EFiled: Jan 06 2015 02:50PM EST
Filing ID 56554559
Case Number Multi-Case

IN THE

Supreme Court of the State of Delaware

IN RE VIKING PUMP, INC.
AND WARREN PUMPS, LLC
INSURANCE APPEALS

No. 518, 2014
No. 523, 2014
No. 525, 2014
No. 528, 2014

PUBLIC VERSION FILED:
January 6, 2015

CASES BELOW:

SUPERIOR COURT OF
THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY,
Consolidated C.A. No. N10C-06-141FSS [CCLD]

-and-

COURT OF CHANCERY OF THE
STATE OF DELAWARE,
C.A. No. 1465-VCS

EXCESS INSURERS' REPLY BRIEF

SEITZ ROSS ARONSTAM & MORITZ LLP

Collins J. Seitz, Jr. (#2237)
Garrett B. Moritz (#5646)
Nicholas D. Mozal (#5838)
100 South West Street, Suite 400
Wilmington, DE 19801
Tel: (302) 576-1600

(*additional counsel listed below*)

OF COUNSEL:

Tancred Schiavoni
Gary Svirsky
O'MELVENY & MYERS LLP
Times Square Tower
7 Times Square
New York, NY 10036
Tel: (212) 326-2000

-and-

Brian G. Fox
Lawrence A. Nathanson
SIEGAL & PARK
533 Fellowship Road - Suite 120
Mount Laurel, NJ 08054
Tel: (856) 380-8900

-and-

John D. Balaguer (#2537)
WHITE & WILLIAMS LLP
824 N. Market Street, Suite 902,
P.O. Box 709
Wilmington, DE 19899-0709
Tel: (302) 467-4501

Attorneys for Defendants TIG Insurance Company, f/k/a International Insurance Company, with respect to policies numbered 5220113076 and 5220282357, and Westchester Fire Insurance Company, with respect to policy numbered 5220489339, by operation of novation; ACE Property & Casualty Insurance Company (f/k/a CIGNA Property & Casualty Insurance Company), as successor-in-interest to Central National Insurance Company of Omaha, but only as respects policies issued through Cravens, Dargan & Company, Pacific Coast (improperly named as The Central National Insurance Company of Omaha); and Century Indemnity Company, as successor to CCI Insurance Company, as successor to Insurance Company of North America and Century Indemnity Company as successor to CIGNA Specialty Insurance Company (f/k/a California Union Insurance Company)

TIGHE & COTTRELL, P.A.

Paul Cottrell (#2391)
704 King Street, Suite 500
P.O. Box 1031
Wilmington, DE 19899
Tel: (302) 658-6400

-and-

YOUNG CONAWAY STARGATT & TAYLOR, LLP

Timothy Jay Houseal (#2880)
Jennifer M. Kinkus (#4286)
Rodney Square
1000 North King Street
Wilmington, DE 19810
Tel: (302) 571-6682

Attorneys for The Continental Insurance Company as successor by merger to Fidelity & Casualty Company of New York

OF COUNSEL:

Laura McKay
HINKHOUSE WILLIAMS WALSH LLP
180 N. Stetson St., Suite 3400
Chicago, IL 60601
Tel: (312) 784-5400

-and-

Marc S. Lauerman
Lynn H. Murray
GRIPPO & ELDEN LLC
111 S. Wacker Drive, Suite 5100
Chicago, IL 60606
Tel: (312) 704-7700

TIGHE & COTTRELL, P.A.

Paul Cottrell (#2391)
704 King Street, Suite 500
P.O. Box 1031
Wilmington, DE 19899
Tel: (302) 658-6400

-and-

YOUNG CONAWAY STARGATT
& TAYLOR, LLP

Timothy Jay Houseal (#2880)
Jennifer M. Kinkus (#4286)
Rodney Square
1000 North King Street
Wilmington, DE 19810
Tel: (302) 571-6682

Attorneys for Certain Underwriters at Lloyd's, London and Certain London Market Insurance Companies, Granite State Insurance Company, Lexington Insurance Company And National Union Fire Insurance Company Of Pittsburgh, Pa.

OF COUNSEL:

Laura McKay
HINKHOUSE WILLIAMS
WALSH LLP
180 N. Stetson St., Suite 3400
Chicago, IL 60601
Tel: (312) 784-5400

SMITH KATZENSTEIN & JENKINS LLP

Robert J. Katzenstein (#0378)
800 Delaware Avenue, 10th Floor
P.O. Box 410
Wilmington, DE 19899
(Courier 19801)
Tel: (302) 652-8400

Attorneys for TIG Insurance Company, as successor by merger to International Insurance Company, as successor by merger to International Surplus Lines Insurance Company (Policy No. XSI 5217 only)

OF COUNSEL:

Christopher R. Carroll
Heather E. Simpson
CARROLL MCNULTY
& KULL LLC
120 Mountain View Boulevard
Post Office Box 650
Basking Ridge, NJ 07920
Tel: (908) 848-6300

DILWORTH PAXSON LLP

Thaddeus J. Weaver (#2790)
One Customs House
704 King St., Suite 500
P.O. Box 1031
Wilmington, DE 19801
Tel: (302) 571-8867

-and-

YOUNG CONAWAY STARGATT & TAYLOR, LLP

Timothy Jay Houseal (#2880)
Jennifer M. Kinkus (#4286)
Rodney Square
1000 North King Street
Wilmington, DE 19810
Tel: (302) 571-6682

Attorneys for OneBeacon America Insurance Company as successor to Commercial Union Insurance Company, XL Insurance America, Inc., as successor to Vanguard Insurance Company, and Republic Insurance Company, n/k/a Starr Indemnity & Liability Company

OF COUNSEL:

Laura McKay
Douglas M. DeWitt
HINKHOUSE WILLIAMS WALSH LLP
180 N. Stetson St., Suite 3400
Chicago, IL 60601
Tel: (312) 784-5400

MORRIS JAMES LLP

James W. Semple (#0396)
David J. Soldo (#4309)
500 Delaware Ave., Suite 1500
P.O. Box 2306
Wilmington, DE 19899
Tel: (302) 888-6870

Attorneys for Defendant Westport Insurance Corporation

OF COUNSEL:

Karl S. Vasiloff
Kristin Suga Heres
ZELLE HOFMANN VOELBEL & MASON LLP
950 Winter Street, Suite 1300
Waltham, MA 02451
Tel: (781) 466-0700

TYBOUT REDFEARN & PELL

Robert M. Greenberg (#4407)
750 Shipyard Drive - Suite 400
P.O. Box 2092
Wilmington, DE 19801
Tel: (302) 658-6901

Attorneys for Old Republic Insurance Company

OF COUNSEL:

Amy R. Paulus
Mark D. Paulson
Don Sampen
CLAUSEN MILLER P.C.
10 S. LaSalle St.
Chicago, IL 60603
Tel: (312) 855-1010

December 22, 2014

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES **Page(s)**

OTHER AUTHORITIES

TABLE OF ABBREVIATIONS*

Viking Ans. Br.	Appellant Viking Pump, Inc.'s Answering Brief
Warren Ans. Br.	Appellant Warren Pumps LLC's Answering Brief
WB	Appendix to Appellant Warren Pumps LLC's Answering Brief
XC	Appendix to Excess Insurers' Reply Brief

* Abbreviations defined in the Excess Insurers' Opening Brief and the Excess Insurers' Answering Brief are used here.

PRELIMINARY STATEMENT

Viking and Warren assert that the rulings that the Excess Insurers challenge were "compelled by . . . well-established New York precedents." Warren Ans. Br. 2. In fact, none of the rulings that Excess Insurers appeal is supported by New York law, let alone "compelled" by it. Just the opposite is true. The lower courts' rulings concerning "all sums" allocation, exhaustion of the Liberty 1980–1985 primary polices, and defense obligations under some of the policies contradict New York Court of Appeals precedent and long-settled New York contract interpretation rules. Even with Warren's extended footnote arguments in violation of Supreme Court Rule 14(d), Viking and Warren are unable to marshal New York case law to support their position. Just as Delaware courts are the best authority on Delaware law, New York courts are the best authority on New York law. That is why the issues Excess Insurers appeal should either be reversed under New York law or certified to the New York Court of Appeals.

First, Viking and Warren try to defend the Court of Chancery's allocation decision by asserting that "*Con Ed* based its pro rata ruling on the specific policy language before it" (Warren Ans. Br. 17), as if that gave the court below *carte blanche* to depart from this precedent in construing substantially similar language.

The New York Court of Appeals adopted the pro rata approach because "the policies provide indemnification for liability incurred as a result of an accident or

occurrence during the policy period, *not outside that period*." *Con Ed*, 774 N.E.2d 687, 695 (N.Y. 2002) (emphasis added). The court held that the policyholder's "all sums" argument "would read this important qualification out of the policies." *Id.* New York's high court then reaffirmed *Con Ed*'s pro rata holding in *Roman Catholic Diocese of Brooklyn v. National Union Fire Insurance Co. of Pittsburgh*, 991 N.E.2d 666, 676 (N.Y. 2013).

The Court of Appeals' holding that "during the policy period" is an "important qualification" was a significant development in New York law — and the Court of Chancery's allocation decision is inconsistent with that holding. As in *Con Ed*, the policies at issue here indemnify for bodily injury only "during the policy period" and "not outside that period," so the interpretation advocated by Viking and Warren — which would require Excess Insurers to cover bodily injury outside the policy period — is just as inconsistent with the policy language as the "all sums" approach the Court of Appeals rejected in *Con Ed.*

The attempt to distinguish *Con Ed* by pointing to the Excess Policies' non-cumulation provisions fails because Warren relies on *Hercules, Inc. v. AIU Insurance Co.*, 784 A.2d 481, 490–91 (Del. 2001), which applied *Delaware* law. And while Warren tries to make *Hercules* into a case about non-cumulation provisions, *Hercules* found that the terms "all sums" and "during the policy period" were "unambiguous[ly]" "inconsistent with pro rata allocation" (*id.*) — the

opposite of the result that New York's highest court reached in *Con Ed*. Only after that analysis did this Court in *Hercules* discuss non-cumulation provisions, stating that they "strengthen[ed]" its conclusion but making clear that *Hercules* "rests *solely* on . . . the unambiguous 'all sums' provision." *Id.* at 494 (emphasis added). Because the policies here are governed by New York law, it is *Con Ed*'s interpretation of this language that controls.

In their Opening Brief, the Excess Insurers cited case law, treatises, and practitioner commentary criticizing the Court of Chancery's allocation decision as inconsistent with New York law. Warren claims that the commentary is by insurer-friendly sources. Warren Ans. Br. 16 & n.16. But Warren identifies no case or commentary suggesting that the Court of Chancery's allocation decision follows New York law. Nor can Warren claim any insurer-friendliness concerning the express judicial criticism of the Court of Chancery's allocation ruling in *Mt. McKinley Insurance Co. v. Corning Inc.*, 2012 N.Y. Misc. LEXIS 6531, at *11–12 (N.Y. Sup. Ct. Sept. 7, 2012), or cite any New York case applying "all sums" allocation. The Court of Chancery's allocation decision should be reversed or, at minimum, certified to the New York Court of Appeals. *See* Point I, below.

Second, Viking and Warren fail to offer any meaningful rebuttal to the Excess Insurers' argument based on the plain language of the 1980–1985 Liberty primary policies: under that language and New York law, Viking and Warren are

responsible for the first $100,000 for any claim. Even the Superior Court acknowledged that Viking and Warren's text-based "argument regarding the deductible as a premium calculation is not in accord with the endorsements' language." *Viking III* at 57. That should have been the end of the matter where — as here — unambiguous policy language is at issue.

But the Superior Court nevertheless considered extrinsic evidence. Viking and Warren now rely on that evidence and urge deference to the jury's verdict. That is not the appropriate place to start analyzing an unambiguous contract. Under New York law, the Court must begin with the unambiguous policy language. Tellingly, Viking addresses the "[p]lain [t]erms" of the Liberty policies *third* in its exhaustion argument. Viking Ans. Br. 42. This Court should therefore reverse the Superior Court's ruling that the 1980–1985 Liberty primary policies have been properly exhausted. *See* Point II, below.

Third, Viking and Warren's attempt to defend the Superior Court's rulings regarding whether certain Excess Insurers have an obligation to pay defense costs employs strained policy interpretation and exclusively non-New York case law for everything except the most generic propositions. Because New York law and the policies' language compel a different result, the defense costs rulings at issue should be reversed. *See* Point III, below.

ARGUMENT

I. THE COURT OF CHANCERY ERRED IN RULING THE EXCESS POLICIES PROVIDE FOR "ALL SUMS" ALLOCATION.

As the Excess Insurers' Opening Brief demonstrates, the New York Court of Appeals in *Con Ed* held that substantially similar policy language requires pro rata allocation. Warren offers no New York case to defend the Court of Chancery's holding that "all sums" allocation applies. And while Excess Insurers cited case law, treatises, and practitioners critical of the Court of Chancery's allocation decision as inconsistent with New York law, Warren cites no cases or commentary suggesting that the Court of Chancery's allocation decision correctly applied New York law. The Court of Chancery's allocation decision should be reversed or, at minimum, certified to the New York Court of Appeals.

A. The policy language at issue requires pro rata allocation.

1. Warren's main attack is that "*Con Ed* based its pro rata ruling on the specific policy language before it" while Excess Insurers' argument is supposedly divorced from the policy text. Warren Ans. Br. 17. But Warren attacks a straw man without distinguishing the policy language in *Con Ed* from the language here. As Excess Insurers' Opening Brief explained, *Con Ed* construed policy language similar to that used here:

The language construed in *Con Ed*	The language here
"To indemnify the insured for ***all sums*** which the insured shall be obligated to pay by reason of the liability . . . for damages, direct or consequential, and expenses, all as more fully defined by the term ultimate net loss, on account of . . . property damage, caused by or arising out of each occurrence [with occurrence defined to mean 'an event, or continuous or repeated exposure to conditions, which causes injury, damage or destruction ***during the policy period***']." 774 N.E.2d 687, 693 (N.Y. 2002) (emphasis added)	"The company will pay on behalf of the insured ***all sums*** in excess of the retained limit which the insured shall become legally obligated to pay . . . as damages, direct or consequential, because of . . . personal injury [with personal injury defined as 'personal or bodily injury which occurs ***during the policy period*** sustained by a natural person . . . .'] . . . with respect to which this policy applies and caused by an occurrence." Addendum A-14,-18,-20,-25,-29,-31,-37,-43,-48,-55,-62,-72 (emphasis added).

While New York law indeed provides that the policy language governs, that principle does not mean that the court below was free to rewrite New York law. This Court must apply the New York Court of Appeals' interpretation of substantially similar language, holding that pro rata allocation reflected a "straightforward reading of the phrase 'during the policy period'" and was "consistent with the language of the policies," while "all sums" allocation was not. *Con Ed*, 774 N.E.2d at 694–95. The Court of Appeals concluded that "during the policy period" meant that an insurer could not be charged with damage that takes place outside of its policy period. *Id.* at 695. If the parties can quantify how much damage takes place in each policy period, then there is no need to resort to pro rata allocation — otherwise pro rata applies. *Id.*

Neither Viking nor Warren dispute that "[t]he New York Court of Appeals is the most authoritative tribunal empowered to adjudicate definitively the rights and

requirements contained in [contracts] governed by New York law." *Quadrant Structured Prods. Co. v. Vertin*, ---A.3d---, 2013 WL 5962813, at *5 (Del. Nov. 7, 2013). Instead, Warren claims that the *Viking II*'s conclusion that the language here supports "all sums" allocation somehow "harmonize[d] all of the terms of the contract." Warren Ans. Br. 28. But Warren ignores the "during the policy period" language that the Court of Appeals found so significant to determining the allocation method in *Con Ed*. *See also Roman Catholic Diocese*, 991 N.E.2d at 676–77 (reaffirming *Con Ed* and applying pro rata allocation). Indeed, Warren cites no New York case applying "all sums" allocation — and none exists.

2. Warren attempts to get around *Con Ed* by pointing to the Excess Policies' non-cumulation language and citing *Hercules*, 784 A.2d at 490–91, where this Court considered the terms "all sums" and "during the policy period" under *Delaware* law. Warren Ans. Br. 20–30. Leaving aside the irony of Warren now relying on non-cumulation provisions after arguing at trial that the Excess Insurers should not get the protection of those provisions (*see* WA642, JA1483–84), non-cumulation provisions have no bearing on how long-term losses are allocated among multiple consecutive policies. *See, e.g.*, *Greenridge v. Allstate Ins. Co.*, 312 F. Supp. 2d 430, 440 (S.D.N.Y. 2004) (applying New York law and holding that non-cumulation provision dictate policy limit available to insured); *Endicott Johnson Corp. v. Liberty Mut. Co.*, 928 F. Supp. 176, 181-82 (N.D.N.Y. 1996)

(applying New York law and holding that non-cumulation clause reduces limit of liability available by amount paid under prior policies with respect to the same occurrence). Allocation methodology and available coverage limits (with which non-cumulation clauses are concerned) are distinct, non-overlapping concepts. And of course, this Court's decision under *Delaware* law cannot trump the New York Court of Appeals' controlling interpretation under *New York* law.

a. Not only is *Hercules* not controlling in this appeal under New York law, but Warren misreads how *Hercules* applied non-cumulation language. The policy in *Hercules* provided that the insurers would "indemnify the Assured for *all sums* which the Assured shall be obligated to pay . . . caused by or arising out of each occurrence," with occurrence defined as "[a]n accident or happening or event or a continuous or repeated exposure to conditions which . . . results in personal injury . . . *during the policy period*." *Hercules*, 784 A.2d at 490 (emphasis added). Before even discussing non-cumulation provisions, *Hercules* found that the "all sums language" — which is similar to the language in *Con Ed* — "is inconsistent with pro rata allocation" as a result of "unambiguous policy language." *Id.* at 491.

Only after reaching this conclusion based on the above language did this Court turn to non-cumulation language in *Hercules*. Although this Court noted that the non-cumulation provision "strengthen[ed]" its conclusion, it made clear that the "holding rests *solely* on our decision in *Monsanto* based on the

unambiguous 'all sums' provision." *Id.* at 493 (emphasis added). While *Hercules* may be the last word on the terms "all sums" and "during the policy period" as a matter of *Delaware* law, the New York Court of Appeals reached a different conclusion about those terms in favor of pro rata allocation. *Con Ed*, 774 N.E.2d at 693–94. And that is what controls here.

b. Warren cites no New York cases addressing how non-cumulation clauses inform allocation. In fact, two cases applying New York law to policies containing non-cumulation provisions support pro rata allocation. Both *Long Island Lighting Co. v. Allianz Underwriters Ins. Co.*, Index No. 604715/97, at 7 (N.Y. Sup. Ct. Dec. 30, 2003) and *Olin Corp. v. Am. Home Assurance Co.*, 704 F.3d 89, 102–03 (2d Cir. 2012) ("*Olin III*") applied New York law and held that policies with non-cumulation provisions were consistent with pro rata allocation under *Con Ed*. Indeed, the "Prior Insurance and Non-Cumulation of Liability" provision in *Olin III* was very similar to the provisions here:

Umbrella Policies	**Policies in *Olin***
"If the same occurrence gives rise to personal injury . . . which occurs partly before and partly within any annual period of this policy, the[n] each occurrence limit and ***the applicable aggregate limit or limits of this policy shall be reduced by the amount of each payment made*** by [Liberty] with respect to such occurrence . . . ." *E.g.*, JA3722.	"It is agreed that if any loss covered hereunder is also covered in whole or in part under any other excess policy issued to the Assured prior to the inception date hereof, ***the limit of liability hereon ... shall be reduced by any amounts due to the Assured*** on account of such loss under such prior insurance." *Olin III*, 704 F.3d at 94 (emphasis added).

The Second Circuit ruled that the provision "alone cannot trigger joint and several liability in lieu of the pro rata allocation methodology employed in *Olin I* and [*Con Ed*]." *Olin III*, 704 F.3d at 103.

c. Warren asserts that *Hiraldo ex rel. Hiraldo v. Allstate Insurance Co.*, 840 N.E.2d 563 (N.Y. 2005), and other New York cases enforcing non-cumulation provisions support its argument because those courts "applied non-cumulation provisions without reference to pro rata allocation." Warren Ans. Br. 21-22 & n.14. But those cases do not address allocation at all. Indeed, *Hiraldo* and the other New York cases Warren cites all involved claims against one insurer for a single occurrence spanning multiple policy years. Because the same insurance company would be paying the total indemnity amount no matter how it was allocated, there was no reason for those cases to address allocation.

d. Warren's contention that the Excess Insurers did not "explain how there could be a 'double recovery' in a pro rata allocation" scheme (Warren Ans. Br. 26) is both (i) irrelevant and (ii) reflects a misconception of how non-cumulation provisions work.

First, the Excess Insurers discussed double recovery to explain how pro rata divides liability for injury as a matter of law. Excess Insurers' Opening Br. 21–22. They offered that analysis to explain how the Court of Chancery erred. Nothing about that discussion affects the controlling authority of *Con Ed*.

Second, Warren appears to misunderstand that a non-cumulation provision prevents double recovery by limiting an insured to a single policy limit, even if the loss occurs over multiple policy periods and so implicates multiple insurance policies. Excess Insurers' Opening Br. 22; *see also* Christopher C. French, *The "Non-Cumulation Clause": An "Other Insurance" Clause by Another Name*, 60 KAN. L. REV. 375, 387 (2011) (insurance underwriters first "designed the non-cumulation clause to thwart the policyholder's attempt at obtaining twice as much coverage as the amount of the liability by pursuing coverage under [two] policies for the same liability."). As the New York Court of Appeals recently held in construing a non-cumulation clause, "only one policy limit is available" when more than one policy period is triggered, and so coverage under multiple insurance policy periods did not "increase[] the limits of the available coverage." *Nesmith v. Allstate Ins. Co.*, ---N.E.3d---, 2014 WL 6633553 (N.Y. Nov. 25, 2014).

3. Warren argues that "all sums" is "particularly apt" because a "single insurer may be held responsible for paying all defense costs in full." Warren Ans. Br. 20. But *Con Ed* rejected a similar argument, holding that a prior decision finding "no error or unfairness" in a court's declining to order pro rata allocation of defense costs did not mean that indemnity obligations for multi-period harms should be allocated on an "all sums" basis. As the *Con Ed* court noted, "the duty to defend is broader than the duty to indemnify." 774 N.E.2d at 694.

Moreover, Warren incorrectly assumes that all of the Excess Policies have defense obligations. As discussed in Point III below, many of the Excess Policies expressly disclaim defense costs. And there is no dispute that at least one insurer — ISLIC — "has no obligation to pay the costs of defending asbestos claims against Warren and/or Viking." JA1868. Warren does not explain how an "all sums" scheme would work as to defense costs when sixteen Excess Policies — as the Superior Court held — do not pay defense costs outside limits.

4. As set forth in Excess Insurers' Opening Brief at pp. 24–25 & n.6, courts, commentators, and practitioners have criticized the Court of Chancery's "all sums" decision as inconsistent with New York law. Warren's efforts to downplay these criticisms fail.

In an attempt to spin a New York judge's explicit criticism of the Court of Chancery's "all sums" ruling, Warren quotes out of context the *Corning* court's statements that the *Viking II* allocation decision "held that New York has not adopted any one method of allocation" and "that the Court of Appeals has found that the issue is to be governed by the language of the policies at issue." Warren Ans. Br. 19 (quoting *Corning*, 2012 N.Y. Misc. LEXIS 6531, at *11–12). But the policy language here, as discussed above, is substantially similar to the language in *Con Ed*. Moreover, Warren's statement about *Corning* does not change that the court there held that (a) it "disagrees with the Delaware Court's finding" because it

"ignores established New York precedent (*id.* at *14); (b) *Viking II* "derisively" cited and "took issue with" precedent from the New York Court of Appeals (*id.* at *12–13); and (c) "no New York court has adopted the interpretation of policy language in, or holding of" *Viking II* (*id.* at *14).

Warren's effort to undercut the treatises cited by the Excess Insurers (Ans. Br. 16 & n.16) also rings hollow. In fact, Ostrager and Newman's *Handbook on Insurance Coverage Disputes* (quoted at Excess Insurers' Opening Br. 25) is frequently cited by New York and Delaware courts.[1] *Appleman New York Insurance Law* (quoted at Excess Insurers' Opening Br. 25) is likewise cited.[2] Viking itself cites one of those treatises. Viking Ans. Br. 38–39.

And while Warren tries to cast doubt on the Excess Insurers' citation to practitioner commentary criticizing the Court of Chancery's "all sums" ruling as contrary to New York law, Warren does not identify *any* practitioner commentary the other way. Even an article that Warren characterizes as by "a policyholder attorney" observed that the Court of Chancery's allocation decision "departs from

---

[1] *See, e.g.*, *Ment Bros. Iron Works Co. v. Interstate Fire & Cas. Co.*, 702 F.3d 118, 122 (2d Cir. 2012) (citing Ostrager & Newman); *Am. Legacy Found., RP v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 623 F.3d 135, 143 (3d Cir. 2010) (same); *BX Third Ave. Partners, LLC v. Fid. Nat'l Title Ins. Co.*, 977 N.Y.S.2d 9, 10 (N.Y. App. Div. 2013) (same); *Gen. Motors Acceptance Corp. v. Nationwide Ins. Co.*, 828 N.E.2d 959, 961 (N.Y. 2005) (same); *In re Brandon*, 769 N.E.2d 810, 813 (N.Y. 2002) (same); *Hercules*, 784 A.2d at 491 nn.26, 29 (same).

[2] *See, e.g.*, *K2 Inv. Grp., LLC v. Am. Guar. & Liab. Ins. Co.*, 6 N.E.3d 1117, 1123 n.1 (N.Y. 2014) (citing Appleman); *Am. Equity Ins. Co. v. A & B Roofing, Inc.*, 965 N.Y.S.2d 122, 125–26 (N.Y. App. Div. 2013) (same).

the decisions of certain New York courts." PHILIP H. HECHT, BACK TO BASICS: DELAWARE COURT APPLIES "ALL SUMS" ALLOCATION METHODOLOGY UNDER NEW YORK LAW, at 1, 3 (Nov. 2009) (cited at Warren Ans. Br. 16 n.9).

5. Warren has no answer to the fact that the Court of Chancery's "all sums" ruling undermines New York law holding that the insured must bear the risk of any of its insurers becoming unable to pay. Excess Insurers' Opening Br. 23 (quoting *Olin I*, 221 F.3d 307, 323 (2d Cir. 2000)). Nor does Warren explain why the Court of Chancery gave no indication that it ever considered the conflict between its "all sums" ruling and New York law regarding insolvent insurers. Warren only claims in a footnote that the Excess Insurers' argument "is a back-door argument for horizontal exhaustion of the Excess Policies' limits." Warren Ans. Br. 26 n.19. That is a *non sequitur* and is no response to the allocation question. Indeed, the parties raised and the Court of Chancery decided allocation years before the parties litigated whether horizontal or vertical exhaustion applied.

The Excess Insurers also pointed out — and Warren did not respond — that the Court of Chancery assumed that a New York court would seek to impose on insurers a form of joint and several liability that, in fact, New York has modified by statute. Excess Insurers' Opening Br. 24.

6. As for Warren's claim that the Excess Insurers "conceded below that Non-Cumulation Provisions cannot be applied in the context of pro rata allocation"

(Warren Ans. Br. 3), that is not so. The Excess Insurers never argued that non-cumulation provisions cannot be applied together with pro rata. Indeed, non-cumulation provisions have no bearing on allocation methodology, as discussed above. Because non-cumulation provisions apply where the *same occurrence* gives rise to injury occurring partly before and partly within the policy period, the Excess Insurers argued below that the Liberty language did not apply where *multiple occurrences* are at issue, as is the case here. XA95–98.

B. The Court should certify the question to the New York Court of Appeals.

Warren opposes certification on the grounds that the "Court of Chancery did not address questions of first impression." Warren Ans. Br. 30. But Warren does not cite a single New York case holding that "all sums" allocation should apply. Contrary to Warren's claims, the Court of Chancery's decision broke new ground under New York law. Given New York's significant interest in the consistent application of its preeminent insurance law (a proposition that Warren does not challenge), this Court should certify the question to the New York Court of Appeals. *See* Excess Insurers' Opening Br. 26–27.

II. THE SUPERIOR COURT ERRED IN RULING THAT THE LIBERTY POLICIES HAVE BEEN EXHAUSTED.

As the Excess Insurers demonstrate in their Opening Brief, the 1980–1985 Liberty primary policies' plain language and New York law provide that Viking and Warren were responsible for the first $100,000 of each occurrence, which would not erode the [redacted] aggregate limit for each primary policy. Excess Insurers' Opening Br. 28–41. Viking and Warren argue that Liberty paid the full limits of the underlying policies and that the policies are exhausted whether or not Viking or Warren paid deductibles, and that the jury's conclusion on these points should stand. Viking Ans. Br. 32–49; Warren Ans. Br. 36–38. These arguments lack merit.

A. The Liberty primary policies' plain language supports Excess Insurers' reading.

Tellingly, the argument that the Liberty primary policies were exhausted under their "[p]lain [t]erms" appears *third* in Viking's exhaustion argument. Viking Ans. Br. 42. Instead, Viking and Warren place much weight on the jury's findings — about this purely legal issue involving the interpretation of unambiguous policies — and urge a deferential standard of review. Viking Ans. Br. 32; Warren Ans. Br. 36. Warren focuses its argument on the self-serving testimony of Liberty claims handler Carl Brigada (Warren Ans. Br. 38) while Viking likewise discusses extrinsic evidence at length (Viking Ans. Br. 47–49).

The Superior Court's ruling, however, was based on its interpretation of the policies and so is reviewed *de novo*. Because the Liberty primary policies were not exhausted according to their plain language, and the Superior Court held that the policies were unambiguous, extrinsic evidence and jury findings are irrelevant.

1. The Deductible Endorsement expressly requires Viking or Warren to absorb a $100,000 deductible for each underlying judgment or settlement. That endorsement says nothing about premiums; and the Premium Adjustment Endorsement says nothing about deductibles. Excess Insurers' Opening Br. 29. Under New York's rule that "the best evidence of what the parties intended is the contract itself," *Int'l Flavors & Fragrances, Inc. v. Royal Ins. Co. of Am.*, 844 N.Y.S.2d 257, 263–64 (N.Y. App. Div. 2007), that is the end of the inquiry.

2. Viking argues that the Premium Adjustment Endorsement — and not the Deductible Endorsement — somehow governs deductibles. Viking Ans. Br. 43. But the Premium Endorsement does not mention the Deductible Endorsement, let alone alter or negate it. "The Deductible Expense" is only one part of the calculation of the "adjusted premiums," and is defined differently than the Deductible Endorsement. In *Air Products & Chemicals, Inc. v. Hartford Accident & Indemnity Co.*, Liberty successfully argued that "a premium for the 'handling' of deductible losses" must be paid in addition to losses within the deductible. 707 F. Supp. 762, 776 n.13 (E.D. Pa. 1989). This premium is a "handling charge," *id*. at

777, to compensate the insurer for handling claims that fall within the deductible. The structure of the policies here reflects this same setup. Even the Superior Court noted below that Viking's "argument regarding the deductible as a premium calculation is not in accord with the endorsements' language." *Viking III* at 57.

3. Viking asserts that the 1980–1985 primary policies are exhausted even if the deductibles were not paid because deductibles are part of, and subtracted from, the policy's limits. Viking Ans. Br. 39. Viking also claims that "exhaustion does not depend on who pays the deductible," and that it only matters that indemnity payments are made under each policy. *Id*. at 42. These contentions fail because (i) New York law requires the insured to pay deductibles; (ii) the policy language here makes clear that amounts within the $100,000 per-claim deductible do not erode aggregate limits, regardless of who pays them; and (iii) an underlying insurer's conduct cannot affect an excess insurer's contractual obligations.

First, the deductibles are Viking's and Warren's responsibility. New York law defines deductible as "the *self-insured* portion of a property or liability loss *retained by the policyholder*." *Allstate Ins. Co. v. Am. Home Assurance Co.*, 837 N.Y.S.2d 138, 139 n.2 (N.Y. App. Div. 2007) (emphasis added).

Here, the Deductible Endorsement's plain terms reflect this self-insured nature: it expressly provides that Liberty's obligation "applies only to the amount of such damages and 'allocated adjustment loss expense' in excess of a deductible

amount of $100,000." *E.g.*, JA3685. While the endorsement provides that Liberty may "pay any part of all of the deductible," it also provides that the insured "*shall* promptly reimburse" that amount. *See, e.g.*, JA3685 (emphasis added). So even if Liberty were to front the money, Viking and Warren would be required to repay it. In short, nothing in the Deductible Endorsement relieves Viking and Warren from paying the deductible.

Second, the policy language makes clear that amounts within the $100,000 per-claim deductible do not erode aggregate limits. The 1980–85 primary policies provide that only "payment of judgments or settlements" can exhaust the policies' "applicable limit." The New York Court of Appeals has interpreted the phrase "payment of judgments or settlements" as requiring payments *by the insurer*. *See Fed. Ins. Co. v. Watnick*, 607 N.E.2d 771, 774 (N.Y. 1992). The "applicable limit," in turn, refers here to the policy's *aggregate* limit for bodily injuries. Indeed, in another asbestos coverage case involving identical Liberty policy language, Liberty argued and the court agreed that its obligations ended only by exhausting the policy's aggregate limit. *Liberty Mut. Fire Ins. Co. v. Flexo Supply Co.*, 2008 WL 4371490, at *1 n.1 (E.D. Mo. Sept. 19, 2008).

Only the insurer's payments for judgments or settlements can exhaust the aggregate limits. Amounts within the deductible are the insured's responsibility. Thus, even amounts under $100,000 *paid by Liberty* cannot erode the aggregate

limit. A primary insurer cannot use a side agreement to "lessen[] the amount of primary insurance required to be exhausted." *John Crane, Inc. v. Admiral Ins. Co.*, 991 N.E.2d 474, 487 (Ill. App. Ct. 2013). Yet "lessen[ing] the amount of primary insurance required to be exhausted" is what would happen if Liberty could use Viking's and Warren's deductible to erode Liberty's aggregate limits.

Third, as the Excess Insurers demonstrate in their Opening Brief (at pp. 37–39), an underlying insurer's extra-contractual conduct cannot affect an excess insurer's contractual obligations. *Metro. Transp. Auth. v. Zurich Am. Ins. Co.*, 891 N.Y.S.2d 376 (N.Y. App. Div. 2009) (an excess insurer is not bound by the primary insurer's coverage decisions); *accord In re Liquidation of Midland Ins. Co.*, 861 N.Y.S.2d 922, 937 (N.Y. Sup. Ct. 2008) (same), *rev'd on other grounds*, 893 N.Y.S.2d 31 (N.Y. App. Div. 2010); *Forest Labs., Inc. v. Arch Ins. Co.*, 984 N.Y.S.2d 361, 362 (N.Y. App. Div. 2014). Viking has no answer other than to cite non-New York cases and then offer the irrelevant statement that an excess insurer may not question an underlying insurer's decision to pay.

4. While Viking concedes that the Deductible Endorsement is unambiguous and that the Court "should not resort to" extrinsic evidence, Viking nonetheless relies on trial testimony several times in its brief, and argues that the doctrine of *contra proferentem* should be applied. Viking Ans. Br. 44, 46–47. Under black-letter New York law, this Court may not consider extrinsic evidence of the

policies' alleged meaning unless it finds an ambiguity, nor may it allow a party to use extrinsic evidence to create ambiguity. *Brad H. v. City of New York*, 951 N.E.2d 743, 746 (N.Y. 2011). Because Liberty failed to exhaust as a matter of the primary policies' plain language, Viking's extended review of testimony from Liberty employee Carl Brigada (*see* Viking Ans. Br. 47–49) is irrelevant.

As to *contra proferentem*, "[a]bsent ambiguity, there [is] no reason to resort to *contra proferent[e]m*." *Schron v. Troutman Saunders LLP*, 945 N.Y.S.2d 25, 29 (N.Y. App. Div. 2012), *aff'd*, 986 N.E.2d 430 (N.Y. 2013). Here, Viking, Warren, and the Excess Insurers all agreed that the policies are unambiguous, and the Superior Court so held. *Viking III* at 4, 53, 61; JA1534, JA1558–61, JA1607, JA1622. Moreover, Viking acknowledges that the rule does not apply where there is a "sole construction which can be fairly be placed upon the words employed." Viking Ans. Br. 47. Because that is the case here, *contra proferentem* is irrelevant.

5. Finally, Viking tries to defend the exhaustion ruling by claiming that it is "undisputed . . . that Liberty paid the full aggregate policy limits," citing as support the "Established Facts for Submission To Jury." Viking Ans. Br. 33. But the Excess Insurers vigorously *disputed* many of those "undisputed" facts, which the Superior Court entered over the Excess Insurers' objections — and then sanctioned them simply for objecting (only to later vacate the sanction). XC1–58. Leaving aside the procedural impropriety underlying the so-called "undisputed" facts, while

the Excess Insurers did not dispute the amount that Liberty claims to have paid, they most definitely disputed that these payments exhausted the underlying policies in light of the $100,000 per-claim deductible.

B. The policies' plain language — not Liberty's self-serving interpretation — controls.

1. Seeking to avoid the Liberty primary policies' language, Viking argues that "the law does not permit" Excess Insurers to "challenge a primary carrier's good-faith payment decisions." Viking Ans. Br. 34. Viking further argues that New York law provides that a contract should be interpreted "according to . . . the meaning that the parties have ascribed to it, not the interpretation of a stranger to the agreement." Viking Ans. Br. 34 (citing *MBL Contracting Corp. v. King World Prods., Inc.*, 98 F. Supp. 2d 492, 497 (S.D.N.Y. 2000), and *In re Windsor Plumbing Supply Co.*, 170 B.R. 503, 522 (Bankr. E.D.N.Y. 1994)).

But neither *MBL Contracting* nor *Windsor* involve insurance coverage disputes or the relationship between primary and excess coverage. Far from being a "stranger" to the policies, the Excess Insurers' obligations turn on whether the underlying policies were exhausted. As Viking acknowledges, the "New York Court of Appeals has held that a policyholder is not entitled to excess coverage unless the policyholder proves that the underlying insurance is exhausted." Viking Ans. Br. 38 n.17. And under New York law, unambiguous policy language, not the underlying insurer's claims handling decisions, govern coverage obligations.

Excess Insurers' Opening Br. 37 (collecting cases). Thus, "interpretations or positions taken by the underlying insurer . . . are not binding upon the excess insurer." 1-16 PAUL R. KOEPFF, NEW APPLEMAN NEW YORK INSURANCE LAW § 16.04[2][b] (Dec. 2013); *see also Maryland Cas. Co. v. W.R. Grace & Co.*, 218 F.3d 204, 211 (2d Cir. 2000) ("[T]he contract of settlement an insurer enters into with the insured cannot affect the rights of another insurer who is not a party to it").

2. Indeed, contrary to Viking's claim, New York authority holds that an excess insurer can challenge a primary carrier's payment decisions for purposes of determining whether the underlying insurance is exhausted. *See Home Ins. Co. v. Am. Home Prods. Corp.*, 665 F. Supp. 193, 196 (S.D.N.Y. 1987), *modified*, 902 F.2d 1111 (2d Cir. 1990) (excess insurer could challenge primary insurer's allocation of payments so as to prematurely exhaust primary coverage). *John Crane*, 991 N.E.2d 474 (applying Illinois law), is instructive. There, the insured and primary carrier agreed that defense costs would exhaust the primary policy. *Id.* at 484. The court ruled that the excess insurers had standing to challenge that agreement, reasoning that the insured could not "lessen[] the amount of primary insurance required to be exhausted," to the detriment of the excess insurers. *Id.* at 487. So too here. That Viking, Warren, and Liberty now agree that deductibles were part of the premium does not negate unambiguous and clear policy terms.

3. The various non-New York cases Viking cites are inapposite. For example, Viking relies on *LSG Technologies, Inc. v. U.S. Fire Insurance Co.*, 2010 WL 5646054 (E.D. Tex. Sept. 2, 2010) (applying Texas law) (cited at Viking Ans. Br. 38), to support its claim that an excess insurer cannot question how a primary policy was exhausted. The excess insurer in *LSG* argued that the insured and primary insurer had to present proof at a "mini-trial" to show the validity of each underlying claim. *Id*. at *13. The other cases Viking cites dealt with the excess insurer either challenging the validity of the primary insurer's coverage decisions[3] or directly suing the insured.[4] The Excess Insurers' deductible argument does not remotely resemble these cases. Excess Insurers merely seek to have their own obligations to pay determined based on the underlying Liberty primary policies' plain language regarding exhaustion.

---

[3] *ARM Prop. Mgmt. Grp. v. RSUI Indem. Co.*, 2008 WL 5973220, at *6 (W.D. Tex. Aug. 25, 2008) (issue before court was "whether the payments on the underlying policies were outside the scope of the underlying policy coverage"); *Edward E. Gillen Co. v. Ins. Co. of the State of Pa.*, 2011 WL 1694431, at *4 (E.D. Wis. May 3, 2011) (excess insurer argued it "may question the validity of a primary insurer's coverage"); *Ins. Co. of N. Am. v. Kayser-Roth Corp.*, 770 A.2d 403, 416 (R.I. 2001) (excess insurer argued the insured must "prove the validity of both the coverage and the payments afforded by the underlying" policy).

[4] *UNR Indus., Inc. v. Cont'l Ins. Co.*, 1988 WL 121574, at *16 (N.D. Ill. Nov. 9, 1988), is about the excess insurer instituting an action against an insured because of the primary insurer's improper exhaustion, but Excess Insurers are not doing that here.

III. THE SUPERIOR COURT ERRED IN RULING ON DEFENSE COSTS AS TO SOME OF THE EXCESS POLICIES.

As the Excess Insurers show in their Opening Brief, the Superior Court erred by holding that (i) several Excess Insurers had a duty to pay Viking's and Warren's defense costs despite express language disclaiming that duty; and (ii) those Excess Insurers that had a duty to pay defense costs had to pay them in addition to their aggregate policy limits, despite policy language to the contrary. Viking's and Warren's attempt to defend the Superior Court's decision relies heavily on non-New York case law. Because New York law and the language of the policies compel a different result, the defense costs rulings at issue should be reversed.

A. Liberty has no duty to defend Viking's and Warren's claims under its umbrella policies.

Liberty's umbrella obligations have defense obligations only for claims "not covered" by underlying insurance. "Covered" in the insurance context refers to whether an occurrence is insured, not whether the policy has been exhausted. In *Pergament Distributors, Inc. v. Old Republic Insurance Co.*, the New York Appellate Division rejected the contention that drop-down coverage is triggered "when the primary carrier is unable to pay." 513 N.Y.S.2d 467, 468 (N.Y. App. Div. 1987). New York law holds that the term "covered" "as related to the primary policy, should be construed as referring to whether the primary policy provides coverage and not to whether it is collectible." *See Am. Safety Indem. Co. v. 612*

Realty LLC, 901 N.Y.S.2d 897, 2009 WL 2407822, at *5 (N.Y. Sup. Ct. Aug. 4, 2009). Warren does not offer any New York case in response. Therefore, even if the primary policies were fully exhausted, the underlying asbestos claims would remain "covered" by the primaries so that Liberty would have no defense obligations under its umbrella policies.

Warren wrongly claims that the cases the Excess Insurers cite do not show the Superior Court erred. Concerning *American Safety*, 2009 WL 2407822, at *5, whether the policy contained the "would be covered but for the insured's retention" is irrelevant. That language refers to the deductibles that must be paid by Viking and Warren, which do not affect the words "but not covered under any underlying policy or any other insurance" that follow. Nor does the meaning of "covered" depend on the application of *contra proferentem*. There is "only one reasonable interpretation of the . . . terms 'covered' and 'not covered'" and they "refer[] to whether the policy insures against a certain risk, not whether the insured can collect on an underlying policy." *Pergament*, 513 N.Y.S.2d at 468–69.

And in *Liberty Mutual Insurance Co. v. Pacific Indemnity Co.*, 579 F. Supp. 140 (W.D. Pa. 1984), the court construed a Liberty excess policy with nearly identical language to the Umbrella Policies here, ruling that because the primary insurance provided coverage for defense costs, the Liberty excess policy had no obligation to do so. 579 F. Supp. at 144–45. Although Warren is correct that there

were two primary insurers, that is a distinction without a difference. The court did not condition its ruling on the fact that two primary insurers were apportioning defense costs; it focused solely on "coverage." *Id*.

B. Certain Excess Policies contain express defense exceptions.

As set forth in Excess Insurers' Opening Brief at pp. 44–49, several Excess Policies contain express exceptions making clear that they have no obligation to pay defense costs. Warren's lead responsive argument is that the policies include endorsements that Warren contends "either adopt[] the Liberty defense obligation or set[] forth an express promise to pay defense costs." Warren Ans. Br. 42. Warren's claim about the endorsements is incorrect. And Warren's other arguments regarding the express disclaimers of defense costs also fail.

1. Six Excess Policies expressly disclaim any duty to pay defense costs using language that courts have enforced.[5] Excess Insurers' Opening Br. 44–46. Warren does not dispute this. Rather, Warren responds by citing endorsements that Warren claims "control over inconsistent policy language." Warren Ans. Br. 42–43.

In *County of Columbia v. Continental Insurance Co.*, 634 N.E.2d 946 (N.Y. 1994), New York's highest court rejected a similar argument. The insured there

[5] International Policies 5220113076, 5220282357, 5220489339 (JA3998, JA4113, JA4427); California Union Policy ZCX003889 (JA3621); INA Policies XCP145194 and XCP156562 (JA4164, JA4420).

sought coverage for pollution-related property damage. Though the policies specifically disclaimed pollution coverage, the insured pointed to a broadly worded "personal injury" endorsement in claiming coverage. *Id.* at 948. The Court of Appeals disagreed, explaining that "[a]n insurance contract should not be read so that some provisions are rendered *meaningless*," and that "[i]t would be *illogical* to conclude that the claims fail because of the pollution exclusion while also concluding that the insurer wrote a personal injury endorsement to cover the same eventuality." *Id.* at 950 (emphasis added). As with potentially conflicting provisions in any contract, where possible, a court should read a policy form and endorsement so as to harmonize and give effect to both. *Nat'l Conversion Corp. v. Cedar Bldg. Corp.*, 246 N.E.2d 351, 354 (N.Y. 1969). Using this approach here results in application of the express disclaimers of defense costs.

a. International Policies 5220113076 and 5220282357 contain express disclaimers of any duty to pay defense costs, using language that courts have enforced. Excess Insurers' Opening Br. 44–46. Warren cites endorsements stating that International follows Liberty "except as regards . . . the amount and limits of liability." Warren Ans. Br. 42 n.28. Imposing defense obligations on the two International policies with this endorsement certainly "regards . . . the amount . . . of liability" to which International agreed. Moreover, those policies clearly state that International does not follow Liberty "with respect to [] any obligation to

investigate or defend any claim or suit." JA4000. Just as construing the broad personal injury endorsement to cover pollution claims would have rendered the pollution exclusion "meaningless" in *County of Columbia*, so too would interpreting the endorsements here as imposing Liberty's defense obligations render the International policies' disclaimer of defense costs meaningless.

N.Y. Marine & General Insurance Co. v. Tradeline (L.L.C.), 266 F.3d 112 (2d Cir. 2001) (cited at Warren Ans. Br. 43), is inapposite. First, the policy there already contained "industry standard [] Cargo Clauses . . . referenced in the typed clauses or endorsements" applied by the court. 266 F.3d at 117. Second, the typewritten provision contained no exclusions, so that the industry standard clauses fully applied. The New York case cited by *N.Y. Marine* for the proposition that typewritten provisions prevail over printed policies held that endorsements are given effect "except as otherwise expressly and clearly stated therein." *Perth Amboy Drydock Co. v. N.J. Mfrs. Ins. Co.*, 270 N.Y.S.2d 819, 820 (N.Y. App. Div. 1966). Here, the endorsements contain an express exception "as regards . . . *the amount and limits of liability*." JA4005, JA4120 (emphasis added).

New York courts have also held that where an endorsement does not "specifically eliminate" a policy provision, the provision remains in effect. *Hunt v. Ciminelli-Cowper Co.*, 939 N.Y.S.2d 781, 784 (N.Y. App. Div. 2012); *see also Soho Plaza Corp. v. Birnbaum*, 969 N.Y.S.2d 96, 100 (N.Y. App. Div. 2013)

(additional exclusions in endorsement "did not eliminate the exclusions contained in the" policy); *Response Pers., Inc. v. Hartford Fire Ins. Co.*, 812 F. Supp. 2d 309, 315 (S.D.N.Y. 2011) ("[T]he words of the policy remain in full force and effect except as altered by the words of the endorsement.") (quotation omitted). Because the endorsements did not alter the policies' "amount and limits of liability," International Policies 5220113076 and 5220282357 have no duty to defend.[6]

b. California Union Policy ZCX003889 and INA Policy XCP156562 each provide that they do "not apply to any expenses for which insurance is provided in the primary insurance." JA3622, JA4421. This language has been read to "expressly exclude the obligation to assume responsibility for defense, while reserving a right to do so if respondent so wishes" and also "further exclude coverage for expenses covered by primary insurance." *Chubb/Pac. Indem. Grp. v. Ins. Co. of N. Am.*, 233 Cal. Rptr. 539, 543 (Cal. Ct. App. 1987). Although Excess Insurers have not located a New York case interpreting this exact language, the New York cases discussed at pp. 25–26 above concerning the definition of "covered" under New York law are instructive.

---

[6] Additionally, the endorsement language in INA Policy XCP145194 that the policy's coverage is "no less broad than underlying" does not impose a duty to defend, because the underlying umbrella policy had no duty to defend as discussed above. INA Policy XCP145194, as well as International Policies 5220113076 and 5220282357, California Union Policy ZCX003889, and INA Policy XCP156562 also do not have defense obligations given their "assistance and cooperation" clauses as noted in Point III.B.2. International Policy 5220489339, California Union Policy ZCX003889, and INA Policy XCP145194 also do not have defense obligations given their "consent" clauses as discussed in Point III.B.3.

2. As Excess Insurers discuss in their Opening Brief at pp. 46–47, certain Excess Policies contain assistance and cooperation clauses that give the insurer the right, but not the duty, to assume the defense.[7] In an effort to rebut New York case law on such clauses, Warren attempts to break out an insurer's defense obligations into separate duties (1) to conduct the defense and (2) to pay defense costs.

Warren claims that this position is supported by *Stonewall Insurance Co. v. Asbestos Claims Management Corp.*, in which the court found that an "assistance and cooperation" clause negated only a duty to conduct the defense but not the duty to pay defense costs. 73 F.3d 1178, 1218 (2d Cir. 1995). That is not New York law. While Warren states that *Stonewall*'s holding was "under New York law" (Warren Ans. Br. 44), in fact, the court applied Texas law in the section Warren quotes. As the Second Circuit stated, "Texas law applies to the substantive interpretation of NGC's insurance policies issued after the spring of 1976." *Id.* at 1189. The quotations from *Stonewall* at page 44 of Warren's Answering Brief concern 1980s policies — *i.e.*, policies governed by Texas law.

As to policies governed by New York law, the *Stonewall* court reached a different conclusion: "[S]everal insurers have *no* duty to pay defense costs" because of the removal of "expenses" from the definition of "ultimate net loss,"

---

[7] Addendum A-11,-12,-16,-21,-23,-26,-32,-34,-35; *see also* Addendum A-33,-41,-56, -63,-69,-81,-82.

and others "ha[d] *no* duty to defend or pay costs" because "[t]he consent provision [did] not require" them to do so. *Id.* at 1218–19 (emphasis added). *Stonewall* thus actually supports Excess Insurers' position.

Warren also cites *In re September 11th Liability Insurance Coverage Cases*, 458 F. Supp. 2d 104 (S.D.N.Y. 2006) (cited at Warren Ans. Br. 44–45 n.34). But *September 11th* held that "assistance and cooperation" language identical to the provisions here "clearly disclaimed coverage of *defense costs*." 458 F. Supp. 2d at 123, 124–25 (emphasis added).

3. As Excess Insurers show in their Opening Brief at pp. 46–47, certain Excess Policies contain "consent" clauses that disclaim responsibility to pay defense costs incurred without the insurer's consent.[8] Warren's primary case on this point applies Ohio law to the consent provision it was interpreting. *See N. River Ins. Co. v. CIGNA Reinsurance Co.*, 52 F.3d 1194, 1208 (3d Cir. 1995) (cited at Warren Ans. Br. 45).

Warren cites no New York case holding that excess policies with "consent" clauses are somehow overridden by a primary insurer's obligation. To the contrary, Warren's own case, *Stonewall* (cited at Warren Ans. Br. 44), interpreted a "consent" clause to mean that the "insurer has no duty to defend or pay costs, but only has the right to do so at its own election." 73 F.3d at 1219. Warren's

[8] Addendum A-16,-26,-32,-34,-35,-41,-56,-63,-69,-81,-82.

argument in footnotes 37 and 38 that trial court opinions dealing with different facts related to primary insurers somehow overrules *Stonewall* makes no sense.

Warren tries to obfuscate by focusing on primary insurers. But New York's highest court has held that while primary insurers "contemplate[] defending a potential lawsuit when it contracts with the insured," that is not the case for an "excess, or 'umbrella,' policy, where the duty to defend is not as readily triggered." *GMAC v. Nationwide Ins. Co.*, 828 N.E.2d 959, 961–62 (N.Y. 2005).

4. Five Excess Policies define "ultimate net loss" as excluding "legal expenses"[9] and three Excess Policies define "loss" to "exclude all expenses and costs."[10] Under New York law, a policy that excludes defense costs from its definition of "loss" disclaims any duty to pay defense. Excess Insurers' Opening Br. 48–49. Warren claims that because five of these policies also contain "consent" provisions that contemplate apportioning defense costs (paid at Excess Insurers' discretion), the exclusions from the "loss" definition cannot disclaim defense. Warren Ans. Br. 47–48. This is a false conflict. Apportioning costs that an insurer may *choose* to pay does mean that the insurer *must* pay defense.

Warren also attempts to use an out-of-context statement from briefing below to allege that the Excess Insurers have "admitted" that policies containing a cost

---

9 *See* Addendum A-16,-26,-32,-34,-35 (emphasis added).

10 *See* Addendum A-22,-27; *see also* Addendum A-33.

apportionment provision have a defense obligation. Warren Ans. Br. 48 (citing WB528). But Excess Insurers specifically noted that the policies would pay defense costs only "to the extent all other terms and provisions are satisfied" (WB528), which includes a requirement to obtain the Excess Insurers' written consent. The Excess Insurers admitted only that they would reimburse defense costs incurred with their consent.

Finally, Warren contends that a policy defining "ultimate net loss" to exclude defense costs must nonetheless pay defense costs because of separate language promising to follow form to the Umbrella Policies. Warren Ans. Br. 48–49. Warren is incorrect. First, Warren relies on non-New York cases (*see* Warren Ans. Br. 48 & n.40) which contradict New York law. Second, while Warren tries to twist *Aetna Casualty & Surety Co. v. Home Insurance Co.*, 882 F. Supp. 1328 (S.D.N.Y. 1995) (cited at Warren Ans. Br. 48–49), that court held that the relevant policies (i) defined "loss" to exclude defense expenses, and (ii) did not have an independent duty to defend, and so had no duty to pay defense costs at all based on the definition of ultimate net loss. 882 F. Supp. at 1335, 1337–38. The same is true here.[11]

[11] As the Excess Insurers stated in their Opening Brief at p. 49 n.16, they join Travelers' argument that Houdaille did not validly assign coverage rights under the excess policies to Viking and Warren. The Excess Insurers also join Point I of Travelers' reply brief, which Excess Insurers incorporate herein.

CONCLUSION

For the foregoing reasons and the reasons set forth in the Excess Insurers' Opening Brief, this Court should reverse (i) the Court of Chancery's allocation ruling, (ii) the Superior Court's ruling that the 1980–1985 Liberty policies are exhausted, and (iii) the Superior Court's ruling that the Excess Policies identified above are obligated to pay defense costs or, to the extent that some are required to pay defense costs, that they must do so outside aggregate limits. In the event that this Court finds existing New York Court of Appeals precedent is not controlling on one or more issues, this Court should certify these questions to the New York Court of Appeals for a definitive ruling on New York law.

SEITZ ROSS ARONSTAM & MORITZ LLP

/s/ Collins J. Seitz, Jr.
Collins J. Seitz, Jr. (#2237)
Garrett B. Moritz (#5646)
Nicholas D. Mozal (#5838)
100 South West Street, Suite 400
Wilmington, DE 19801
Tel: (302) 576-1600

OF COUNSEL:

Tancred Schiavoni
Gary Svirsky
O'MELVENY & MYERS LLP
Times Square Tower
7 Times Square
New York, NY 10036
Tel: (212) 326-2000

-and-

Brian G. Fox
Lawrence A. Nathanson
SIEGAL & PARK
533 Fellowship Road - Suite 120
Mount Laurel, NJ 08054
Tel: (856) 380-8900

-and-

WHITE & WILLIAMS LLP

/s/ John D. Balaguer
John D. Balaguer (#2537)
824 N. Market Street, Suite 902,
P.O. Box 709
Wilmington, DE 19899-0709
Tel: (302) 467-4501

Attorneys for Defendants TIG Insurance Company, f/k/a International Insurance Company, with respect to policies numbered 5220113076 and 5220282357, and Westchester Fire Insurance Company, with respect to policy numbered 5220489339, by operation of novation; ACE Property & Casualty Insurance Company (f/k/a CIGNA Property & Casualty Insurance Company), as successor-in-interest to Central National Insurance Company of Omaha, but only as respects policies issued through Cravens, Dargan & Company, Pacific Coast (improperly named as The Central National Insurance Company of Omaha); and Century Indemnity Company, as successor to CCI Insurance Company, as successor to Insurance Company of North America and Century Indemnity Company as successor to CIGNA Specialty Insurance Company (f/k/a California Union Insurance Company)

TIGHE & COTTRELL, P.A.

/s/ Paul Cottrell
Paul Cottrell (#2391)
704 King Street, Suite 500
P.O. Box 1031
Wilmington, DE 19899
Tel: (302) 658-6400

-and-

YOUNG CONAWAY STARGATT & TAYLOR, LLP

/s/ Timothy Jay Houseal
Timothy Jay Houseal (#2880)
Jennifer M. Kinkus (#4286)
Rodney Square
1000 North King Street
Wilmington, DE 19810
Tel: (302) 571-6682

Attorneys for The Continental Insurance Company as successor by merger to Fidelity & Casualty Company of New York

OF COUNSEL:

Laura McKay
HINKHOUSE WILLIAMS WALSH LLP
180 N. Stetson St., Suite 3400
Chicago, IL 60601
Tel: (312) 784-5400

-and-

Marc S. Lauerman
Lynn H. Murray
GRIPPO & ELDEN LLC
111 S. Wacker Drive, Suite 5100
Chicago, IL 60606
Tel: (312) 704-7700

TIGHE & COTTRELL, P.A.

/s/ Paul Cottrell
Paul Cottrell (#2391)
704 King Street, Suite 500
P.O. Box 1031
Wilmington, DE 19899
Tel: (302) 658-6400

-and-

YOUNG CONAWAY STARGATT & TAYLOR, LLP

/s/ Timothy Jay Houseal
Timothy Jay Houseal (#2880)
Jennifer M. Kinkus (#4286)
Rodney Square
1000 North King Street
Wilmington, DE 19810
Tel: (302) 571-6682

Attorneys for Certain Underwriters at Lloyd's, London and Certain London Market Insurance Companies, Granite State Insurance Company, Lexington Insurance Company And National Union Fire Insurance Company Of Pittsburgh, Pa.

OF COUNSEL:

Laura McKay
HINKHOUSE WILLIAMS WALSH LLP
180 N. Stetson St., Suite 3400
Chicago, IL 60601
Tel: (312) 784-5400

SMITH KATZENSTEIN & JENKINS LLP

/s/ Robert J. Katzenstein
Robert J. Katzenstein (#0378)
800 Delaware Avenue, 10th Floor
P.O. Box 410
Wilmington, DE 19899
(Courier 19801)
Tel: (302) 652-8400

Attorneys for TIG Insurance Company, as successor by merger to International Insurance Company, as successor by merger to International Surplus Lines Insurance Company (Policy No. XSI 5217 only)

OF COUNSEL:

Christopher R. Carroll
Heather E. Simpson
CARROLL MCNULTY
& KULL LLC
120 Mountain View Boulevard
Post Office Box 650
Basking Ridge, NJ 07920
Tel: (908) 848-6300

DILWORTH PAXSON LLP

/s/ Thaddeus J. Weaver
Thaddeus J. Weaver (#2790)
One Customs House
704 King St., Suite 500
P.O. Box 1031
Wilmington, DE 19801
Tel: (302) 571-8867

-and-

YOUNG CONAWAY STARGATT & TAYLOR, LLP

/s/ Timothy Jay Houseal
Timothy Jay Houseal (#2880)
Jennifer M. Kinkus (#4286)
Rodney Square
1000 North King Street
Wilmington, DE 19810
Tel: (302) 571-6682

Attorneys for OneBeacon America Insurance Company as successor to Commercial Union Insurance Company, XL Insurance America, Inc., as successor to Vanguard Insurance Company, and Republic Insurance Company, n/k/a Starr Indemnity & Liability Company

OF COUNSEL:

Laura McKay
Douglas M. DeWitt
HINKHOUSE WILLIAMS WALSH LLP
180 N. Stetson St., Suite 3400
Chicago, IL 60601
Tel: (312) 784-5400

MORRIS JAMES LLP

/s/ James W. Semple
James W. Semple (#0396)
David J. Soldo (#4309)
500 Delaware Ave., Suite 1500
P.O. Box 2306
Wilmington, DE 19899
Tel: (302) 888-6870

Attorneys for Defendant Westport Insurance Corporation

OF COUNSEL:

Karl S. Vasiloff
Kristin Suga Heres
ZELLE HOFMANN VOELBEL & MASON LLP
950 Winter Street, Suite 1300
Waltham, MA 02451
Tel: (781) 466-0700

TYBOUT REDFEARN & PELL

/s/ Robert M. Greenberg
Robert M. Greenberg (#4407)
750 Shipyard Drive - Suite 400
P.O. Box 2092
Wilmington, DE 19801
Tel: (302) 658-6901

Attorneys for Old Republic Insurance Company

OF COUNSEL:

Amy R. Paulus
Mark D. Paulson
Don Sampen
CLAUSEN MILLER P.C.
10 S. LaSalle St.
Chicago, IL 60603
Tel: (312) 855-1010

December 22, 2014

PUBLIC VERSION FILED:
January 6, 2015