinnati Ins. Co. (1984), 9 Ohio St.3d 177, 9 Ohio B. 463, 459 N.E.2d 555*.

[20] *Motorists Mut. Ins. Co. v. Trainor (1973), 33 Ohio St. 2d 41, 294 N.E.2 874, 294 N.E.2d 874*; *Socony-Vacuum Oil Co. v. Continential Cas. Co. (1945), 144 Ohio St. 382, 59 N.E.2d 199*. See *Trimper v. Nationwide Ins. Co. (D.C.S.C., 1982), 540 F.Supp. 1188*.

[21] *Leader Nat'l Ins. Co. v. Eaton (1997), 119 Ohio App.3d 688, 696 N.E.2d 236*. See *Interstate Fire & Cas. Co. v. Stuntman Inc. (C.A.9, 1988), 861 F.2d 203*.

[22] *Pacific Indem. Co. v. Fireman's Fund Ins. Co. (Cal.App. 2 Dist., 1985), 223 Cal. Rptr. 312, 175 Cal. App. 3d 1191*.

[23] *W. Lyman Case & Co. v. National City Corp. (1996), 76 Ohio St.3d 345, 1996 Ohio 392, 667 N.E.2d 978* ("the duty to defend is separate and distinct from the duty to idemnify"); *Riverside Ins. Co. v. Wiland (1984), 16 Ohio App.3d 23, 26, 16 Ohio B. 24, 474 N.E.2d 371*. See *Wedge Prods., Inc. v. Hartford Equity Sales Co. (1987), 31 Ohio St. 3d 65, 67, 31 Ohio B. 180, 509 N.E.2d 74* (duty to defend arises if the allegations in the pleadings state a claim "potentially or arguably" within the policy's coverage); *Chemstress Consultant, Inc. v. Cincinnati Ins. Co. (1998), 128 Ohio App.3d 396, 715 N.E.2d 208* ("the duty to indemnify, on the other hand, arises only if liability in fact exists under the policy.") See, also *American States Ins. Co. v. Maryland Cas. Co. (D.C. Mich., 1984), 587 F.Supp. 1549*.

[24] *Socony-Vacuum Oil Co. v. Continental Cas. Co. (1945), 144 Ohio St. 382, 59 N.E.2d 199*, paragraph one of the syllabus ("As long as the complaint contains some claim which is arguably within the scope of the policy coverage, the insurer is obliged to defend **[*12]** the insured") citing *Sanderson v. Ohio Edison Co. (1994), 69 Ohio St. 3d 582, 1994 Ohio 379, 635 N.E.2d 19*,

defend even those claims that **[*11]** may be determined to lack merit by a court judgment or settlement.[26] Any doubt as to the insurance company's duty to defend its insured must be resolved in favor of insured.[27]

P18 ***HN9*** Unlike the duty to indemnify, the duty to defend begins at the outset of the case.[28] An insurance company is not entitled to tender the limits of coverage and thereby be relieved of the duty to defend[29] before settlement or final adjudication of the case,[30] or before obtaining the consent of insured.[31]

P19 Under Insuring Agreement 2 of the primary policies, the London Insurers agreed to "Defend any suit against the Assured alleging injury, sickness, disease or destruction and seeking damages on account thereof, even if such suit is groundless, false or fraudulent * * *" and to "Pay all expenses incurred by the Underwriters" in the defense of those claims "in addition to the applicable limit of liability."[32]

P20 Based on the unambiguous language of the policies, this Court concludes that the London Insurers have a duty to defend. Thus, this Court must next determine whether the London Insurers: (a) have a duty to defend after exhaustion of the policy limits; and (b) properly allocated their duty to defend among themselves, by allocating a portion of their defense expenses to insolvent insurers.

**a. The Duty to Defend Does Not Terminate After Exhaustion of the Policy Limits**

P21 ***HN10*** The primary right of the insured against his liability insurer is the right to reimbursement for loss falling **[*15]** within the coverage defined in the policy, the scope of that right being determined by the construction of the

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paragraph one of the syllabus. See *Fidelity and Guar. Ins. Underwriters, Inc. v. City of Kenner (C.A.5, 1990), 894 F.2d 782*; *Siligato v. Welch (D.C. Conn., 1985), 607 F.Supp. 743*.

[25] *Vahila v. Hall (1997) 77 Ohio St. 3d 421, 430, 1997 Ohio 259, 674 N.E.2d 1164* ("Appellants were not required to establish that they would have been successful in the underlying civil, criminal, and administrative matters giving rise to the malpractice action"). See *Graham v. Milky Way Barge, Inc. (C.A.5, 1987), 824 F.2d 376*, rehearing denied, ***832 F.2d 1264*** and ***Land and Offshore Services Inc. v. American Fidelity Ins. Co., 832 F.2d 1264*** and ***Milky Way Barge, Inc. v. Land and Offshore Services, Inc., 832 F.2d 1264***.

[26] *Willoughby Hills v. Cincinnati Ins. Co. (1984), 9 Ohio St.3d 177, 9 Ohio B. 463, 459 N.E.2d 555*; *W. Lyman Case & Co. v. National City Corp. (1996), 76 Ohio St.3d 345, 1996 Ohio 392, 667 N.E.2d 978*. *Putnam v. Insurance Co. of North America (N.D. Miss.,1987), 673 F.Supp. 171*, affirmed, ***845 F.2d 1020***. See *Preferred Risk Ins. Co. v. Gill (1987), 30 Ohio St. 3d 108, 30 Ohio B. 424, 507 N.E.2d 1118*, paragraph two of the syllabus ("Where the insurer does not **[*13]** agree to defend groundless, false or fraudulent claims, an insurer's duty to defend does not depend solely on the allegations of the underlying tort complaint. Absent such an agreement, the insurer has no duty to defend or indemnify its insured where the insurer demonstrates in good faith in the declaratory judgment action that the act of the insured was intentional and therefore outside the policy coverage.") See, also *Trizec Properties, Inc. v. Biltmore Const. Co., Inc. (C.A.11, 1985), 767 F.2d 810*.

[27] *Willoughby Hills v. Cincinnati Ins. Co. (1984), 9 Ohio St.3d 177, 9 Ohio B. 463, 459 N.E.2d 555*. See *Aetna Cas. & Sur. Co., Inc. v. Centennial Ins. Co. (C.A.9, 1988), 838 F.2d 346*.

[28] *W. Lyman Case & Co. v. National City Corp. (1996), 76 Ohio St.3d 345, 1996 Ohio 392, 667 N.E.2d 978*; *Wedge Prods. v. Hartford Equity Sales Co.. (1987), 31 Ohio St. 3d 65, 67, 31 Ohio B. 180, 509 N.E.2d 74*; *Chemstress Consultant, Inc. v. Cincinnati Ins. Co. (1998), 128 Ohio App.3d 396, 715 N.E.2d 208*.

[29] *Davis v. Travelers Indem. Co. of America (C.A.11, 1986), 800 F.2d 1050*.

[30] *Utah Power & Light Co. v. Federal Ins. Co. (D.Utah, 1989), 711 F.Supp. 1544*.

[31] *Samply v. Integrity Ins. Co. (1985), 476 So.2d 79*. **[*14]** See *American Employers Ins. Co. v. Goble Aircraft Specialties, Inc. (1954), 205 Misc. 1066, 131 N.Y.S.2d 393*; cf. *Lumbermen's Mutual Casualty Co., v. McCarthy (1939), 90 N.H. 320, 8 A.2d 750*.

[32] App. 0582, 0583.

clauses defining the personal injury liability and property damage liability coverages. The primary policies issued by the London Insurers contain a separate insuring agreement set forth in the policy and headed "Defense, Settlement, Supplementary Payments."[33] It provides in pertinent part: "As respects the insurance afforded by the terms of this policy the Underwriters shall: (a) Defend any suit against the Assured alleging such injury, sickness, disease or destruction and seeking damages on account thereof, even if such suit is groundless, false or fraudulent; but the Underwriters may make such investigation, negotiation and settlement of any claim or suit as it deems expedient; * * * The amounts incurred under this Insuring Agreement, except settlements of claims and suits are payable by the Underwriters in addition to the applicable limit of liability of this policy."[34]

P22 While it does not appear that any Ohio court has addressed whether the duty to defend terminates after the exhaustion of the policy limits, a review of cases in other jurisdictions **[*16]** addressing this issue reflect a split as to the rule to be applied.[35] On the one hand it has been held, apparently without regard to the specific language of the liability policy, that the insurer may not absolve itself of its duty to defend the insured by tendering its policy limits into court,[36] while on the other hand it has been held that under a liability policy limited to bodily injury, wherein the insurer agreed to "[d]efend any suit against the insured alleging such injury, sickness, disease or destruction and seeking damages on account thereof even if such suit is groundless, false or fraudulent; . . .," the insurer's duty to defend ceased upon payment to the limits of the policy.[37]

P23 Although it has been held that the duty of the insurer to defend ceased upon payment by the insurer **[*18]** to the full extent of the policy limits, the North Dakota Supreme Court stated by way of dictum in *Prince v. Universal Underwriters, Ins. Co*.,[38] that nevertheless an insurer may not pay to the full extent of the policy limits and so place the full burden of the defense on the insured from the beginning, nor may it abandon an undertaken defense under circumstances prejudicial to the insured.

P24 In the case of a liability insurance policy incorporating the defense clause into the coverage clause,[39] it has been held that the insurer was barred from withdrawing its representation of the insured, despite the fact that it had made an offer to pay into court an amount equal to the limit under the policy.[40] In *National Casualty Co. v. Insurance Co. of North America*,[41] the U.S. District Court for the Northern District of Ohio held that despite the fact

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[33] App. 0582.

[34] App. 0582-0583.

[35] *American Family Life Assur. Co. v. United States Fire Co. (C.A.11, 1989), 885 F.2d 826* (Liability insurer's tender of its policy limits to insured did not relieve it of its obligation to provide defense in action brought against insured); *Atlantic Mutual Ins. Co. v. J. Lamb, Inc. (Cal. App. 2 Dist., 2002), 100 Cal. App. 4th 1017, 123 Cal. Rptr. 2d 256* (The liability insurer's duty to defend is a continuing one, arising on tender of defense and lasting until the underlying lawsuit is concluded or until it has been shown **[*17]** that there is no potential for coverage); *M.H. Detrick Co. V. Century Indem. Co. (Ill. App. Ct. 1 Dist., 1998), 299 Ill. App. 3d 620, 233 Ill Dec. 513, 701 N.E.2d 156* (When an insurer has properly exhausted its policy limits by the payment of judgments and/or settlements, it is no longer obligated to defend or indemify the insured, whether such actions are pending at the time of exhaustion or commenced thereafter); *Scruggs v. International Indem. Co. (1998), 233 Ga. App. 772, 505 S.E.2d 267 (Insurer's duty to defend ended upon payment of policy limits)*.

[36] *National Casualty Co. v. Insurance Co. of N.A. (1964), 230 F.Supp 617*. See, *e.g., Anchor Casualty Company v. McCaleb (5th Cir. 1949), 178 F.2d 322*; cf. Risjord & Austin, Obligation of Insurer to Defend After Exhaustion of Policy Limits, 6 Federation of Insurance Counsel Quarterly 18 (1956), for a summary of the authorities.

[37] *Oda v. Highway Ins. Co. (1963), 44 Ill. App. 2d 235, 194 N.E.2d 489*. See also, *American Employers Ins. Co. v. Goble Aircraft Specialties, Inc.. (1954), 205 Misc. 1066, 131 N.Y.S.2d 393*, app withdrawn, ***1 App. Div. 2d 1008, 154 NYS2d 835***.

[38] *Prince v. Universal Underwriters, Ins. Co. (N.D., 1966) 143 N.W.2d 708*.

[39] See Keaton, Ancillary Rights of the Insured Against His Liability Insurer. 13 Vanderbilt L. Rev 837 (1960).

[40] See *Simmons v. Jeffords (D.C. Pa., 1966), 260 F.Supp 641*.

that the insurer had tendered its policy limits into court, it was not relieved of its duty to defend three personal injury actions which might in the future be brought against the insured by members of a family injured in an automobile accident in which the insured was **[*19]** involved, since the insurer's duty is both to defend actions and to pay judgments against the insured. The court stated that although it was cited to no Ohio case holding thus, such a request by an insurer to be discharged of its duty to defend had generally been denied by other courts.[42]

P25 The Court in *National Casualty Co.*, observed: "The insurer's duty is both to defend actions and to pay judgment against the insured. Otherwise, where the damages exceed the policy coverage, the insurer could walk into court, toss the amount of the policy on the table, and blithely inform the insured that the rest was up to him. This would obviously constitute a breach of the insurer's **[*20]** contract to defend actions against the insured, for which premiums had been paid, and should not be tolerated by the courts."[43] Thus, the Court stressed, "Such action will not be permitted in this Court; we cannot absolve the applicant from its duty to defend."[44]

P26 Brush further suggests that the duty to defend does not terminate upon exhaustion of the policy limits because: (i) in the absence of explicit language, the duty to defend survives exhaustion of policy limits; (ii) the preamble to Insuring Agreement 2 does not create an exception to the duty to defend; and (iii) the parties did not intend for the language used in the primary policies to create an exhaustion limitation.

**i. In the Absence of Explicit Language to the Contrary, The Duty to Defend Survives Exhaustion of Policy Limits**

P27 ***HN11*** Whether the duty to defend under the primary policies terminates upon exhaustion of the indemnity limits depends again, on the language of the primary policies. Brush argues that the duty to defend is a separate **[*21]** and independent obligation imposed by the insurance contract on the insurer,[45] and as such, is "much broader"[46] than the duty to pay settlements and judgments.[47] Brush argues that the undertaking to defend is absolute under the terms of the policy,[48] because the obligation to defend suits "alleging such injury, sickness, disease, or destruction and seeking damages on account thereof, even if such suit is groundless, false or fraudulent * * *," is clear and unequivocal.[49] The London Insurers could have limited its obligation to the defense of suits where, on the facts, it was liable to the insured. It did not do so.

P28 ***HN12*** Pursuant to Ohio law, limitations or exceptions should not be read into an insurance policy.[50] Here, the **[*22]** primary policies contain no limitation or exception terminating the duty to defend upon exhaustion of the limits

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[41] *National Casualty Co. v. Insurance Co. of North America (N.D.Ohio, 1964), 230 F. Supp. 617* (applying Ohio law).

[42] *National Casualty Co. v. Insurance Co. of North America (N.D.Ohio, 1964), 230 F. Supp. 617*. See *e.g., American Casualty Co. of Reading Pa. v. Howard (4th Cir. 1951), 187 F.2d 322*; *Anchor Casualty Co. v. McCaleb (5th Cir. 1949) 178 F.2d 322*.

[43] *National Casualty Co. v. Insurance Co. of North America (N.D.Ohio, 1964), 230 F. Supp. 617*.

[44] *National Casualty Co. v. Insurance Co. of North America (N.D.Ohio, 1964), 230 F. Supp. 617*.

[45] *Union Indem. Co. v. Mostov (1932), 41 Ohio App. 518, 11 Ohio Law Abs. 712, 181 N.E. 495*.

[46] Plaintiff Brush Wellman Inc.'s Reply Brief in Support of its Motion for Partial Summary Judgment, at 17.

[47] *City of Willoughby Hills v. Cincinnati Ins. Co. (1984), 9 Ohio St. 3d 177, 9 Ohio B. 463, 459 N.E.2d 555*.

[48] See *Union Indem. Co. v. Mostov (1932), 41 Ohio App. 518, 11 Ohio Law Abs. 712, 181 N.E. 495*.

[49] See *U.S. Fidelity Guar. Co. v. Lighting Rod Mut. Ins. Co. (1997), 80 Ohio St. 3d 584, 1997 Ohio 311, 687 N.E.2d 717*.

[50] *McGlone v. Midwestern Group (1991), 61 Ohio St.3d 113, 573 N.E.2d 92*.

of liability for settlements and judgments. Insuring Agreement 2 provides that the London Insurers will: "Defend any suit against the Assured alleging such injury, sickness, disease or destruction and seeking damages on account thereof, even if such suit is groundless, false or fraudulent; but the Underwriters may make such investigation, negotiation and settlement of any claim or suit as they deem expedient."[51] Insuring Agreement 2 also provides that the expenses associated with that defense will be paid "in addition to the applicable limit of liability."[52]

P29 The London Insurers argue that the exhaustion of policy liability limits ends the duty to defend further claims. This question has been addressed in Courts outside Ohio. In *Lumbermen's Mutual Casualty Co., v. McCarthy*,[53] the Supreme Court of New Hampshire held that the duty to defend ends with the policy limits, assuming no prejudice attaches to the insured. However, in *American Employers Ins. Co. v. Goble Aircraft* ***[*23]*** *Specialties, Inc*.,[54] a Supreme Court of New York construed the insurer's obligation to defend as an independent duty which is not discharged on payment of the policy limit.

P30 Since this question has not yet been answered in Ohio, it is appropriate to apply Ohio law holding that limitations or exceptions should not be read into an insurance policy.[55] Thus, ***HN13*** in order to withdraw from defense of its insured after payment of the policy liability limit, the insurer would have had to reserve its right to discontinue defense in clear and plain language. As the New York Court observed that "If plaintiff intended to reserve the right to withdraw counsel and cease to defend such actions as might be pending after payment of the total amount for which it indemnified, or to refuse to defend any new action commenced after such payments, it was under a duty to so state in the policy which it issued."[56]

P31 **[*24]** Further, ***HN14*** Ohio limitations on the duty to defend arise by contract, not by operation of law and the duty to defend is properly viewed as a valuable right of the one who purchased it.[57] In *W. Lyman Case & Co. v. National City Corp*.,[58] the Ohio Supreme Court held that "[t]he contractual right to have another party provide a defense in a civil action is by no means 'insignificant' -- it is a valuable right, and therefore may very well be sought in contract negotiations, * * *." Thus, the London Insurer's suggestion that deference should be accorded *Lumbermen's Mutual Casualty Co., v. McCarthy*, is without merit since the New Hampshire Court disregarded the language of the contract and construed the promise of the company to defend "* * * not as an undertaking for the benefit of the assured, but as a stipulation for the benefit of the insurer."[59] In *Lumbermen's Mutual Casualty Co*., the Court did not find language limiting or excepting the insurer's duty to defend. Instead, the Court assumed in the absence of express words that the duty to defend is independent of the duty to pay.

**ii. The Preamble to Insuring Agreement 2 Does Not Create an Exception to the Duty to Defend**

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[51] App. 0582-0583.

[52] App. 0582-0583.

[53] *Lumbermen's Mutual Casualty Co., v. McCarthy (1939), 90 N.H. 320, 8 A.2d 750*.

[54] *American Employers Ins. Co. v. Goble Aircraft Specialties, Inc. (1954), 205 Misc. 1066, 131 N.Y.S.2d 393*.

[55] *McGlone v. Midwestern Group (1991), 61 Ohio St.3d 113, 573 N.E.2d 92*.

[56] *American Employers Ins. Co. v. Goble Aircraft Specialties, Inc. (1954), 205 Misc. 1066, 131 N.Y.S.2d 393*.

[57] *W. Lyman Case & Co. v. National City Corp. (1996), 76 Ohio St.3d 345, 1996 Ohio 392, 667 N.E.2d 978*.

[58] *W. Lyman Case & Co. v. National City Corp. (1996), 76 Ohio St.3d 345, 1996 Ohio 392, 667 N.E.2d 978*.

[59] *Lumbermen's Mutual Casualty Co., v. McCarthy (1939), 90 N.H. 320, 8 A.2d 750*, **[*25]** at dissent.

P32 In addition, Brush asserts that the preamble to Insuring Agreement 2, which is identical to the 1947 CGL, does not create an exception to the duty to defend because the language is ambiguous. The preamble states: "As respects the insurance afforded by the other terms of this Policy, the Underwriters shall * * * Defend any suit against the Assured alleging such injury, sickness, disease or destruction * * *." It further provides that the limit of liability is "$500,000 Ultimate Net Loss in respect to each and every occurrence * * *."[60] Brush suggests that the language of the preamble is ambiguous because (1) numerous other jurisdictions have arrived at conflicting conclusions as to the meaning of terms in the 1947 CGL which was identical to that used by the London Insurers; (2) the London Insurers continued to use the 1947 CGL form after 1966; and (3) the London Insurers successfully asserted that the preamble to the pre-1966 forms was ambiguous.

P33 Brush suggests that because the 1947 CGL form was found to be ambiguous in other jurisdictions, it is reasonably susceptible **[*26]** to two or more constructions.[61] In *Aetna Casualty & Surety Co. v. Certain Underwriters at Lloyds of London*,[62] the California Court of Appeals held that the 1955 CGL form was reasonably susceptible to the interpretation that it did not terminate the duty to defend upon exhaustion. Although the 1966 CGL form was adapted to include new language that highlighted the policy term on indemnity limits and explicitly provided that the duty to defend would terminate upon exhaustion of limits, the London Insurers argue that "none of the changes to the 1966 CGL form rendered earlier language *ipso facto* ambiguous."[63]

P34 In *George H. Olmsted & Co. v. Metropolitan Life Ins. Co.*,[64] the Ohio Supreme Court held that ***HN15*** "Where the language of a clause used in an insurance contract is such that courts of numerous jurisdictions have found it necessary to construe it and in such construction **[*27]** have arrived at conflicting conclusions as to the correct meaning, intent and effect thereof, the question whether such clause is ambiguous ceases to be an open one."[65] Given that the Court in *Lumbermen's Mutual Casualty Co.*, found it necessary to construe the substantive provisions of the policy after the monetary limits had been reached, this Court could conclude that the preamble is ambiguous.[66]

P35 ***HN16*** Where the language in a contract is ambiguous if it is reasonably susceptible of two or more meanings, Courts may consider extrinsic evidence to "to ascertain the intent of the parties when the contract is unclear or ambiguous, or **[*28]** when circumstances surrounding the agreement give the plain language special meaning."[67] Courts should endeavor to give effect to every part of the contract and therefore "if one construction of a doubtful condition in a contract would make that condition meaningless, and it is possible to give it another construction that would give it meaning and purpose, then the latter construction must obtain."[68] Moreover, an ambiguous contract is

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[60] App. 0569.

[61] *George H. Olmstead & Co. v. Metropolitan Life Ins. Co. (1928), 118 Ohio St. 421, 6 Ohio Law Abs. 383, 161 N.E. 276*.

[62] *Aetna Casualty & Surety Co. v. Certain Underwriters at Lloyds of London (1976), 56 Cal. App.3d 791, 129 Cal. Rptr. 47*.

[63] Defendant's Memorandum of Law in Opposition to Motion by Plaintiff for Partial Summary Judgment, at 17.

[64] *George H. Olmsted & Co. v. Metropolitan Life Ins. Co. (1928), 118 Ohio St. 421, 6 Ohio Law Abs. 383, 161 N.E. 276*; cf. *Akers v. Beacon Insurance Co., 3rd Dist. No. 9-86-16, 1987 Ohio App. LEXIS 8550*.

[65] *George H. Olmsted & Co. v. Metropolitan Life Ins. Co. (1928), 118 Ohio St. 421, 6 Ohio Law Abs. 383, 161 N.E. 276*. See Plaintiff Brush Wellman Inc.'s Memorandum in Support of its Motion for Partial Summary Judgment, at 39.

[66] *Lumbermen's Mutual Casualty Co., v. McCarthy (1939), 90 N.H. 320, 8 A.2d 750*; See, *George H. Olmsted & Co. v. Metropolitan Life Ins. Co. (1928), 118 Ohio St. 421, 6 Ohio Law Abs. 383, 161 N.E. 276*.

[67] *Graham v. Drydock Coal Co. (1996), 76 Ohio St.3d 311, 1996 Ohio 393, 667 N.E.2d 949*.

to be construed against the party who drafted it.[69] As such, where the language is ambiguous, a court must construe the language against the party who prepared the contract.[70]

P36 Arguing that "this is not a boilerplate auto policy,"[71] the London Insurers insist that Brush's suggestion that **[*29]** the "language in the insurance policies must be construed in favor of the policyholder and against the insurer,"[72] is not applicable in this case. The London Insurers argue that "[t]his principle of contract interpretation grows out of cases where the policyholder — a lay consumer with little or no insurance expertise or bargaining power — purchases a standard form policy drafted entirely by the insurer and offered to the public on a take-it-or-leave-it-basis with no opportunity for negotiation and no realistic choice as to terms."[73] However, the *contra proferentum* rule espoused by the London Insurers is inapplicable here because none of the language was drafted by Brush.[74] While some changes in the language of the contract may have been suggested by Brush, there is no evidence that these changes were ever made.[75] And although the London Insurers contend that this policy "'was the product of negotiation between two highly sophisticated parties of comparable bargaining power, who presumably had access to counsel,'" there is no evidence that policy language drafted by Brush was included in the policy.[76] As drafters of the policy, the London Insurers were in the best position to avoid **[*30]** ambiguity and uncertainty. As such, it should not "benefit from an ambiguity of [its] own creation."[77]

P37 Since it is settled law in Ohio that ***HN17*** an exclusion within an insurance policy must be interpreted as applying only to that which is clearly intended to be excluded, the preamble must be construed **[*31]** against the London Insurers.[78] Thus, assuming that the language of the policy is ambiguous, the London Insurer's duty to defend does not terminate upon exhaustion of indemnity limits.

P38 Next, Brush argues that the London Insurers continued use of the 1947 CGL form (or any pre-1966 form) after 1966, by which time the industry had developed new language that highlighted the policy term on indemnity limits and explicitly provided that the duty to defend would terminate upon exhaustion of limits, "establishes as a matter of law their intention not to terminate the duty to defend upon exhaustion of the primary limits."[79] Arguing that the London Insurers' continued use of the 1947 CGL form bars a claim that it intended to terminate the duty to defend upon exhaustion, Brush relies on *George H. Olmsted & Co*., as supporting the proposition that courts would

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[68] *Foster Wheeler Enviresponse, Inc. v. Franklin Co. Convention Facilities Authority (1997), 78 Ohio St.3d 353, 1997 Ohio 202, 678 N.E.2d 519* citing *Farmers' Nat'l Bank v. Delaware Ins. Co. (1911), 83 Ohio St. 309, 94 N.E. 834, 8 Ohio L. Rep. 607*, paragraph six of the syllabus.

[69] *Graham v. Drydock Coal Co. (1996), 76 Ohio St.3d 311, 1996 Ohio 393, 667 N.E.2d 949*.

[70] See *Central Realty Co. v. Clutter (1980), 62 Ohio St. 2d 411, 413, 406 N.E.2d 515, 517*.

[71] Defendants' Memorandum of Law in Opposition to Motion by Plaintiff for Partial Summary Judgment, at 3.

[72] Defendants' Memorandum of Law in Opposition to Motion by Plaintiff for Partial Summary Judgment, at 1-2.

[73] Defendants' Memorandum of Law in Opposition to Motion by Plaintiff for Partial Summary Judgment, at 2.

[74] Defendants' Memorandum of Law in Opposition to Motion by Plaintiff for Partial Summary Judgment, at 4. See *Union Fire Ins. Co. of Pittsburg v. Pan American Energy LLC (Del.Ch., 2003), 2003 Del. Ch. LEXIS 29, 2003 WL 1432419*.

[75] Defendants' Memorandum of Law in Opposition to Motion by Plaintiff for Partial Summary Judgment, at 3.

[76] Defendants' Memorandum of Law in Opposition to Motion by Plaintiff for Partial Summary Judgment, at 4. See *Union Fire Ins. Co. of Pittsburg v. Pan American Energy LLC (Del.Ch., 2003), 2003 Del. Ch. LEXIS 29, 2003 WL 1432419*.

[77] *Copelin-Mohn, Inc. v. Buckeye Union Cas. Co. (1939), 135 Ohio St. 287, 291, 20 N.E.2d 713*.

[78] See *Andersen v. Highland House Co. (2001), 93 Ohio St. 3d 547, 2001 Ohio 1607, 757 N.E.2d 329*.

[79] Plaintiff Brush Wellman Inc.'s Memorandum in Support of its Motion for Partial Summary Judgment, at 39.

"hesitate to accept insurer's interpretation even if [sic] court had been inclined to find the provision unambiguous" where the insurer had continued to use the provision when other, more clear provisions were available.[80] And in *Grant Lumber Co. v. North River* ***[*32]*** *Ins. Co. of N.Y.*,[81] the Northern District of Idaho observed, "notwithstanding the conflicting views of courts of last resort, of which the defendant doubtless has had knowledge, it persists in the use of this form of policy, ambiguous though it has been found to be." Therefore, the Court stressed, "There is every reason, * * * for applying the familiar rule that contracts of this character, if uncertain, will be construed favorably to the insured."[82]

P39 Nevertheless, the London Insurers assert that the fact that the amendment of the standard CGL policy in 1966, does not cast doubt upon the pre-1966 forms. Whether the 1966 amendment is an implicit acknowledgement that the pre-1966 policies might reasonably be interpreted **[*33]** not to contain any such limit on the duty to defend, necessarily turns on the London Insurers' claim in *Aetna Casualty & Surety Co. v. Certain Underwriters at Lloyds of London*,[83] that the pre-1966 forms are ambiguous.

P40 Brush argues that the London Insurers "are judicially estopped from changing the position they took in *Aetna Casualty & Surety Co*., namely, that the pre-1966 CGL forms are, at a minimum, ambiguous as to whether the duty to defend terminates upon exhaustion."[84] ***HN18*** The doctrine of judicial estoppel forbids a party from taking a position inconsistent with one successfully and unequivocally asserted by the same party in a prior proceeding.[85] The rationale of judicial estoppel is that "a party should not be allowed to convince one judicial body to adopt certain factual contentions and then subsequently unconscionably assert [to] another judicial body that these contentions were inaccurate and that a different set of facts should be found."[86]

P41 ***HN19*** The doctrine applies only if three factors are met. The party asserting judicial estoppel must prove that its adversary "(1) took a contrary position; (2) under oath in a prior proceeding; and (3) the prior position was accepted by the court."[87] In *Aetna Casualty & Surety Co*.,[88] the London Insurers argued that the preamble to the pre-1966 forms was ambiguous. While the California Court of Appeals held that the 1955 CGL form was reasonably susceptible to the interpretation that it did not terminate the duty to defend upon exhaustion, the Court observed that the London Insurer's "claimed freedom from any defense obligations and costs [] rest not so much on the clarity of the terms of their policy nor upon any clear legal freedom to deny any defense, but rather more on the application of strained meaning to the terms of the policy."[89] Observing that the London Insurers "do not demonstrate or direct our attention to any clear and certain statement in their policies that they will **[*35]** not defend against any claims,"

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[80] Plaintiff Brush Wellman Inc.'s Memorandum in Support of its Motion for Partial Summary Judgment, at 39. See *George H. Olmsted & Co. v. Metropolitan Life Ins. Co. (1928), 118 Ohio St. 421, 6 Ohio Law Abs. 383, 161 N.E. 276*.

[81] *Grant Lumber Co. v. North River Ins. Co. of N.Y. (D.C. Idaho, 1918), 253 F. 83*.

[82] *Grant Lumber Co. v. North River Ins. Co. of N.Y. (D.C. Idaho, 1918), 253 F. 83*.

[83] *Aetna Casualty & Surety Co. v. Certain Underwriters at Lloyds of London (1976), 56 Cal. App.3d 791, 129 Cal. Rptr. 47*.

[84] Plaintiff Brush Wellman Inc.'s Memorandum in Support of its Motion for Partial Summary Judgment, at 36-37.

[85] *Smith v. Dillard Dept. Stores, Inc. (2000), 139 Ohio App. 3d 525, 533, 744 N.E.2d 1198*, **[*34]** quoting *Teledyne Indus., Inc. v. Natl. Labor Relations Bd. (C.A.6, 1990), 911 F.2d 1214, 1217*.

[86] *Scioto Mem. Hosp. Assn., Inc. v. Price Waterhouse & Co., 10th Dist. No. 90AP-1124, 1993 Ohio App. LEXIS 6176*.

[87] *Smith v. Dillard Dept. Stores, Inc. (2000), 139 Ohio App. 3d 525, 533, 744 N.E.2d 1198*, quoting *Teledyne Indus., Inc. v. Natl. Labor Relations Bd. (C.A.6, 1990), 911 F.2d 1214, 1217*.

[88] *Aetna Casualty & Surety Co. v. Certain Underwriters at Lloyds of London (1976), 56 Cal. App.3d 791, 129 Cal. Rptr. 47*.

[89] *Aetna Casualty & Surety Co. v. Certain Underwriters at Lloyds of London (1976), 56 Cal. App.3d 791, 129 Cal. Rptr. 47*.

the Court stressed, "'How simple it would have been to amend the standard language'" to say clearly that the insurer and insured agree that the insurer shall not be required to defend any claim."[90]

P42 Although the California Appellate Court in *Aetna Casualty & Surety Co*., accepted the London Insurer's argument that the preamble was ambiguous, it did not agree that Aetna did not have a right of contribution for post-exhaustion expenses. Nevertheless, the London Insurers did prevail on the singular issue before both Courts — whether the preamble is ambiguous. As a result, the London Insurers are judicially estopped from **[*36]** now claiming that the pre-1966 forms are not ambiguous.

**iii. The Parties Did Not Intend for the Language Used in the Primary Policies to Create an Exhaustion Limitation**

P43 Brush offers the affidavit of Professor George Flanigan to support its assertion that the 1947 CGL form, which is used word for word in the Brush primary policies, "was never intended as an exhaustion provision."[91] In his Affidavit,[92] Professor Flanigan explains that beginning in the late 1940s or early 1950s, the U.S. Domestic industry (but not the London Market) began to take the position that the 1947 CGL form (and its predecessors) contained language from which it could be inferred that the defense cost obligation ended upon payment of the policy limits.[93] Relevant to Professor Flanigan's analysis is his observation that as early as 1911, liability policies provided for a duty to defend with "no provision terminating the defense obligation upon exhaustion of the limits of liability."[94] Implying that the London Insurers knew of this "established casualty practice," Professor Flanigan found the ongoing changes to the industry form to be significant. In 1955, the form was amended to include "such" in the preamble **[*37]** so that the provision read: "[w]ith respect to such insurance as is afforded by this policy * * *."[95] And in 1956, the U.S. insurance industry introduced the Family Auto Plan ("FAP") which also had a duty to defend.[96] And in 1966, the U.S. insurance industry revised the duty to defend to provide that it terminated with exhaustion of the limits.[97] The 1966 CGL form specifically stated: "* * * but the company shall not be obligated to pay a claim or judgment or defend any suit after the applicable limit of the company's liability has been exhausted by payment of judgments or settlements."[98]

P44 Although the London Insurers concede that the policy must contain clear language that the duty to defend terminates when the limits of liability are paid, it argues that Professor Flanigan's analysis that it was the established casualty practice then to provide an unlimited duty to defend, is flawed because "[h]e was only 14 years old in 1957,"[99] and he is "an academic whose only possible basis of knowledge is that of a person doing historical research."[100] The London Insurers' argument would preclude any expert witness from testifying as to trade usage unless they had personally worked in the insurance industry during the period the language was changed. The

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[90] *Aetna Casualty & Surety Co. v. Certain Underwriters at Lloyds of London (1976), 56 Cal. App.3d 791, 129 Cal. Rptr. 47*.

[91] Plaintiff Brush Wellman Inc.'s Memorandum in Support of its Motion for Partial Summary Judgment, at 40.

[92] App. 0028.

[93] App. 0034.

[94] Affidavit of George B. Flanigan, App. 0029.

[95] Plaintiff Brush Wellman Inc.'s Memorandum in Support of its Motion for Partial Summary Judgment, at 40; App. 0035.

[96] Plaintiff Brush Wellman Inc.'s Memorandum in Support of its Motion for Partial Summary Judgment, at 41; App. 0036.

[97] Plaintiff Brush Wellman Inc.'s Memorandum in Support of its Motion for Partial Summary Judgment, at 41; App. 0036.

[98] Plaintiff Brush Wellman Inc.'s Memorandum in Support of its Motion for Partial Summary **[*38]** Judgment, at 41; App. 0036.

[99] Defendant's Memorandum of Law in Opposition to Motion by Plaintiff for Partial Summary Judgment, at 23.

[100] Defendant's Memorandum **[*39]** of Law in Opposition to Motion by Plaintiff for Partial Summary Judgment, at 23.

London Insurers fail to recognize that ***HN20*** expert opinion testimony is admissible to aid the Court in arriving at a correct determination of the litigated issue in all proceedings involving matters of insurance, and to restrict expert witnesses to those who were employed by the insurance industry during the contested period would effectively render *Evid. Rule 702(A)* hollow.[101]

P45 The London Insurers further assert that Professor Flanigan's knowledge of "prevailing trade usage as to the scope of the defense obligation in policies negotiated in 1957 can only be based entirely upon secondary sources."[102] Yet, the London Insurers did not move to strike the expert testimony of Professor Flanigan, but instead attacked the merits of his testimony within its motion for summary judgment. Professor Flanigan's testimony is relevant and material and the possible use of secondary sources is insufficient to raise genuine issues of material fact. Moreover, with Brush having satisfied its **[*40]** initial burden, the London Insurers then has a reciprocal burden as outlined in *Civ.R. 56(E)* to set forth specific facts showing that there is a genuine issue for trial. In *Dresher v. Burt*,[103] the Ohio Supreme Court held that ***HN22*** a non-moving party cannot rest upon the allegations of the pleadings, but must respond with affidavits or similar evidentiary materials demonstrating that a genuine issue of material fact exists for trial.[104] Here, the London Insurer's opposition to Professor Flanigan's use of secondary sources is non-responsive. As a result, Professor Flanigan's analysis is admissible and is relevant in demonstrating that the language in the primary policies was never intended as an exhaustion provision.

**b. The London Insurers May Not Allocate Expenses to Insolvent Insurers**

P46 Brush and the London Insurers disagree also about who should bear the risk of insolvencies among subscribers to the primary policies, and specifically whether the London Insurers may allocate a portion of the expenses **[*41]** incurred in the defense of Brush to insolvent insurers. Citing policy terms, the London Insurers argue that each subscribing syndicate at Lloyd's of London, and each subscribing London Market Company is only *severally* liable for its share of that policy. Accordingly, the London Insurers contend that Brush must bear any loss attributable to the policy shares of insolvent carriers. Brush disagrees, arguing that the London Insurers are contractually bound to provide a defense and cannot divide that duty.

P47 Brush suggests that the duty to defend is a personal, separate and indivisible service, and that these principles will be better served by requiring the solvent insurers to spread this loss among themselves. Arguing that the duty to defend cannot be apportioned among the individual subscribing underwriters, Brush asserts that "no language in the Brush primary policies even attempts to do so."[105] Relying on Insuring Agreement 2 of the primary policies which provides that the subscribing underwriters will "[d]efend any suit against the Assured alleging such injury, sickness, disease, or destruction and seeking damages on account thereof, even if such suit is groundless, false or fraudulent **[*42]** * * *," and to "Pay all expenses incurred by the Underwriters" in the defense of those claims "in addition to the applicable limit of liability,"[106] Brush argues that "the underwriters subscribing to each primary policy

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[101] ***HN21*** Under ***Ohio Evid.R. 702***, a witness must be 'qualified as an expert by knowledge, skill, experience, training, or education' before he can render an expert opinion. In Ohio, expert testimony must be: 1) relevant and material; 2) be on the knowledge of the average layman; 3) have acceptable scientific reliability; and 4) have probative value which outweighs its prejudicial impact. *State v. Thomas (1981), 66 Ohio St.2d 518, 423 N.E.2d 137*, syllabus; *State v. Whitman (1984), 16 Ohio App.3d 246, 16 Ohio B. 269, 475 N.E.2d 486*.

[102] Defendant's Memorandum of Law in Opposition to Motion by Plaintiff for Partial Summary Judgment, at 23.

[103] *Dresher v. Burt (1996), 75 Ohio St.3d 280, 1996 Ohio 107, 662 N.E.2d 264*.

[104] Citing ***Civ.R. 53(E)***.

[105] Plaintiff Brush Wellman, Inc.'s Memorandum in Support of its Motion for Partial Summary Judgment, at 28.

[106] App. 0582, 0583.

jointly and severally owe Brush a complete defense, and Brush can therefore seek a full defense from all or any of them."[107]

P48 The London Insurers argue, however, that the primary policies "unambiguously recite that the obligations of the subscribing insurers are several."[108] And the London Insurers insist that the preamble provides that the agreement to "insure against loss, damage, or liability to the extent and in the manner hereinafter provided" is subject to the individual member's several shares.[109]

P49 The London Insurers assert that "U.S. Courts have widely recognized and uniformly held that such coverage is 'several' and not 'joint' or 'joint and several.'"[110] As a result, it contends that "solvent subscribers cannot be held liable for the several shares of any subscribers who become insolvent." In *Chemical Leaman Tank Lines, Inc., v. Aetna Casualty and Surety Co*.,[111] the District Court for New Jersey held that the solvent subscribers shall not bear losses attributable to the policy shares of insolvent subscribers. However, the Court addressed **[*45]** only whether the cost of *damages* could be allocated to insolvent insurers. It did not address whether the expense of providing a *defense* could be allocated to insolvent insurers. Similarly, the other cases cited by the London Insurers address only the issue of damages.

P50 Here, the language of the insurance policies is not ambiguous. The preamble provides that each of the London Insurers will indemnify the Assured against "all such loss, damage, or liability" only for his own part and not for another. The preamble limits each individual subscriber's obligation to pay settlement and judgments to their fraction of the policy limits. However, the preamble does not apply to the duty to defend, which is payable **[*46]** in addition to the policy limits. Thus, payments made by the London Insurers in defense of Brush are expenses that the underwriters must incur, and does not impose any liability upon the insured.

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[107] Plaintiff Brush Wellman, Inc.'s Memorandum in Support of its Motion for Partial Summary Judgment, at 27. See ***Restatement of the Law, Contracts (Second) (1981), § 289, comment a***.

[108] Defendants' Memorandum of Law in Opposition to Motion by Plaintiff for Partial Summary Judgment, at 46.

[109] Defendants' Memorandum of Law in Opposition to Motion **[*43]** by Plaintiff for Partial Summary Judgment, at 47.

The preamble provides: "Now know Ye that we the Underwriters, Members of the Syndicates whose definitive numbers in the after-mentioned List of Underwriting Members of Lloyds are set out in the attached Table, hereby bind ourselves each for his own part and not one for another, our Heirs, Executors and Administrators and in respect of his due proportion only, to pay or make good to the Assured or to the Assured's Executors or Administrators or to indemnify him or them against all such loss, damage or liability as herein provided, after such loss, damage or liability is proved and the due proportion for which each of us, the Underwriters, is liable shall be ascertained by reference to his share, as shown in the said List of the Amount, Percentage or Proportion of the total sum insured hereunder which is in the Table set opposite the definitive number of the Syndicate of which such Underwriter is a Member AND FURTHER THAT the List of Underwriting Members of Lloyd's referred to above shows their respective Syndicates and Shares therein, is deemed to be incorporated in and to from part of this policy * * *."

In addition, the London Insurers **[*44]** insist it is not obliged to absorb the shares of defense costs owed by any insolvent insurers because Insuring Agreement 2 also obliges the insurers to "Pay all expenses incurred by the Underwriters," and to "Reimburse the Assured for all reasonable expenses, other than loss of earnings, incurred at the Underwriters' request." The London Insurers argue that these two provisions deal directly with defense costs and "[i]t is the payment of these costs that the London Insurers have properly allocated in accordance with their shares." See Defendants' Memorandum of Law in Opposition to Motion by Plaintiff for Partial Summary Judgment, at 49.

[110] Defendants' Memorandum of Law in Opposition to Motion by Plaintiff for Partial Summary Judgment, at 45.

[111] *Chemical Leaman Tank Lines, Inc. v. Aetna Casualty and Surety Co. (D.C.N.J., 1997), 978 F.Supp 589, 608-610*, rev'd on other grounds, *(C.A.3, 1999), 177 F.3d 210, 219*; *Haynsworth v. Lloyd's of London (S.D.Tex., 1996), 933 F. Supp. 1315, 1319*, aff'd, *(C.A.5, 1997), 121 F.3d 956*; *Arkansas-Oklahoma Gas Corp. v. Lukis Stewart Price Forbes & Co. (Ark. 1991), 306 Ark. 425, 816 S.W.2d 571, 573*.

P51 Moreover, indemnification is provided only after "such loss, damage or liability is proved."[112] The expenses associated with the duty to defend, however, are incurred and paid directly by the Brush and no proof of loss, damage, or liability is required. ***HN23*** The agreement to furnish a defense to a lawsuit is distinct from and in addition to the insuring agreement as to liability.[113] Further, the duty to defend is personal to each insurer. The obligation is several, and the insuring carrier is not entitled to divide the duty to defend nor require a contribution for defending from another carrier without a specific contractual agreement to that effect.[114]

P52 **[*47]** Thus, this Court finds that the language of the primary policy provides that each insurer shall pay its proportionate share of any judgment or settlement, and not the expenses incurred as a result of the insurer's duty to defend. As such, the percentage share of the liability limits subscribed to by the primary insurers is irrelevant to each insurer's duty to provide a full defense. The duty to defend is the personal duty of each insurer, and is indivisible.[115]

**B. The Excess Policies Impose Upon the London Insurers an Unconditional Obligation to Pay Expenses as Incurred**

P53 Arguing that the excess policies impose upon the London Insurers an unconditional obligation to pay expenses as incurred, Brush asserts (a) that each excess policy contains an unambiguous promise by the Underwriters to pay expenses on behalf of the insured; (b) that Condition 2(C) is not ambiguous and merely describes how costs will be apportioned among the insurers; (c) that the parties intended the policies to pay expenses as incurred; and (d) that the Claims Handling Agreement entered into by the parties in 1999 binds the London Insurers **[*48]** subscribing to "all policies" issued to Brush, including the excess policies, to pay legal fees and expenses incurred for all cases "actually or potentially covered by the London Policies."[116]

**a. The Excess Policies Contains an Unambiguous Promise By the London Insurers to Pay Expenses on Behalf of Brush**

P54 Brush argues that the excess policies contain a promise to pay on behalf of Brush, all expenses that it becomes obligated to pay because of legal liabilities. Brush also argues that the London Insurers must pay those expenses on claims based on allegations of the complaint, even if the true facts reveal that there is no coverage for a settlement or judgment.

P55 The excess policies provide in part: "UNDERWRITERS hereby agree, subject to the terms, conditions and limitations hereinafter mentioned, to pay on behalf of the Assured all sums which the Assured shall become obligated to pay by reason of liability imposed by law * * * as damages, losses or expense * * *." Although "expense" is not defined in the contract, courts have defined it to mean expenses incurred in defending claims.[117] While the London Insurers do not suggest that the policy is ambiguous, it insists that **[*49]** the language cannot be

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[112] App. 0569

[113] *Transamerica Ins. Group v. Empire Mut. Ins. Co. (Conn. C.P., 1974), 31 Conn. Supp. 235, 327 A.2d 734*; *United States Fid. & Guar. Co. v. Tri-State Ins. Co. (C.A.10, 1960), 285 F.2d 579, 582*.

[114] *Transamerica Ins. Group v. Empire Mut. Ins. Co. (Conn. C.P., 1974), 31 Conn. Supp. 235, 327 A.2d 734*; *United States Fid. & Guar. Co. v. Tri-State Ins. Co. (C.A.10, 1960), 285 F.2d 579, 582*.

[115] *Westchester Fire Ins. Co. v. Rhoades (Tex.Ct.App., 1966), 405 S.W.2d 812, 815*.

[116] App. 0009.

[117] *Owens-Corning Fiberglas Corp. v. American Centennial Ins. Co. (Lucas C.P., 1995), 74 Ohio Misc.2d 183, 660 N.E.2d 770*. See Plaintiff Brush Wellman, Inc.'s Reply Brief in Support of its Motion for Partial Summary Judgment, at 25.

construed to provide for expenses incurred in defending lawsuits because the policies "expressly deal with legal expenses separately."[118] As such, it claims that the excess policy does not incorporate the defense obligation of the primary policy.

P56 The London Insurers assert that it has no duty to defend under the excess policies, and that any obligation to pay defense costs does not extend to groundless, false or fraudulent suits. According to the London Insurers, "[w]hether and to what extent an excess insurer may be required to contribute to the payment of any defense costs that the insured or its primary insurer incurs is strictly a matter of agreement and can vary from policy to policy."[119] The London Insurers argue that the excess policies provide that it is obligated to pay an allocable share of defense costs only in certain **[*50]** circumstances. Thus, the London Insurers argue that Condition 2(C) sets forth a limited obligation to share in the reimbursement of certain defense costs.

**b. Condition 2(C) of the Excess Policies Creates no Ambiguity; It Merely Describes How Costs Will be Apportioned Among the Insurers**

P57 Both Brush and the London Insurers maintain that Condition 2(C) describes how costs will be apportioned among the insurers. However, Brush and the London Insurers disagree on whether it provides that expenses will be paid as incurred or after Brush incurs them. The London Insurers have suggested that Condition 2(C) creates "an obligation to reimburse only if and when a settlement or judgment is paid."[120]

P58 Condition 2 provides in relevant part: "'Costs' incurred by the Assured personally, with written consent of Underwriters, and for which the Assured is not covered by the said Primary and/or Underlying insurers, shall be apportioned as follows * * * (C) Should, however, the sum for which said **[*51]** claim or claims may be so adjustable exceed the Primary and/or Underlying Limit or Limits, the Underwriters, if they consent to the proceedings continuing, shall contribute to the 'Costs' incurred by the Assured in the ratio that their proportion of the Ultimate Net Loss as finally adjusted bears to the whole amount of such Ultimate Net Loss."[121]

P59 By its terms Condition 2 merely governs the apportionment of costs among insurers. It provides that the excess insurers will "contribute to the 'Costs' incurred by the Assured" in a specific ratio. It does not limit the excess London Insurers' obligation to pay expenses under the Insuring Agreement.

**c. The Parties Intended the Policies to Pay Expenses as Incurred**

P60 Brush argues that the London Insurers' conduct over the past decade reflects their intent to pay expenses as incurred. Brush asserts that "For over a decade preceding the filing of this lawsuit the London Insurers paid expenses as incurred under the excess policies."[122] The London Insurers argue, however, that "The **[*52]** claims handlers who administered this insurance in more recent times simply lost sight of the fact that nearly 40 years ago, the policy language was changed."[123] As such, the London Insurers argue that this conduct does not evidence a "course of dealing" that "elucidates the parties' intent when they drafted these policies."[124]

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[118] Defendants' Memorandum of Law in Opposition to Motion by Plaintiff for Partial Summary Judgment, at 29.

[119] Defendants' Memorandum of Law in Support of Defendants' Motion for Partial Summary Judgment, at 28.

[120] Plaintiff Brush Wellman, Inc.'s Memorandum in Support of its Motion for Partial Summary Judgment, at 46.

[121] App. 0728.

[122] Plaintiff Brush Wellman, Inc.'s Memorandum in Support of its Motion for Partial Summary Judgment, at 48.

[123] Defendants' Memorandum of Law in Opposition to Motion by Plaintiff for Partial Summary Judgment, at 44.

[124] Defendants' Memorandum of Law in Opposition to Motion by Plaintiff for Partial Summary Judgment, at 44.

P61 However, it is a well established principle of law that ***HN24*** where words are susceptible of more than one meaning, the courts will adopt that interpretation which the parties themselves by their *subsequent* acts have placed upon such words.[125] Thus, this Court finds that the London Insurers' conduct reflects that it intended to pay, and did pay, expenses under the excess policies as incurred.

**d. The Claims Handling Agreement is Irrelevant as to Whether the London Insurers Have an Unconditional Obligation to Pay Expenses as Incurred**

P62 Finally, Brush claims that the Claims Handling Agreement ("CHA") entered into by the Parties in 1999 binds the London Insurers subscribing to "all policies" issued to Brush, including the excess policies, to pay legal fees and expenses as incurred for all cases "actually or potentially covered by the London Policies."[126] Brush also claims that the CHA provides no exception for expenses allocated to the excess policies but permits the London Insurers to refuse to pay expenses as incurred only if the claim is not even potentially covered or the expense is unreasonable or unnecessary.

P63 As such, Brush claims that the CHA is "a subsequent contract that takes precedence over any contrary language in the excess policies (of which there is none)," and that "[t]he Agreement both confirms the intent of the parties that the expenses are to be paid as incurred and separately imposes the obligation to do so."[127] The London Insurers, **[*54]** however, argue that "Brush has not pleaded any claim under the Claims Handling Agreement, and that agreement is not before the Court."[128] The London Insurers also argue that the CHA "does not amend the excess policies or otherwise modify the parties' rights and obligations under them. It simply provides administrative procedures and guidelines governing the timing of payment of defense costs once those payments are agreed to."[129]

P64 The CHA provides that it applies to certain coverage issues under all policies * * * from August 1, 1956 to January 31, 1996; * * * concerning [] defense and settlement strategy, including the selection of counsel, in cases actually or potentially covered by the London Policies (the 'Covered Claims'); * * * and the payment of defense and coordinating counsel fees for the purpose of achieving efficient and cost-effective litigation management **[*55]** * * * [t]he parties agree that any defense or coordinating counsel representing Brush in defense of Covered Claims being paid in whole or substantial part by London Insurers will do so in accordance with the 'General Guidelines for Brush Wellman Defense Counsel."[130]

P65 Considering the CHA in *pari materi* with the "General Guidelines for Brush Wellman Defense Counsel," the intent of the CHA is to provide administrative procedures and guidelines governing the timing of payment of defense costs.[131] It does not amend or otherwise modify the parties' rights and obligations under the primary and excess policies. The CHA is irrelevant, however, in determining whether the London Insurers are obligated to pay expenses in all cases actually or potentially covered by the primary and excess policies because this Court has already

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[125] *Courtright v. Scrimger (1924), 110 Ohio St. 547, 2 Ohio Law Abs. 135, 2 Ohio Law Abs. 407, 144 N. E. 294*; *City of Cincinnati v. Gaslight & Coke Co. (1895), 53 Ohio St. 278, 41 N.E. 239*. See *Grundstein v. Suburban Motor Freight, Inc. (1952), 92 Ohio App. 181, 188, 107 N.E.2d 368, 62 Ohio Law Abs. 252*. **[*53]** See, also *Fagan v. Ulrich (1915), 166 App. Div. 342, 152 N. Y. Supp. 37*, affirmed without opinion ***222 N. Y 696, 119 N.E. 1042***.

[126] App. 0009.

[127] Plaintiff Brush Wellman, Inc.'s Memorandum in Support of its Motion for Partial Summary Judgment, at 50.

[128] Defendants' Memorandum of Law in Opposition to Motion by Plaintiff for Partial Summary Judgment, at 34.

[129] Defendants' Memorandum of Law in Opposition to Motion by Plaintiff for Partial Summary Judgment, at 34.

[130] Appendix in Support of Brush Wellman Inc.'s Motion for Partial Summary Judgment, Volume I, Exhibit B, App.0009.

[131] App. 0009.

determined in Section A and B(a)-(c) that the London Insurers has a duty to (1) defend under the language of the primary policy and (2) to pay to Brush expenses under the excess policy.

**C. Certain of Excess Policies Provide for Trigger of Coverage [*56] Requiring an Occurrence, Not a Judgment During the Policy Period**

P66 The London Insurers assert in their counterclaim that certain of the excess policies require a judgment during the policy period, a claim that Brush insists is inconsistent with the London Insurers' conduct for the past two decades and is inconsistent with the language of the primary and excess policies. Specifically, the London Insurers assert that the omission of "in respect of occurrences occurring" in certain of the second layer excess policies in 1967 created a trigger of coverage requiring a judgment or settlement during the policy period.[132] Brush, however, asserts that the omission of the five words from certain of the excess policies was most likely a clerical error, and created no confusion because even in the absence of these five words, the language of the policy is clear. As a threshold matter, this Court must consider whether the language of certain excess policies in 1967-70 and thereafter is ambiguous.

**a. Excess Policies Are Not Ambiguous; The Omission of "In Respect of Occurrences Occurring" In Certain [*57] of The Second Layer Excess Policies in 1967 Did Not Create a Trigger of Coverage Requiring a Judgment or Settlement During the Policy Period**.

P67 Brush contends that the contested language of the excess policies, "obligated to pay by reason of liability imposed by law" is not ambiguous and is still reasonably subject to only one interpretation — under the plain language of the policy, a court judgment imposing damages is *not* necessary to trigger the duty to indemnify.[133]

P68 Brush relies on a decision of the California Supreme Court in *Powerine Oil Company, Inc. v. The Superior Court of Los Angeles County (Powerine II)*.[134] In that case, policy language "liable to pay * * * as damages" was construed to require indemnification only of sums that the insured became legally obligated to pay as damages by order of a court. Although the Court in *Powerine II* held that the primary insurer's duty to indemnify insured under standard CGL insurance was limited to court-ordered money damages, it stressed that while "the insurer is legally obligated to pay under abstract legal rules, even without a judgment **[*58]** or settlement,"[135] "it is the addition of the single word 'damages' that limits the indemnification to money ordered by a court."[136]

P69 Brush insists that the common use of the term 'damages' are applicable here and Brush argues that this concept has been acknowledged by other courts. In *Certain Underwriters at Lloyd's of London v. The Superior Court of Los Angeles County (Powerine I)*,[137] the California Supreme Court observed that "one might speak of a 'sum that the insured becomes legally obligated to pay' * * * apart from any order by a court." Similarly, in *Central Ill.*

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[132] App. 0146, 1967-70 Second Layer Excess Policy. See App. 0746, 1964-67 First Layer Excess Policy.

[133] See App. 0146, 1967-70 Second Layer Excess Policy; App. 0746, 1964-67 First Layer Excess Policy.

[134] *Powerine Oil Company, Inc. v. The Superior Court of Los Angeles County (2005), 37 Cal.4th 377, 33 Cal.Rptr.3d 562, 118 P.3d 589 (Powerine II)*.

[135] *Powerine Oil Company, Inc. v. The Superior Court of Los Angeles County (2005), 37 Cal.4th 377, 33 Cal.Rptr.3d 562, 118 P.3d 589 (Powerine II)*.

[136] *Powerine Oil Company, Inc. v. The Superior Court of Los Angeles County (2005), 37 Cal.4th 377, 33 Cal.Rptr.3d 562, 118 P.3d 589 (Powerine II)*.

[137] *Certain Underwriters at Lloyd's of London v. The Superior Court of Los Angeles County (2001), 24 Cal. 4th 945, 103 Cal. Rptr. 2d 672, 16 P.3d 94 (Powerine I)*.

*Light Co. v. Home Ins. Co.*,[138] the Illinois Supreme Court held that "liability imposed * * * by law" does not require the filing of a lawsuit * * * as a precondition * * * to indemnify."

P70 **[*59]** The insuring language of excess policies prior to 1967-70 provides, in relevant part: "UNDERWRITERS hereby agree, subject to the terms, conditions and limitations hereinafter amended, to pay on behalf of the Assured all sums which the Assured shall become obligated to pay by reason of liability imposed by law or assumed under contract in respect of occurrences occurring during the period of this Policy, as damages, losses or expenses."[139] The insuring language of certain excess policies is identical except for the omission of "in respect of occurrences occurring" beginning in 1967-70 and thereafter.[140] Nevertheless. this Court agrees with the California Supreme Court "that the addition of the term 'expenses' in the [excess] policies extends coverage beyond the limitation imposed where the term 'damages' used alone and thereby enlarges the scope of coverage beyond the "money ordered by a court."[141]

P71 In addition to the inclusion of the term "expenses" which itself broadens the scope of coverage beyond that **[*60]** afforded under the standard primary CGL policy, Condition 4 of the excess policies unmistakably provides that the underlying policies only pay claims triggered by an "occurrences occurring during the period of the policy."[142] Condition 4, "Maintenance of Primary Insurance" provides: "It is a condition of this Policy that the Policy(ies) of the Primary and *Underlying Excess Insurers* shall be maintained in full effect during the currency of this Policy except for any reduction in the aggregate limit contained therein solely *by payment of claims in respect of occurrences occurring during the period of the policy*."[143] Moreover, a "claim" can be "any number of things, none of which rise to for formal level of a suit * * *."[144] Thus, Brush argues that while a court judgment imposing damages is sufficient to trigger the duty to indemnify, under the plain language of the policy, it is not necessary.

P72 Finally, Brush asserts that if the words used in the **[*61]** policy are clear and unambiguous, they must be given their plain, ordinary, and popular meaning.[145] ***HN25*** The mutual intention of the parties is to be inferred, if possible, solely from the written provisions of the contract. Where contractual language is clear and explicit, it governs.[146] When construing the language of an insurance policy, a court's primary objective is to "ascertain and give effect to the intentions of the parties" as expressed by the words of the policy.[147] An insurance policy, like any contract, is to

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[138] *Central Ill. Light Co. v. Home Ins. Co. (2004), 213 Ill.2d 141, 821 N.E.2d 206, 290 Ill. Dec. 155*.

[139] See App. 0753.

[140] See App. 0146.

[141] *Powerine Oil Company, Inc. v. The Superior Court of Los Angeles County (2005), 37 Cal.4th 377, 33 Cal.Rptr.3d 562, 118 P.3d 589 (Powerine II)*.

[142] App. 0755; Defendant's Ex. 1 (1983-84 Excess Policy).

[143] App. 0755; Defendant's Ex. 1 (1983-84 Excess Policy). Emphasis added.

[144] *Foster-Gardner, Inc. v. National Union Fire Ins. Co. (1998), 18 Cal.4th 857, 77 Cal.Rptr.2d 107, 959 P.2d 265*.

[145] *Miller v. Marrocco (1986), 28 Ohio St.3d 438, 439, 28 Ohio B. 489, 504 N.E.2d 67, 69*. See *Olmstead v. Lumbermens Mut. Ins. Co. (1970), 22 Ohio St.2d 212, 216, 259 N.E.2d 123*; *Nationwide Ins. Co. v. Tobler (1992), 80 Ohio App.3d 560, 564, 609 N.E.2d 1318*. See *Outboard Marine, 154 Ill.2d at 108, 180 Ill.Dec. 691, 607 N.E.2d 1204*.

[146] *Northland Ins. Co. v. Guardsman Products, Inc. (1998), 141 F.3d 612*; *ACL Tech., Inc. v. Northbrook Property and Cas. Ins. Co. (Cal. Ct. App., 1993), 17 Cal. App. 4th 1773, 1784, 22 Cal. Rptr. 2d 206*.

[147] *Foster Wheeler Enviresponse, Inc. v. Franklin Cty. Convention Facilities Auth. (1997), 78 Ohio St. 3d 353, 361, 1997 Ohio 202, 678 N.E.2d 519* ("'the intent of the parties to a contract is presumed to reside in the language they chose to employ in the agreement'") quoting *Kelly v. Med. Life Ins. Co. (1987), 31 Ohio St. 3d 130, 31 Ohio B. 289, 509 N.E.2d 411*; *Aultman Hosp. Assn. v. Community Mut. Ins. Co. (1989), 46 Ohio St. 3d 51, 53, 544 N.E.2d 920*. See *Robert F. Lindsay Realty Co. v. Woodley*

be construed as a whole, giving effect to every provision, if possible, because it must be assumed that every provision was intended to serve a purpose.[148] However, if the words used in the policy are reasonably susceptible to more than one meaning, they are ambiguous and will be strictly construed against the drafter.[149] Further, "[v]agueness of expression, indefiniteness and uncertainty as to any of the essential terms of an agreement, have often been held to prevent the creation of an enforceable contract."[150] A contract is not rendered ambiguous merely because the parties disagree on its meaning.[151] On the other hand, a contract is not necessarily unambiguous when, **[*62]** as here, each party insists that the language unambiguously supports its position. Rather, whether a contract is ambiguous is a question of law.[152]

P73 Under the excess policies, indemnification is provided if the insured is obligated to pay damages by reason of liability either (1) imposed by law or (2) assumed under contract or agreement. Thus, if the amounts paid by Brush constitute "damages," "losses," or "expenses," Brush is entitled to indemnification if the liability for damages, losses, or expenses is either imposed by law or assumed by agreement (under both the earlier and later policies). The policies do not define the terms "damages," "obligated," "liable to pay," or "imposed by law." Moreover, the plain, ordinary, and popular meanings of the terms, as reflected in dictionary definitions, do not resolve the issue.

P74 "Liable" **[*65]** can mean "legally obligated"[153] or "obligated according to law or equity."[154] Black's Law Dictionary defines "liability" as the "quality or state of being legally obligated or accountable; legal responsibility to another or to society, enforceable by civil remedy or criminal punishment."[155] The mechanism producing the obligation is not explained in the definition.

P75 An "obligation" is a "legal or moral duty to do * * * something" or a "formal, binding agreement or acknowledgment of a liability to pay a certain amount or to do a certain thing * * *; esp. a duty arising by

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*Wavecrest, Ltd., 6th Dist. No. L-01-1247, 2001 Ohio App. LEXIS 5115*. See, also *Crum & Forster, 156 Ill.2d at 391, 189 Ill.Dec. 756, 620 N.E.2d 1073*.

[148] *Saunders v. Mortensen (2004), 101 Ohio St. 3d 86, 2004 Ohio 24, 801 N.E.2d 452*; **[*63]** *Foster Wheeler Enviresponse, Inc. v. Franklin Cty. Convention Facilities Auth. (1997), 78 Ohio St. 3d 353, 361, 1997 Ohio 202, 678 N.E.2d 519*; *Expanded Metal Fireproofing Co. v. Noel Constr. Co. (1913), 87 Ohio St. 428, 434, 101 N.E. 348*. See *Martindell v. Lake Shore National Bank, 15 Ill.2d 272, 283, 154 N.E.2d 683 (1958)*.

[149] *Buckeye Union Ins. Co. v. Price (1974), 39 Ohio St.2d 95, 99, 313 N.E.2d 844*; *King v. Nationwide Ins. Co. (1988), 35 Ohio St.3d 208, 519 N.E.2d 1380*, syllabus; *Equity Diamond Brokers, Inc. v. Transatl. Ins. Co., 151 Ohio App.3d 747, 2003 Ohio 1024, 785 N.E.2d 816*. See *Outboard Marine, 154 Ill.2d at 108-09, 180 Ill.Dec. 691, 607 N.E.2d 1204*.

[150] *Rulli v. Fan Co. (1997), 79 Ohio St.3d 374, 1997 Ohio 380, 683 N.E.2d 337*; 1 Corbin on Contracts (Rev.Ed. 1993) 525, Section 4.1. See *Platt v. Gateway International Motorsports Corp. (2004) 351 Ill.App.3d 326, 330, 286 Ill.Dec. 222, 813 N.E.2d 279* (an ambiguity will be found if the language of the contract is "obscure in meaning through indefiniteness of expression."). See, also *Meyer v. Marilyn Miglin, Inc., 273 Ill.App.3d 882, 888, 210 Ill.Dec. 257, 652 N.E.2d 1233 (1995)*.

[151] *Ed Schory & Sons, Inc. v. Soc. Nat'l Bank (1996), 75 Ohio St. 3d 433, 440, 1996 Ohio 194, 662 N.E.2d 1074*. **[*64]** *Johnstowne Centre Partnership v. Chin, 99 Ill.2d 284, 288, 76 Ill.Dec. 80, 458 N.E.2d 480 (1983)*.

[152] *Sherman R. Smoot Co. of Ohio v. Ohio Dept. of Adm. Serv. (2000), 136 Ohio App.3d 166, 172, 736 N.E.2d 69*. See also, *Long Beach Assn., Inc. v. Jones (1998), 82 Ohio St. 3d 574, 576, 1998 Ohio 186, 697 N.E.2d 208*; *Moody v. Ohio Rehab. Serv. Comm., 10th Dist. No. 02 AP-596, 2002 Ohio 6965*; *Quake Construction, Inc. v. American Airlines, Inc, (1990) 141 Ill.2d 281, 288, 152 Ill.Dec. 308, 565 N.E.2d 990*.

[153] Webster's New College Dictionary 631 (1999).

[154] Merriam-Webster's Collegiate Dictionary 668 (2000).

[155] Black's Law Dictionary 932 (8th ed.2004).

contract."[156] Legal obligations can arise in several ways: through a binding contract or "statutory obligation."[157] In neither of these definitions is an adjudication or the filing of a lawsuit a necessary precondition of the obligation.

P76 Similarly, the dictionary definition of "damages" as "[m]oney to be paid as compensation for injury or loss" does not reveal under what circumstances **[*66]** which require the compensation.[158] The definition contained in the legal dictionary, "[m]oney claimed by, or ordered to be paid to, a person as compensation for loss or injury,"[159] suggests that damages are only those funds paid in response to a claim or in compliance with an order. The filing of a lawsuit is, then, sufficient to assert a claim for damages. The policies clearly contemplate that the insured might admit liability and agree to pay damages as part of a settlement or compromise of lawsuit.

P77 In *Powerine II*, the California Supreme Court distinguished between the standard primary CGL policy considered in *Powerine I* and the excess policy in *Powerine II*, noting that "the insuring clause of the [excess] policies in contrast, provides indemnification for 'damages, direct or consequential and expenses * * *.'"[160] The Court observed that the use of the terms "damages" and "expenses" in the policy "raises the inference that they were not intended to be synonymous."[161] The **[*67]** Court stated "[s]urely then, an insured would harbor an objectively reasonable expectation that these policies also afforded coverage for such expenses, something above and beyond court-ordered 'damages.'"[162]

**b. The London Insurer's Conduct Following this Omission Demonstrates that the Language of the Contract is Unambiguous**

P78 Brush argues that the London Insurers' application of an occurrence trigger even after the omission of "in respect of occurrences occurring" in certain of the second layer excess policies in 1967 does not support the London Insurers' assertion that the omission created a trigger of coverage requiring a judgment or settlement during the policy period. Insisting that the policy language is still unambiguous, Brush argues that pursuant **[*68]** to *Courtright v. Scrimger*,[163] this Court must adopt the interpretation that the parties have placed upon it by their subsequent performance.

P79 However, in *Courtright v. Scrimger*, the Ohio Supreme Court held, ***HN26*** "*Where words used in a contract are susceptible of more than one meaning*, and the signatories to the contract have by acts done in carrying out the terms thereof placed their own interpretation upon the meaning of the words, courts will adopt the interpretation which the signatories to the contract have themselves made."[164] Thus, if this Court were to accept in the

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[156] Black's Law Dictionary 1104 (8th ed.2004).

[157] Black's Law Dictionary 1105 (8th ed.2004).

[158] Webster's New College Dictionary 285 (1999); see also Merriam-Webster's Collegiate Dictionary 290 (2000) ("compensation in money imposed by law for loss or injury").

[159] Black's Law Dictionary 416 (8th ed.2004)

[160] *Powerine Oil Company, Inc. v. The Superior Court of Los Angeles County (2005), 37 Cal.4th 377, 33 Cal.Rptr.3d 562, 118 P.3d 589 (Powerine II)*.

[161] *Powerine Oil Company, Inc. v. The Superior Court of Los Angeles County (2005), 37 Cal.4th 377, 33 Cal.Rptr.3d 562, 118 P.3d 589 (Powerine II)*.

[162] *Powerine Oil Company, Inc. v. The Superior Court of Los Angeles County (2005), 37 Cal.4th 377, 33 Cal.Rptr.3d 562, 118 P.3d 589 (Powerine II)*.

[163] *Courtright v. Scrimger (1924), 110 Ohio St. 547, 2 Ohio Law Abs. 135, 2 Ohio Law Abs. 407, 144 N. E. 294*

[164] *Courtright v. Scrimger (1924), 110 Ohio St. 547, 2 Ohio Law Abs. 135, 2 Ohio Law Abs. 407, 144 N. E. 294*; *City of Cincinnati v. Gaslight & Coke Co. (1895), 53 Ohio St. 278, 41 N. E. 239*. See *Grundstein v. Suburban Motor Freight, Inc. (1952), 92 Ohio*

alternative, that the language of the policy is ambiguous, then application of *Scrimger* would require this Court to accept the construction of the policy given to it by the parties.

P80 But ***HN27*** "if the contract is **[*69]** not ambiguous, [] it must be enforced according to its terms, without regard to the construction heretofore placed upon it by the parties in the course of its performance."[165] In *Cincinnati v. Gaslight & Coke Co.*,[166] the Ohio Supreme Court held that "while the practical construction of the contract by the parties who made it is entitled to great weight, in case of doubt, the construction placed theron by those who follow is of much less weight." The Court emphasized, however, that ***HN28*** "in determining the rights of parties under a written contract, it is not the duty of a court to seek for, or create doubts and ambiguities, but rather to avoid them, and construe and enforce the contract according to its evident meaning, giving force to every word."[167]

P81 Moreover, it is "well established that ***HN29*** words used in a contract of insurance are to be given their natural and usual meaning unless otherwise defined in the contract."[168] As noted above, a court is without authority **[*70]** to construe the terms of a contract when their meaning is unambiguous.[169] Where a term is ambiguous, parol evidence is admissible to interpret, but not to contradict, the express language of the contract.[170] "If such an ambiguity is alleged, it must arise from the language of the contract itself and, therefore, courts will not admit parol testimony to construe an ambiguity forced into the contract to strain the apparent meaning of the language."[171]

P82 Here, there is nothing ambiguous about the Post-1976 language which provides **[*71]** in pertinent part: "UNDERWRITERS hereby agree, subject to the terms, conditions and limitations hereinafter amended, to pay on behalf of the Assured all sums which the Assured shall become obligated to pay by reason of liability imposed by law or assumed under contract during the period of this Policy, as damages, losses or expenses." Nor does this Court find anything ambiguous about the term "expenses." ***HN30*** A term is not ambiguous merely because the policy does not define it.[172]

**D. All Primary and Excess Policies are Written on an "All Sums" Basis; Thus, Brush May Select the Policy Among Those That Are Triggered to Respond to a Claim**

P83 Brush and the London Insurers disagree also about the method that should be used to allocate insurance coverage among the multiple policies. ***HN31*** Allocation deals with the apportionment of a covered loss across

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*App. 181, 188, 107 N.E.2d 368, 62 Ohio Law Abs. 252*. See, also *Fagan v. Ulrich (1915), 166 App. Div. 342, 152 N. Y. Supp. 37*, affirmed without opinion ***222 N. Y 696, 119 N.E. 1042***.

[165] *Cincinnati v. Gaslight & Coke Co. (1895), 53 Ohio St. 278, 41 N.E. 239*.

[166] *Cincinnati v. Gaslight & Coke Co. (1895), 53 Ohio St. 278, 41 N. E. 239*.

[167] *Cincinnati v. Gaslight & Coke Co. (1895), 53 Ohio St. 278, 41 N. E. 239*.

[168] *Garlick v. McFarland (1953), 159 Ohio St. 539, 545, 113 N.E.2d 92*.

[169] *Alexander v. Buckeye Pipe Line Co. (1978), 53 Ohio St.2d 241, 246, 374 N.E.2d 146*.

[170] *Ohio Historical Soc. v. Gen. Maintenance & Eng. Co. (1989), 65 Ohio App.3d 139, 146, 583 N.E.2d 340*.

[171] *Fireman's Fund Ins. Co. v. Mitchell-Peterson, Inc. (1989), 63 Ohio App.3d 319, 328, 578 N.E.2d 851*, citing *Cincinnati v Gas Light & Coke Co. (1895), 53 Ohio St. 278, 286-287, 41 N.E. 239*; see also, *Heritage Mut. Ins. Co. v. Ricart Ford, Inc. (1995), 105 Ohio App.3d 261, 268, 663 N.E.2d 1009* ("finding the contract clear and unambiguous, we therefore conclude that there can be no introduction of parol evidence").

[172] *Nationwide Mut. Fire Ins. Co. v. Guman Bros. Farm (1995), 73 Ohio St.3d 107, 108, 1995 Ohio 214, 652 N.E.2d 684*.

multiple triggered insurance policies.[173] The issue of allocation arises in situations involving long-term injury or damage, such as is the case here.

P84 There are two accepted methods for allocating coverage. One approach, favored by Brush, permits the policyholder to seek coverage from any policy in effect during the time period of injury or damage. This "all sums" approach allows Brush to seek full coverage for its claims from any single policy, up to that policy's coverage limits, out of the group of policies that has been triggered. In contrast, the London Insurers suggest that a pro rata allocation scheme "is consistent with the contractual agreement of the parties and with the known facts of the injuries at issue."[174] Under the pro rata approach, each insurer pays only a portion of a claim based on the duration of the occurrence during its policy period in relation to the entire duration of the occurrence. It divides "a loss 'horizontally' among all triggered policy periods, with each insurance company paying only a share of the policyholder's total damages."[175] For the reasons that follow, this Court finds the "all sums" method of allocation to be appropriate.

P85 There is no language in the triggered policies that would serve to reduce the London Insurers' liability if an injury occurs only in part of a given policy period. The policies covered Brush for "all sums" incurred as damages for an injury to property occurring during the policy period. The plain language of this provision is inclusive of all damages resulting from a qualifying occurrence.

P86 Interpreting the policy language in this manner is a practice that has been frequently implemented in other jurisdictions.[176] In *Keene Corp. v. Ins. Co. of N. Am.*,[177] the U.S. District Court of Appeals for the District of Columbia held that each insurer whose insurance policy had been triggered would be liable in full for the indemnification and defense costs of the insured relating to the asbestos claims. In reaching this conclusion, the Court **[*74]** of Appeals noted that there was nothing in the triggered policies that "provides for a reduction of the insurer's liability if an injury occurs only in part during a policy period."[178] This being so, the Court of Appeals reasoned that the insured would have reasonably expected "complete security from each policy it purchased."[179]

P87 Like the insured in *Keene*, Brush expected complete security from each policy that it purchased.[180] This approach promotes economy for the insured while still permitting insurers to seek contribution from other responsible parties when possible. For this reason, the Ohio Supreme Court in *Goodyear Tire & Rubber Co. v. Aetna Cas. **[*75]** & Sur. Co.*,[181] held that ***HN32*** where "a continuous occurrence of environmental pollution triggers

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[173] *Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co. (2002), 95 Ohio St.3d 512, 2002 Ohio 2842, 769 N.E.2d 835*; **[*72]** Paar, Recovery is in the Details: Hot Issues in the Administration and Application of General Liability Insurance Policies (2000), 86 PLI/NY 199, 216.

[174] Defendants' **[*73]** Memorandum of Law in Opposition to Motion by Plaintiff for Partial Summary Judgment, at 49.

[175] *Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co. (2002), 95 Ohio St.3d 512, 2002 Ohio 2842, 769 N.E.2d 835*; Paar, Recovery is in the Details: Hot Issues in the Administration and Application of General Liability Insurance Policies (2000), 86 PLI/NY 199, 217.

[176] *Am. Natl. Fire Ins. Co. v. B & L Trucking & Constr. Co., Inc. (1998), 134 Wn. 2d 413, 428, 951 P.2d 250* (noting that the national majority rule forbids insurers from limiting their liability to a pro rata share unless the policy expressly allows it).

[177] *Keene Corp. v. Ins. Co. of N. Am. (C.A.D.C.1981), 215 U.S. App. D.C. 156, 667 F.2d 1034*.

[178] *Keene Corp. v. Ins. Co. of N. Am. (C.A.D.C.1981), 215 U.S. App. D.C. 156, 667 F.2d 1034, 1048*.

[179] *Keene Corp. v. Ins. Co. of N. Am. (C.A.D.C.1981), 215 U.S. App. D.C. 156, 667 F.2d 1034, 1048*.

[180] See, also, *J.H. France Refractories Co. v. Allstate Ins. Co. (1993), 534 Pa. 29, 626 A.2d 502*.

claims under multiple primary insurance policies, the insured is entitled to secure coverage from a single policy of its choice that covers 'all sums' incurred as damages 'during the policy period,' subject to that policy's limit of coverage." The Court stressed that "In such an instance, the insurers bear the burden of obtaining contribution from other applicable primary insurance policies as they deem necessary."[182]

P88 Thus, Brush should be permitted to choose, from the pool of triggered primary policies, a single primary policy against which it desires to make a claim. In the event that this policy does not cover Brush's entire claim, Brush may then pursue coverage under other **[*76]** primary or excess insurance policies.

**E. The London Insurers Breached Their Obligation to Brush By Failing to Pay Expenses Incurred in the Defense of *Massengale, Baum* and *Jones* Lawsuits**

P89 The *Massengale, Baum* and *Jones* lawsuits do not require a determination of whether the the language of the primary and excess policies is ambiguous.[183] In *Massengale, Baum* and *Jones*, Brush and the London Insurers disagree as to whether these claims are "arguably or potentially" within the coverage of the policies issued to Brush.[184]

P90 In *Gray v. Zurich Insurance Co.*,[185] California Supreme Court observed: "It is by now a familiar principle that***HN33*** a liability insurer owes a broad duty to defend its insured against claims that create a potential for indemnity. Holding that "the carrier must defend a suit which *potentially* **[*77]** seeks damages within the coverage of the policy," the Court observed that "[i]mplicit in this rule is the principle that the duty to defend is broader than the duty to indemnify; an insurer may owe a duty to defend its insured in an action in which no damages ultimately are awarded."[186]

P91 Emphasizing that ***HN34*** "The duty to defend is determined by reference to the policy, the complaint, and *all* facts known to the insurer from any source,"[187] the Court stressed, "The determination whether the insurer owes a duty to defend usually is made in the first instance by comparing the allegations of the complaint with the terms of the policy. Facts extrinsic to the complaint also give rise to a duty to defend when they reveal a possibility that the claim may be covered by the policy."[188] Further, the "insured is entitled to a defense if the underlying complaint

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[181] *Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co. (2002), 95 Ohio St.3d 512, 2002 Ohio 2842, 769 N.E.2d 835*. See also, *Keene Corp. v. Ins. Co. of N. Am. (C.A.D.C.1981), 215 U.S. App. D.C. 156, 667 F.2d 1034*.

[182] *Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co. (2002), 95 Ohio St.3d 512, 2002 Ohio 2842, 769 N.E.2d 835*.

[183] *Massengale v. Brush Wellman, Inc*. (D.C.Wash., 1999), Case No. C99-2050; *Baum v. NKG Metals Corporation, et. al*. (Philadelphia County, Pa., C.P., Sept. 2000), Case No. 001760; *Jones v. Brush Wellman, Inc. (N.D. Ohio, 2000), Case No. 1:00 CV 0777, 2000 U.S. Dist. LEXIS 21897*; App. 0399 (*Massengale*), App. 0415 (*Baum*), App. 0444 (*Jones*).

[184] *Willoughby Hills v. Cincinnati Ins. Co. (1984), 9 Ohio St.3d 177, 9 Ohio B. 463, 459 N.E.2d 555*.

[185] *Gray v. Zurich Insurance Co. (1966) 65 Cal.2d 263, 54 Cal.Rptr. 104, 419 P.2d 168*.

[186] *Gray v. Zurich Insurance Co. (1966) 65 Cal.2d 263, 54 Cal.Rptr. 104, 419 P.2d 168*. See *Horace Mann Ins. Co. v. Barbara B. (1993) 4 Cal.4th 1076, 1081, 17 Cal.Rptr.2d 210, 846 P.2d 792*.

[187] *Gray v. Zurich Insurance Co. (1966) 65 Cal.2d 263, 54 Cal.Rptr. 104, 419 P.2d 168*. See *Montrose Chemical Corp. v. Superior Court (1993), 6 Cal.4th 287, 300, 24 Cal.Rptr.2d 467, 861 P.2d 1153*. See also, *Willoughby Hills v. Cincinnati Ins. Co., 9 Ohio St.3d 177, 9 Ohio B. 463, 459 N.E.2d 555*; Windt, Insurance Claims and Disputes (4th Ed. 2005) § 4.3 at 284-87.

[188] *Gray v. Zurich Insurance Co. (1966) 65 Cal.2d 263, 54 Cal.Rptr. 104, 419 P.2d 168*. See *Montrose Chemical Corp. v. Superior Court (1993), 6 Cal.4th 287, 300, 24 Cal.Rptr.2d 467, 861 P.2d 1153*; *Preferred Risk Ins., Co. v. Gill (1987), 30 Ohio St.3d 108, 30 Ohio B. 424, 507 N.E.2d 1118*.

alleges the insured's liability for damages *potentially* covered under **[*78]** the policy, or if the complaint might be amended to give rise to a liability that would be covered under the policy."[189] Thus, "[a]ny doubt as to whether the facts establish the existence of the defense duty must be resolved in the insured's favor."[190]

***a. Massengale***

P92 Brush asserts it is entitled to rely upon extrinsic evidence to show Massengale's claim as "arguably or potentially" covered and that the London Insurers have a duty to defend.[191] In his complaint, Vernon Massengale did not allege when he was exposed to beryllium.[192] However, Brush's investigation determined that Massengale worked around, and was exposed to, beryllium in 1982, 1985, and "during a time period including 1992-1994."[193] As a result of this information, the London Insurers provided a defense. However, when the London Insurers later determined that Massengale had responded on a questionnaire that he had not been "exposed to an irritant or fumes" while working at a beryllium processing facility in the 1980s,[194] and **[*80]** that he had answered on an interrogatory that he had not worked with any materials containing beryllium, the London Insurers abandoned that defense, claiming that Massengale had not been exposed to beryllium.

P93 The London Insurers abandoned coverage on the ground that Massengale "fail[ed] to raise any allegations in the complaint that comes within the London policy periods" and that the additional information provided to the London Insurers failed to "prove" that Massengale was exposed to beryllium during the policy years.[195] The threshold issue is whether the evidence outside the complaint was sufficient to bring the claim within coverage. Brush asserts that the London Insurers could have abandoned their defense of Massengale only if the extrinsic evidence had conclusively shown that there **[*81]** was no exposure during the policy period.

P94 ***HN35*** To prevail on the issue of the duty to defend, "the insured must prove the existence of a *potential for coverage*, while the insurer must establish *the absence of any such potential*. In other words, the insured need only show that the underlying claim *may* fall within policy coverage; the insurer must prove it *cannot*. Facts merely tending to show that the claim is not covered, or may not be covered, but are insufficient to eliminate the possibility that resultant damages (or the nature of the action) will fall within the scope of coverage, therefore add no weight to the scales. Any seeming disparity in the respective burdens merely reflects the substantive law."[196] "The defense duty is a continuing one, arising on tender of defense and lasting until the underlying lawsuit is concluded, or until it has been shown that there is *no* potential for coverage * * * Imposition of an immediate duty to defend is necessary to afford the insured what it is entitled to: the full protection of a defense on its behalf."[197] Hence, once **[*82]** the

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[189] *Gray v. Zurich Insurance Co. (1966) 65 Cal.2d 263, 54 Cal.Rptr. 104, 419 P.2d 168*. See *Montrose Chemical Corp. v. Superior Court (1993), 6 Cal.4th 287, 300, 24 Cal.Rptr.2d 467, 861 P.2d 1153*.

[190] *Gray v. Zurich Insurance Co. (1966) 65 Cal.2d 263, 54 Cal.Rptr. 104, 419 P.2d 168*. See *Montrose Chemical Corp. v. Superior Court (1993), 6 Cal.4th 287, 300, 24 Cal.Rptr.2d 467, 861 P.2d 1153*; **[*79]** *California Union Ins. Co. v. Club Aquarius, Inc. (1980) 113 Cal.App.3d 243, 169 Cal.Rptr. 685* ("there exists a duty on the insurer to *defend* an action if potential liability to pay exists, even though that potential liability to pay is remote").

[191] *Willoughby Hills v. Cincinnati Ins. Co. (1984), 9 Ohio St.3d 177, 9 Ohio B. 463, 459 N.E.2d 555*.

[192] *Massengale v. Brush Wellman, Inc*. (D.C.Wash., 1999), Case No. C99-2050; App. 0399.

[193] Plaintiff Brush Wellman, Inc.'s Memorandum in Support of its Motion for Partial Summary Judgment, at 63; App. 0405-0411.

[194] Defendants' Memorandum of Law in Opposition to Motion by Plaintiff for Partial Summary Judgment, at 44.

[195] Plaintiff Brush Wellman, Inc.'s Memorandum in Support of its Motion for Partial Summary Judgment, at 63; App. 0412-0414.

[196] *Montrose Chemical Corp. v. Superior Court (1993), 6 Cal.4th 287, 300, 24 Cal.Rptr.2d 467, 861 P.2d 1153*, italics in original.

[197] *Montrose Chemical Corp. v. Superior Court (1993), 6 Cal.4th 287, 295, 24 Cal.Rptr.2d 467, 861 P.2d 1153*.

insured establishes the potential of coverage, the insurer must defend the suit unless it conclusively refutes such potential.[198]

P95 Brush provided the London Insurers with facts showing that Massengale worked around, and was exposed to, beryllium in 1982, 1985, and "during a time period including 1992-1994."[199] Specifically, Massengale worked as a grinder in 1982, at San Jose Delta, a company that machined beryllium oxide during that period of time, and in 1985 where he "double-disc ground copper-beryllium alloy" at Precision's Redwood, California facility.[200] As well, Massengale was exposed to beryllium during his work at Peterson Precision from 1992-1994.[201]

P96 That Massengale did not himself grind beryllium at these jobs, is irrelevant to whether he was potentially exposed to beryllium. In *Morgan v. Brush Wellman, Inc*.,[202] it was revealed that indviduals living in the neighborhoods outside of the Brush facility in Lorain, Ohio had contracted berylliosis. In *Renwand v. Brush Wellman, Inc*.,[203] the Eighth Appellate Court observed that "it is undisputed that Brush Wellman did not consistently achieve the OSHA recommended level of 2 micrograms per cubic meters of air," and "[t]here is evidence that on different occasions, the air counts at the Brush Wellman plant exceeded the OSHA standard for a few hours due to beryllium spills in the plant." Finally, in *Norgard v. Brush Wellman*,[204] a fluoride furnace operator at its beryllium plant in Elmore, Ohio contracted berylliosis within weeks of the start of his employment.

P97 **[*84]** That Massengale denied any exposure "to an irritant or fumes" while working at a beryllium processing facility in the 1980s,[205] and that he had not worked with any materials containing beryllium, is insufficient to show that Massengale was not exposed to beryllium. Brush is well aware that one need not knowingly be exposed to "an irritant or fumes" or work specifically with beryllium in order to contract berylliosis.[206] Thus, the London Insurers have failed to prove that the claim *cannot* fall within the policy coverage.

***b. Baum***

P98 Brush asserts that the allegations of the *Baum* complaint triggered the London Insurers' duty to defend. The complaint alleged that Brush's "actions * * * were committed intentionally and/or when [Brush] knew or had reason to know that its acts and ommissions created a high degree of risk of physical harm to [Baum] and class members, and [Brush] deliberately proceeded to act in conscious disregard of, or indifference to that **[*85]** risk, for which [Baum] seeks an award of punitive damages."[207] The London Insurers, however, refused to defend this claim, asserting that "any such loss would not be fortuitous" and "general principles of insurance law and public policy bar coverage for damage caused by intentional conduct."[208] Nevertheless, Brush contends that since the policies do

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[198] *Montrose Chemical Corp. v. Superior Court (1993), 6 Cal.4th 287, 300, 24 Cal.Rptr.2d 467, 861 P.2d 1153*.

[199] Plaintiff Brush Wellman, Inc.'s Memorandum in Support of its Motion for Partial Summary Judgment, at 63; App. 0405-0411.

[200] Plaintiff Brush Wellman, Inc.'s Memorandum in Support of its **[*83]** Motion for Partial Summary Judgment, at 63; App. 0407-0408.

[201] Plaintiff Brush Wellman, Inc.'s Memorandum in Support of its Motion for Partial Summary Judgment, at 63; App. 0405-0411.

[202] *Morgan v. Brush Wellman, Inc. (2001), 165 F.Supp.2d 704*.

[203] *Renwand v. Brush Wellman, Inc. (2002), 149 Ohio App. 3d 692, 778 N.E.2d 654, 2002 Ohio 5849*.

[204] *Norgard v. Brush Wellman, Inc. 8th Dist. No. 81899, 2003 Ohio 2749, 2003 Ohio App. LEXIS 2476*.

[205] Plaintiff Brush Wellman, Inc.'s Reply Brief in Support of its Motion for Partial Summary Judgment, at 44. App. 0413.

[206] Plaintiff Brush Wellman, Inc.'s Reply Brief in Support of its Motion for Partial Summary Judgment, at 44; App. 0413.

[207] *Baum v. NKG Metals Corporation, et. al*. (Philadelphia County, Pa., C.P., Sept. 2000), Case No. 001760; App. 0415.

not contain an explicit exclusion for intentional conduct and because Ohio does not bar insurance for all intentional torts, the London Insurers are obligated to defend.

P99 As early as 1938, the Ohio Supreme Court found that it was "well settled from the standpoint of public policy that the act of intentionally inflicting an injury cannot be covered by insurance in anywise protecting the person who inflicts such injury."[209] However, application of this public policy has not always been absolute. In *Harasyn v. Normandy Metals, Inc.*,[210] the Court addressed whether the general public policy precluding insuring **[*86]** against liability for intentional torts prevented an employer from procuring insurance for a tortious act performed not with purpose to injure but with the knowledge that injury was substantially certain to occur. The Court concluded that it did not. The Court reasoned: "It is often said that public policy prohibits liability insurance for intentional torts. This statement is based on 'the assumption that such conduct would be encouraged if insurance were available to shift the financial cost of the loss from the wrongdoer to his insurer. * * *'[211] However, this blanket prohibition 'makes no distinctions as to the various forms of intentional wrongdoing and does not admit the possibility that some torts might not be particularly encouraged if insurance were available for them.'"[212] Thus, the Court in *Harasyn* held that the "better view is to prohibit insurance only for those intentional torts where 'the fact of insurance coverage can be related in some substantial way to the commission of wrongful acts of that character. * * *.'"[213]

P100 Holding that ***HN36*** "public policy **[*88]** does not prohibit an employer from securing insurance against compensatory damages sought by an employee in tort where the employer's tortious act was one performed with the knowledge that injury was substantially certain to occur,"[214] the Court distinguished "substantially certain" intentional torts from "direct intent" torts in which insurance may encourage people to harm others. The Court concluded that "where the employer's alleged tortious actions were not taken with deliberate intent to injure the employee, and where the damages sought are to compensate for injury rather than to punish wrongdoing, the public policy argument for depriving the employer of insurance protection is not compelling."[215]

P101 Although the London Insurers admit that the policy language does not exclude intentional torts, it claims that the "exclusion is one that is implied in law and demanded by public policy."[216] But in *Trochelman v. Cauffiel*,[217] the

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[208] Defendants' Memorandum of Law in Opposition to Motion by Plaintiff for Partial Summary Judgment, at 58; App. 0442.

[209] *Rothman v. Metro. Cas. Ins. Co. (1938), 134 Ohio St. 241, 246, 16 N.E.2d 417, 420*. See also, *Commonwealth Cas. Co. v. Headers (1928), 118 Ohio St. 429, 6 Ohio Law Abs. 271, 161 N.E. 278* **[*87]** ("Accordingly, we have long adhered to the view that Ohio prohibits insuring against liability for one's own intentional torts"). See *Buckeye Union Ins. Co. v. New England Ins. Co. (1999), 87 Ohio St. 3d 280, 283, 1999 Ohio 67, 720 N.E.2d 495, 498*; *Gearing v. Nationwide Ins. Co. (1996), 76 Ohio St. 3d 34, 38, 1996 Ohio 113, 665 N.E.2d 1115, 1118*; *Wedge Products, Inc. v. Hartford Equity Sales Co. (1987), 31 Ohio St. 3d 65, 67, 31 Ohio B. 180, 509 N.E.2d 74, 76* (no coverage for tort where employer was substantially certain that employees would be injured); *Preferred Mut. Ins. Co. v. Thompson (1986), 23 Ohio St. 3d 78, 81, 23 Ohio B. Rep. 208, 210, 491 N.E.2d 688, 691*.

[210] *Harasyn v. Normandy Metals, Inc. (1990), 49 Ohio St. 3d 173, 551 N.E.2d 962*.

[211] *Harasyn v. Normandy Metals, Inc. (1990), 49 Ohio St. 3d 173, 551 N.E.2d 962*. See Farbstein & Stillman, Insurance for the Commission of Intentional Torts (1969), 20 Hastings L.J. 1219, 1245-1246.

[212] Farbstein & Stillman, Insurance for the Commission of Intentional Torts (1969), 20 Hastings L.J. 1219, 1251.

[213] *Isenhart v. General Cas. Co. (1962), 233 Ore. 49, 52-53, 377 P.2d 26, 28*; *Harasyn v. Normandy Metals, Inc. (1990), 49 Ohio St. 3d 173, 551 N.E.2d 962*.

[214] *Harasyn v. Normandy Metals, Inc. (1990), 49 Ohio St. 3d 173, 551 N.E.2d 962*, at syllabus.

[215] *Harasyn v. Normandy Metals, Inc. (1990), 49 Ohio St. 3d 173, 175-176, 551 N.E.2d 962*.

[216] Defendants' Memorandum of Law in Opposition to Motion by Plaintiff for Partial Summary Judgment, at 58.

[217] *Trochelman v. Cauffiel, 6th Dist. No. L-99-1098, 1999 Ohio 983, 1999 Ohio App. LEXIS 6335*.

Sixth Appellate Court held, "If the policy explicitly states that it excludes **[*89]** coverage for direct-intent and substantial-certainty intentional torts, then there is no coverage for damages caused by an employer intentional tort."[218] In *U.S. Fidelity & Guar. Co. v. Lighting Rod Mut. Ins. Co*.,[219] the Ohio Supreme Court stressed, ***HN37*** "The insurer, being the one who selects the language in the contract, must be specific in its use; an exclusion from liability must be clear and exact in order to be given effect." Because the policy was not written to exclude intentional torts, it does not exclude coverage for substantial-certainty intentional torts.[220] Thus, Brush has shown that the underlying claim *may* fall within policy coverage and that the London Insurers have failed to prove that it *cannot*.

***c. Jones***

P102 Brush asserts it is entitled to rely upon extrinsic evidence to show that Jones and the class members' claim is "arguably or potentially" covered and that the London Insurers have a duty to defend. The complaint alleged that Brush "negligently misrepresented and concealed the dangers of its beryllium-containing products,"[221] and that as a result of Brush's conduct, Jones and the class members were exposed to levels of beryllium dust and fumes causing beryllium sensitivity and cancer.[222] The complaint, however, did not allege specific dates for the class members' exposure but alleged generally that the class members had worked at facilities owned and operated by Brush.

P103 As with *Massengale*, Brush argues that since the claim is "arguably or potentially" within the scope of coverage, the London Insurers **[*91]** have an obligation to defend.[223] The London Insurers denied coverage because their "reading of the Complaint reveal[ed] that no bodily injury or property damage was alleged to have occurred during the policy periods."[224] The London Insurers also asserted that it "denied a defense because their policies provide coverage only for 'personal injury' and 'property damage' and nothing in the *Jones* complaint alleged any injury or damage of any kind."[225] Finally, the London Insurers suggest that there was no "injury" because Brush prevailed in U.S. District Court on its motion to dismiss for failure to state a claim, successfully arguing that plaintiffs had failed to allege "any present injury or loss," upon which relief could be granted at that time.[226]

P104 But the *Jones* plaintiffs specifically asserted in their complaint that "the defective and unreasonably dangerous condition **[*92]** of defendant's beryllium-containing products was the proximate cause of plaintiff's injuries and damage."[227] And the U.S. District Court for the Northern District of Ohio, Eastern Division, observed in

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[218] *State Auto Ins. Co. v. Golden (1998), 125 Ohio App. 3d 674, 677, 709 N.E.2d 529*. See, also, *Izold v. Suburban Power Piping Corp., 8th Dist. No. 70873, 1997 Ohio App. LEXIS 1077*.

[219] *U.S. Fidelity & Guar. Co. v. Lighting Rod Mut. Ins. Co., (1997), 80 Ohio St.3d 584, 1997 Ohio 311, 687 N.E.2d 717*. *Lane v. Grange Mut. Cos. (1989), 45 Ohio St.3d 63, 65, 543 N.E.2d 488, 490*, **[*90]** citing *Am. Fin. Corp. v. Fireman's Fund Ins. Co. (1968), 15 Ohio St.2d 171, 239 N.E.2d 33*.

[220] See *Trochelman v. Cauffiel, 6th Dist. No. L-99-1098, 1999 Ohio 983, 1999 Ohio App. LEXIS 6335*.

[221] Plaintiff Brush Wellman, Inc.'s Memorandum in Support of its Motion for Partial Summary Judgment, at 66.

[222] *Jones v. Brush Wellman, Inc. (N.D. Ohio, 2000), Case No. 1:00 CV 0777, 2000 U.S. Dist. LEXIS 21897*; App. 0444.

[223] *Willoughby Hills v. Cincinnati Ins. Co. (1984), 9 Ohio St.3d 177, 9 Ohio B. 463, 459 N.E.2d 555*.

[224] Plaintiff Brush Wellman, Inc.'s Memorandum in Support of its Motion for Partial Summary Judgment, at 67; App 0479.

[225] Defendants' Memorandum of Law in Opposition to Motion by Plaintiff for Partial Summary Judgment, at 61.

[226] App. 0461.

[227] Plaintiff Brush Wellman, Inc.'s Reply Brief in Support of its Motion for Partial Summary Judgment, at 49.

its decision granting Brush's motion to dismiss that "Plaintiffs allege that they have been injured through exposure to defendant's beryllium or beryllium-containing products."[228]

P105 The District Court held that "* * * a plaintiff must allege a present injury or loss to maintain an action in tort," it is clear that Jones and the class members did allege an injury. Although the District Court did not address when the alleged exposure occurred, once Brush demonstrated the existence of a potential for coverage, the London Insurers had to establish the absence of any such potential. In order to show that the underlying claim cannot fall within the policy coverage, the London Insurers had to prove that Jones and the class members did not allege an injury, and that the injury did not occur within the scope of coverage. It is not necessary that the alleged injury be **[*93]** a "present" one. Thus, the London Insurers have failed to prove that this claim *cannot* fall within the policy coverage..

P106 A defense cannot be refused merely because Jones and the class members failed to specify the exposure dates. In *Sherwin-Williams Co. v. Certain Underwriters at Lloyd's London*,[229] the U.S. District Court for the Northern District of Ohio, Eastern Division, held, "Although the dates of occurrence are unclear from the information provided in the complaints, so little information is provided that it cannot be proved that the injuries occurred outside of the policy period. Because doubts in the pleadings must be resolved in favor of the insured, the London Market Insurers must provide a defense."[230] Similarly, in this case because there is no proof that the injuries occurred outside of the policy period, the London Insurers must provide a defense.

**III. CONCLUSION**

P107 Based on the foregoing, this Court concludes that Plaintiff has established that no genuine issues of material **[*94]** fact exist, by which it can meet the standard for establishing (1) the primary policies have an indivisible duty to defend; (2) the duty to defend is not subject to the limits of liability; (3) the excess policies also contain an unconditional obligation to pay expenses as incurred; (4) all policies are triggered by an occurrence during the policy period; (5) all policies provide for an "all sums" allocation; and (6) the London Insurers wrongfully denied coverage for the *Massengale, Baum* and *Jones* claims.

P108 Specifically, there is no language in the triggered policies that would limit the London Insurer's duty to defend or to pay expenses on behalf of Brush as incurred. The language does not provide for trigger of coverage requiring a judgment during the policy period. Instead, it requires an occurrence. Even if the language in the triggered policies was determined to be ambiguous, this Court must reasonably construe ambiguities in favor of the insured.

P109 As well, all primary and excess policies are written on an "all sums" basis. There is no language in the triggered policies that would serve to reduce the London Insurers' liability if an injury occurs only in part of a given policy **[*95]** period. Thus, Brush may select the policy among those that are triggered.

P110 Finally, the London Insurers breached their obligation to Brush by failing to pay expenses incurred in the defense of *Massengale, Baum* and *Jones* lawsuits. Because each of these claims was "arguably or potentially" within the coverage of the policies issued to Brush, the London Insurers are obligated to defend and pay all expenses Brush has incurred in the defense of these claims. Accordingly,

P111 IT IS ORDERED, ADJUDGED, and DECREED that Brush's Motion for Partial Summary Judgment is GRANTED, and the London Insurers' Motion for Partial Summary Judgment is DENIED;

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[228] App. 0461, at 7.

[229] *Sherwin-Williams Co. v. Certain Underwriters at Lloyd's London (N.D.Ohio, 1993), 813 F.Supp. 576*.

[230] *Zanco, Inc. v. Michigan Mut. Ins. Co. (1984) 11 Ohio St.3d 114, 115, 11 Ohio B. 413, 464 N.E.2d 513, 514*.

P112 FURTHER, IT IS ORDERED, ADJUDGED, and DECREED that Brush is entitled to select any unexhausted primary policy or, if the pertinent primary policy is exhausted, any excess policy providing coverage for any period of time in which a plaintiff in a lawsuit alleges he was injured by beryllium particulate;

P113 FURTHER, IT IS ORDERED, ADJUDGED, and DECREED that Brush is entitled to reallocate the Beryllium Cases to the policy years of its choosing;

P114 FURTHER, IT IS ORDERED, ADJUDGED, and DECREED that this Court shall retain juridiction for the purpose **[*96]** of assuring that the London Insurers comply with all respects with orders of this Court;

P115 FURTHER, IT IS ORDERED, ADJUDGED, and DECREED that Brush is entitled to an award of attorneys fees in an amount to be determined at a later hearing;

P116 FURTHER, IT IS ORDERED, ADJUDGED, and DECREED that this matter is set for trial beginning September 18, 2006, on the amount of damages arising out of the London Insurer's breach of contract for their failure to meet their obligations under primary and general excess liability policies that they issued to Brush from August 1, 1956, through January 31, 1986.

P117 **Clerk of Courts shall send copies of this Judgment Entry to all parties of record or their counsel by regular U.S. Mail**.

AUGUST 30, 2006

PAUL C. MOON, JUDGE

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