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**IN THE SUPREME COURT OF THE STATE OF DELAWARE**

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| IN RE VIKING PUMP, INC. AND WARREN PUMPS LLC INSURANCE APPEALS | No. 518,2014<br>No. 523,2014<br>No. 525,2014<br>No. 528, 2014 | PUBLIC VERSION<br>Dated: NOVEMBER 21, 2014 |
| | CASES BELOW: | |
| | SUPERIOR COURT OF THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY, Consolidated C.A. No. N10C-06-141 FSS [CCLD]<br>-and-<br>COURT OF CHANCERY OF THE STATE OF DELAWARE, Civil Action No. 1465-VCS | |

# APPELLANT TRAVELERS CASUALTY AND SURETY COMPANY'S OPENING BRIEF

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## NATURE OF THE PROCEEDINGS

In this insurance-coverage dispute, two companies faced with asbestos personal-injury claims—Viking Pump, Inc. ("Viking") and Warren Pumps, LLC ("Warren")—seek to recover under insurance policies issued to a third company: Houdaille Industries, Inc. ("Houdaille"). The litigation first arose in 2005, when Viking brought suit in the Court **o**f Chancery claiming that it was the rightful heir to insurance policies that the Liberty Mutual Insurance Company ("Liberty") had issued to Houdaille or, in the alternative, seeking partition of the Liberty policy limits. Liberty, Viking, and Warren settled their dispute. Viking and Warren then filed new complaints against more than twenty other insurers that had issued excess policies to Houdaille. Appellant Travelers Casualty and Surety Company, formerly known as the Aetna Casualty and Surety Company ("Travelers Casualty"), is one of those excess carriers.[1]

In the Chancery Court, the parties cross-moved for summary judgment on two issues: (1) whether Viking and Warren had any rights to coverage under Houdaille's excess policies, and (2) if so, how to allocate the losses where, as here, underlying asbestos injuries potentially trigger coverage across multiple policy

[1] Travelers Casualty issued two XN Overlayer Indemnity Policies to Houdaille, effective 3/1/82-3/1/83 and 3/1/83-3/1/84 ("Aetna XN Policies"). Travelers Appendix ("TA") 1126-39, TA1160-74.

periods.[2] As to the first issue, the Court acknowledged that the excess policies contain express provisions requiring insurer consent—never sought or received here—to any assignment of insurance rights. But applying its interpretation of New York law, the Court held that, at the time of the purported assignments, Houdaille's contingent, immature claim to coverage for unknown, unasserted asbestos liabilities was a freely assignable "chose in action," which rendered the consent requirements void as a matter of "New York[] public policy." *Viking Pump, Inc. v. Century Indem*. Co., 2 A.3d 76, 104-06 (Del. Ch. 2009); *but see id.* at 119 ("New York is a state [where] . . . contractual freedom is the key public policy consideration"). Houdaille, the Court concluded, had thus validly assigned its insurance rights to both Viking and Warren. *Id.* at 93-102.

Turning to allocation, the Chancery Court took note of a split in authority: some jurisdictions adopt a "joint and several" rule that allows the insured to pick a triggered policy and collect in full up to policy limits; other courts allocate liability according to each triggered period's "pro rata" share. *Id.* at 107 n.99. The court acknowledged that New York's highest court had rejected "joint and several allocation" as "not consistent" with standard policy language, also included in the

[2] *See Viking Pump, Inc. v. Century Indem*. Co., 2 A.3d 76 (Del. Ch. 2009) (copy of slip opinion attached hereto as Exhibit 1).

policies here, limiting coverage to injury "'*during the policy period*.'" *Consol. Edison Co. of N.Y., Inc.. v. Allstate Ins. Co.*, 774 N.E.2d 687, 695 (N.Y. 2002) ("*Con. Ed*."); *see Viking Pump*, 2 A.3d at 84, 109, 118. But as the Chancery Court saw it, the New York Court of Appeals' "linguistic analysis in [*Con. Ed.* was] extremely abbreviated," "not at all clear," and was "hardly compelled by the words 'during the policy period.'" *Viking Pump,* 2 A.3d at 118; *compare Con. Ed.*, 774 N.E.2d at 695 ("joint and several allocation is not consistent" with "'during the policy period'" limitation). The Chancery Court then attempted to distinguish *Con. Ed.* and its "terse reasoning" on the ground that the policies here contain additional provisions—"Non-Cumulation" provisions—that the Chancery Court viewed as inconsistent with pro rata allocation. *Viking Pump*, 2 A.3d at 118-27.

With those questions decided, the case was transferred to the Superior Court to hear and determine a number of follow-on issues. A three-week trial and extensive post-verdict motion practice followed. Throughout these proceedings, the Superior Court adopted and applied the Chancery Court's allocation holding as the basis for its decisions on several issues.[3] On June 9, 2014, the Superior Court

[3] *See Viking Pump, Inc. v. Century Indem. Co*., 2013 Del. Super. LEXIS 615, at *13 (Del. Super. Oct. 31, 2013) (Chancery Court's "'all sums' holding is important because it ultimately formed the basis for several post-trial arguments")*; see also id*. at *38-39 (rejecting excess carriers' arguments on the application of "non-

entered final judgment. Joint Appendix ("JA") 1862-75 (additional copy attached hereto as Exhibit 2). Warren then moved to clarify and amend the judgment, *see* JA420, which the court denied on August 20. JA1889-91 75 (additional copy attached hereto as Exhibit 3). On September 17, Travelers filed its timely notice of appeal.

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cumulation and prior insurance clauses" as "contrary to *Viking II*" and its "all sums allocation" holding); *id*. at *69 ("horizontal exhaustion and [the Chancery Court's] all sums allocation harmonize").

## SUMMARY OF ARGUMENT

The Chancery Court's decision below is contrary to the excess policies' express terms requiring insurer consent to assignment of coverage, *see* Part I, and contrary to New York's clear precedent requiring pro rata allocation of continuing, multi-period liabilities, *see* Part II. On both grounds, the Court should reverse.

**I.** The purported transfers of Houdaille's excess insurance violated the policies' express consent requirements and were without force or legal effect.

**1.** Consent-to-assignment provisions in insurance contracts are valid under New York law and should be enforced according to their terms. *Truglio v. Zurich Gen. Accident & Liab. Ins. Co.*, 160 N.E. 774 (N.Y. 1928). The one recognized exception to this rule permits unauthorized assignments only after an identifiable loss has accrued and ripened into a fixed debt. *Mellen v. Hamilton Fire Ins. Co.*, 17 N.Y. 609, 615 (1858). That exception is inapplicable to the attempted transfers at issue here, which purport to assign coverage for unknown, unripe, and unreported third-party personal-injury claims. As a growing number of courts have held—and as the New York Court of Appeals is likely to hold when presented with the question—inchoate coverage rights of that sort are too



speculative and carry too much continuing risk to trump bargained-for consent requirements in an insurance contract. *E.g., Travelers Cas. & Sur. Co. v. U.S. Filter Corp*., 895 N.E.2d 1172, 1179 (Ind. 2008); *Henkel Corp. v. Hartford Accident & Indem. Co*., 62 P.3d 69 (Cal. 2003).

At the time of the alleged transfers here, Houdaille's unaccrued coverage for unknown and as-yet unreported asbestos liabilities was in no way fixed or identifiable. Moreover, to permit the unauthorized transfer of those inchoate coverage rights though the array of alleged assignments here—to Warren, *see* TA967-71; to Viking, *see* TA1036-42; but then back to Houdaille, *see* TA1065-66; and to John Crane, Inc. ("John Crane"), *see* TA724—would materially increase defense costs and would put the excess carriers at serious risk of further "disputes over the existence and scope" of multiple alleged assignments. *See Henkel*, 62 P.3d at 75. The Court should enforce the policies' consent requirements and reverse the judgment. In the alternative, the Court should at the very least certify this unsettled and important question to the New York Court of Appeals.

**2.** In addition, this Court need not even reach the enforceability of the policies' consent-to-assignment provisions to reverse the judgment below. By their terms, the agreements at issue do not even contemplate any assignment of excess coverage to Viking or Warren.

**II.** Even if coverage rights had been transferred, the Court below also failed to apply settled New York precedent requiring pro rata allocation of liabilities where "harm spans. . . several successive insurance policies." *Con. Ed*., 774 N.E.2d 687, 693. That binding caselaw specifically rejects the Chancery Court's "joint and several allocation" method and holds that it is "not consistent" with policy language, materially identical to the language here, covering only injury "'during the policy period.'" *Id.* at 695.

The Chancery Court's apparent disagreement with New York's governing pro rata caselaw provides no basis for its failure to apply binding precedent. Nor does the Chancery Court's reliance on other provisions in the excess policies—"Non-Cumulation" and "Prior Insurance" provisions—warrant rejecting New York's settled pro rata rule. The Court should apply settled New York law and reverse the Chancery Court's allocation holding. In the alternative, if the Court is uncertain about the state of New York law in this area, it should certify this question as well to the New York Court of Appeals.

## STATEMENT OF FACTS

### I. THE HOUDAILLE BUSINESS

In the early 1900s, a young Frenchman named Maurice Houdaille came up with an idea for a new product perfectly suited to the coming automobile age: the hydraulic shock absorber. TA715-17. Houdaille opened its Buffalo, New York headquarters in 1919. *Id*. Over the next several decades, Houdaille gradually moved away from automobile parts and diversified, adding "machine tool[s]," "pumps," and other products to its portfolio. *Id*.; *see* Baker & Smith, *The New Financial Capitalists* 65 (Cambridge Univ. Press 1998). By 1977, industrial pumps had become the company's leading line of business and accounted for more than half of the firm's revenue. *Id*. That same year, Houdaille left Buffalo and moved its headquarters to Florida.

Houdaille manufactured and sold its pumps under two brand names: Viking Pump and Warren Pumps. Originally acquired in 1968, the Viking Pump unit operated continuously as a division within Houdaille until 1985. *See* TA1027. The Warren Pumps unit was originally acquired in 1972 through a stock-purchase transaction, and was later merged into Houdaille in 1979. TA740. From then through December 1984, the Warren Pumps brand, like the Viking Pump brand, operated as an unincorporated division within Houdaille. *Id*.; TA757-58.

## II. THE HOUDAILLE INSURANCE POLICIES

### A. Overview Of Houdaille's Coverage

Like many manufacturers, Houdaille purchased and maintained a series of annual liability insurance policies consisting of primary, umbrella, and excess layers. From 1972 through 1985, Houdaille obtained its primary coverage through a series of annual, "occurrence"-based policies issued by Liberty. The limits of the Liberty primary policies varied over time, [redacted].[4]

During this same 14-year period, Houdaille also obtained umbrella policies from Liberty. Each year, the Liberty umbrella policy sat in the layer immediately above Houdaille's primary coverage, providing up to [redacted] of coverage per "occurrence." *See, e.g.*, TA1104-25.

Houdaille also purchased a total of 55 excess policies, issued by more than 20 different insurers, that sat above the Liberty umbrella policies. Subject to their various terms, the excess policies were designed to cover catastrophic losses, kicking in only once the specified underlying retentions were exceeded. Two such policies are the Aetna XN Policies at issue in this appeal. In 1982 and again in 1983, Travelers Casualty issued policies to Houdaille that would indemnify for

[4] *See Viking Pump, Inc. v. Liberty Mut. Ins. Co.*, 2007 Del. Ch. LEXIS 43, at *13 (Del. Ch. Apr. 2, 2007).



[redacted]

covered losses "on account of any one accident or occurrence" in excess of the per occurrence limits of the underlying policies (i.e., [redacted]). TA1126-39, TA1160-74.

### B. The Aetna XN Policies (Along With Most Of The Other Excess Policies) "Follow Form" To The Relevant Terms Of The Liberty Umbrella Policies

Like most of the excess policies in this case, the Aetna XN Policies contain a "follow form" endorsement that adopts many of the terms and conditions of the underlying Liberty umbrella policies. TA1139, TA1174.[5] Under the Liberty umbrella's key coverage language, the insurer has an obligation to "pay . . . all sums . . . which the insured shall become legally obligated to pay . . . as damages . . . because of . . . *personal injury* . . . with respect to which this policy applies and caused by an *occurrence.*" *E.g.*, TA1155 (emphasis added).

The word "occurrence" is a defined term under the Liberty umbrella:

[5] In the lower courts, Travelers Casualty argued that the Aetna XN Policies' "follow form" language did not, as the plaintiffs contended, completely supersede Travelers Casualty's specific coverage provisions and trigger language. But the Superior Court held that the unusually broad terms of the "follow form" endorsement effectively displaced all of the Aetna XN Policies' specific provisions. *Viking Pump, Inc. v. Century Indem. Co*., 2013 Del. Super. LEXIS 615, at *80-81 & n.257 (Del. Super. Oct. 31, 2013). Because that decision does not impact the issues on appeal, Travelers Casualty has elected not to brief the issue.



[redacted]

> "occurrence" means injurious exposure to conditions, which results in personal injury, property damage or advertising injury or damage neither expected nor intended from the standpoint of the insured.

*E.g.*, TA1404.

The Liberty umbrella policies also contain a definition of "personal injury" that expressly limits the term to "personal injury. . . *during the policy period*":

> "personal injury" means *personal injury or bodily injury which occurs during the policy period* sustained by a natural person, . . . .

*E.g.*, *id.* (emphasis added).

In addition to these coverage provisions and definitions, a separate section of the Liberty umbrella policies—entitled to "Limits of Liability"—includes the following "Non-Cumulation" provision:

> Non-Cumulation of Liability — Same Occurrences — If the same occurrence gives rise to personal injury, property damage or advertising injury or damage which occurs partly before and partly within any annual period of this policy, then each occurrence limit and the applicable aggregate limit or limits of this policy shall be reduced by the amount of each payment made by [the insurer] with respect to such occurrence, either under a previous policy or policies of which this is a replacement, or under this policy with respect to previous annual periods thereof.

*E.g.*, TA1156.

Some of the other excess policies at issue in this litigation do not expressly "follow form" to the terms of the Liberty umbrella policies. These policies contain their own (substantially similar) coverage provisions, "occurrence" language, and

"personal injury" definitions. *E.g.*, JA2170. Certain of these other policies also contain a "Prior Insurance and Non Cumulation of Liability" condition. *Id.* Although it is similar in some respects to the Liberty Non-Cumulation provision, this condition also contains an additional "continuing coverage" provision not found in the Liberty Non-Cumulation provision.[6]

### C. Consent-to-Assignment Requirements

The Aetna XN Policies, as well as the other excess policies in this case, were all issued to Houdaille. *E.g.*, TA1126, TA1160. None of Houdaille's divisions or departments had any separate rights—distinct from Houdaille's rights—under the policies. *See generally* 9 *Fletcher Cyclopedia of the Law of Corporations* § 4233.50 ("An unincorporated operating division of a corporate business is not a recognized legal entity."). And the policies expressly barred any assignment of Houdaille's interest to another entity without the written consent of the insurer:

> Assignment of interest under this policy shall not bind [the insurer] until its consent is endorsed hereon.

TA1123, TA1132, TA1157, TA1167.

[6] *See generally Olin Corp. v. Am. Home Assurance Co.*, 704 F.3d 89, 99-100 (2d Cir. 2012) (referring to "the first paragraph of [this condition] as the 'prior insurance provision' and the second as the 'continuing coverage provision.'").

## III. AFTER THE EXCESS POLICIES ARE ISSUED, HOUDAILLE DIVESTS ITS FORMER PUMP DIVISIONS

In January of 1985, Houdaille embarked on a series of transactions in which it spun-off its former divisions into new subsidiaries and, eventually, divested those businesses entirely. At no point did Houdaille or anyone else seek the excess insurers' consent to an assignment of Houdaille's insurance rights.

### A. The Viking Pump Divestiture

#### *1. Houdaille Creates A New Subsidiary For Its Viking Pump Unit*

In January of 1985, Houdaille formed a new corporation—Viking Pump-Houdaille, Inc. ("VPH")—as a wholly owned subsidiary. TA1027. That same day, Houdaille and VPH entered into an Assignment and Assumption Agreement (the "Viking AAA"), under which Houdaille transferred to VPH all [redacted] TA1036. VPH, in turn, "[redacted] TA1037-39.

Aside from these general provisions, the parties did not otherwise mention or refer to insurance coverage or a transfer of insurance rights. Upon execution of



[redacted]

the Viking AAA, no attempt was made to inform the excess carriers that a purported assignment of rights was taking place.

### *2. The Sale Of VPH's Stock To IDEX*

After the Viking AAA was executed, Houdaille operated VPH as a subsidiary for the next three years. In January of 1988, however, Houdaille entered into a Stock Purchase Agreement with IDEX Corporation for the sale of several Houdaille subsidiaries, including VPH. TA1045-71.

Section 5.12 of the Stock Purchase Agreement specifically discusses [redacted] TA1065-66. Under that provision, Houdaille was to *retain* all pre-closing liabilities to the extent of its coverage [redacted]":

[redacted]

*Id*. In addition, extrinsic evidence concerning the parties' negotiations shows that their intent was to keep Houdaille's insurance rights with Houdaille, and not to transfer them to VPH or IDEX. An October 1987 Houdaille memorandum expressly states as much:

[redacted]



[redacted]

[redacted]

TA1074 (emphasis in original).

The Stock Purchase Agreement was executed on January 22, 1988. TA1045. Once again, no one—not Houdaille, not VPH, and not IDEX—notified or sought consent from the excess insurers.[7]

**B. The Warren Pumps Divestiture**

***1. Houdaille Creates A New Subsidiary For Its Warren Pumps Unit***

As it did with Viking, Houdaille also formed a new subsidiary for its Warren Pumps unit—Warren Pumps-Houdaille, Inc. ("WPH")—in December of 1984. TA757-58. In January 1985, Houdaille and WPH also entered into an Assignment and Assumption Agreement ("Warren AAA"), under which Houdaille transferred all [redacted] TA761-62.

***2. Houdaille Sells Off WPH's Assets***

Shortly thereafter, a group of senior managers approached Houdaille with a plan for a management-led buyout of the Warren Pumps unit. The management group formed a new corporation—WP, Inc.—which then entered into an Asset

[7] VPH would later change its name to Viking Pump, Inc., the plaintiff here.



[redacted]

Sale Agreement ("Warren ASA") with both Houdaille and WPH. TA770-964. Under this agreement, WP, Inc. agreed to purchase WPH's assets and to assume responsibility for any as-yet unasserted liabilities. TA791-95.

[redacted]

In an effort to salvage the transaction, Houdaille considered making a request for the excess carriers' consent to a transfer of insurance rights to WP, Inc.

[redacted]

TA974.

Having been so advised, Houdaille never notified or sought consent from any excess carrier. Three days later, Houdaille, WPH, and WP, Inc. amended the Warren ASA to [redacted]



[redacted]

[redacted] TA969-70.[8]

### C. Houdaille Purports To Assign Its Insurance Rights To John Crane

Shorn of its former pump divisions, Houdaille continued to operate its remaining businesses. But by 1989, the company had divested most of its assets and was in the process of winding down its operations.

In November of 1989, Houdaille sold its remaining assets and liabilities to John Crane. TA720-27. The Assignment and Assumption Agreement between Houdaille and John Crane ("John Crane AAA") expressly transferred to John Crane all of Houdaille's [redacted] TA724. As with the other divestitures, Houdaille did not seek or obtain the insurers' consent.

### D. The Asbestos Personal-Injury Claims That Viking And Warren Now Face Were Unasserted And Unknown At The Time Of The Purported Assignments

The underlying asbestos personal-injury claims for which Viking and Warren seek coverage arise out of alleged exposure to asbestos that took place

[8] WP, Inc. has since changed its name and converted to a limited liability company. It is now known as Warren Pumps, LLC, the plaintiff here.



[redacted]

decades ago. Asbestos exposure, however, does not necessarily or immediately cause symptoms. Because of this long latency period, none of the claims for which Viking and Warren now seek coverage were fixed or even known to the claimants, much less Viking, Warren or the excess insurers, at the time of the businesses' divestiture. Houdaille completed the divestiture of its former Warren Pumps division in 1985; the first asbestos claim against Warren was not filed until 1987. TA1101. The Viking Pump divestiture was complete and finalized by January of 1988; the first asbestos claim against Viking was not brought until the early-to-mid 1990s. TA1180. At the time of both divestitures, then, all of Viking's and Warren's asbestos liabilities—and all of their claims for coverage—were unasserted, unripe, and theoretical.

## ARGUMENT

## I. WARREN AND VIKING HAVE NO RIGHTS UNDER THE EXCESS POLICIES

### A. Question Presented

Did Houdaille validly assign coverage rights under the excess policies to Viking and Warren?[9]

### B. Standard Of Review

Whether a contractual provision is void as against public policy is a question of law subject to plenary review. *Whalen v. On-Deck, Inc*., 514 A.2d 1072, 1072 (Del. 1986). A lower court's interpretation of contractual language also presents a legal question subject to *de novo* review. *BLGH Holdings LLC v. enXco LFG Holding, LLC*, 41 A.3d 410, 414 (Del. 2012). In addition, this Court reviews *de novo* a lower court decision granting summary judgment. *Winshall v. Viacom Int'l Inc*., 76 A.3d 808, 815 (Del. 2013). The Court's task is to determine "whether there is any genuine issue of material fact, and if not, whether the moving party is entitled to judgment as a matter of law." *Id*.

### C. Merits Of Argument.

The excess policies issued to Houdaille expressly provide that "[a]ssignment

[9] *See* TA110-11 (transaction nos. 24671246 & 24671230) (raising the question in the court below); *Viking Pump*, 2 A.3d at 91-107 (deciding the question).

of interest under this policy *shall not bind [the insurer] until its consent is endorsed hereon*." *E.g.*, TA1123, TA1132, TA1157, TA1167 (emphasis added). All agree that, contrary to this express requirement, no one ever sought or obtained the excess carriers' consent to any transfer of Houdaille's insurance rights.[10] Thus, under the plain terms of the excess policies, any purported assignment of Houdaille's coverage rights for unknown, unasserted, and inchoate asbestos liabilities was void and without effect. *See infra*, at 20-32. And in any event, the Chancery Court also erred at the threshold because the agreements and assignments executed during Houdaille's divestiture of its pump divisions do not even purport to transfer the excess coverage at issue in this litigation. *See infra*, at 32-37.

### *1. The Failure To Obtain The Excess Carriers' Consent Bars Viking's And Warren's Claims For Coverage*

#### a. Consent-To-Assignment Provisions Are Enforceable Against Purported Transfers Of Unknown, Inchoate, And Unreported Rights To Coverage

New York courts have long recognized that a consent-to-assignment provision in an insurance contract, like any other freely bargained provision, is valid and should generally be enforced according to its terms. *See, e.g., Truglio v. Zurich Gen. Accident & Liab. Ins. Co*., 160 N.E. 774, 774 (N.Y. 1928) (Cardozo,

[10] *Viking Pump*, 2 A.3d at 103.

J.) (enforcing anti-assignment provision and holding that the "policy of insurance . . . was no longer 'a live instrument'" after purported transfer) (citation omitted); *Carle Place Plaza Corp. v. Excelsior Ins. Co*., 534 N.Y.S.2d 397, 398 (App. Div. 1988) (same).[11]

### i. The Traditional New York Exception Permitting Assignment Is Narrow And Limited

The one exception to this rule applies to an assignment taking place after the coverage claim has already become fixed and accrued. *E.g.*, *Mellen v. Hamilton Fire Ins. Co.,* 17 N.Y. 609 (1858); *Courtney v. N.Y. City Ins. Co*., 28 Barb. Ch. 116 (N.Y. Sup. Ct. 1858). The basic rationale for the exception is that, after the "loss occurs and the company ha[s] notice[,] . . . the loss becomes, by force of the contract, a debt payable to the insured presently or at the time appointed in the policy." *Courtney*, 28 Barb. Ch. at 118. This fixed and identifiable right to coverage is for all intents and purposes a "chose in action"—a right to collect a sum certain or a sum "which may readily be made certain as and when the time

[11] The Chancery court concluded that New York law governed the insurance policies. The Chancery Court erred with respect to policies like the Aetna XN policies that were issued to Houdaille after it had transferred its corporate headquarters to Florida. Florida law properly governs the interpretation of insurance policies to an insured located in Florida. This error was harmless because the laws of Florida and New York are in accord on the issues raised in this brief.

comes for [its] transfer." J.E. Penner, *The Idea of Property in Law* 130 (1997). In those circumstances, "it is difficult to see any reason connected either with public policy or the proper rights of the [insurer], why the [insured] should not be permitted" to transfer its rights "in payment of debts or to meet the other necessities of business." *Goit v. Nat'l Prot. Ins. Co.,* 25 Barb. Ch. 189, 194 (N.Y. Sup. Ct. 1855).

All of the early cases developing this exception—and nearly all of the New York cases applying it since—involve claims under first-party property insurance policies (typically, fire insurance policies). *E.g.*, *Mellen,* 17 N.Y. at 609; *Courtney*, 28 Barb. Ch. at 118; *Goit*, 25 Barb. Ch. at 194. In those cases, a fire occurs and property is damaged. Once the fire is put out, "the risk disappears and nothing remains except the assured's right to payment." *Beck-Brown Realty Co. v. Liberty Bell Ins. Co*., 241 N.Y.S. 727, 728 (Sup. Ct. 1930). An assignment of the insured's coverage right, in those circumstances, is little more than an assignment of "an absolute debt" and may no longer be encumbered by a consent-to-assignment requirement. *Goit*, 25 Barb. Ch. at 195; *see Globecon Grp., LLC v. Hartford Fire Ins. Co*., 434 F.3d 165, 171 (2d Cir. 2006) ("once the insured-against loss has occurred, the policy-holder essentially is transferring a cause of action rather than a particular risk profile").

### ii. Coverage Rights For Unknown, Unaccrued, And Unreported Losses Are Not Fixed Debts Or Choses In Action

These New York cases involving transfers of fixed debts arising out of "instantly incurred" property damage are different in kind from the purported transfers at issue in this case—assignments of rights to coverage for third party "bodily injury . . . claims" that had not accrued, were not known, and would "not manifest themselves" until many years after the purported transfers. *See Travelers Cas. & Sur. Co. v. U.S. Filter Corp*., 895 N.E.2d 1172, 1179 (Ind. 2008). As a growing number of courts have recognized, these inchoate rights to recover for as-yet unreported, and perhaps never to be reported, claims are far too "speculative" to constitute "chose[s] in action assignable" in the face of an anti-assignment provision. *See id.* at 1180 (internal quotation marks and citation omitted); *Henkel Corp. v. Hartford Accident & Indem. Co.,* 62 P.3d 69, 75 (Cal. 2003) (claims that "had not been reduced to a sum of money due or to become due under the policy" could not be assigned without consent).[12]

[12] *See also Keller Founds., Inc. v. Wausau Underwriters Ins. Co.*, 626 F.3d 871, 874–75 (5th Cir. 2010) (strictly enforcing anti-assignment provision under Texas law); *Century Indem. Co. v. Aero-Motive Co*., 318 F. Supp. 2d 530 (W.D. Mich. 2003) (applying Michigan law and following *Henkel*); *In re Katrina Canal Breaches Litig*., 63 So. 3d 955, 960 (La. 2011) ("no public policy in Louisiana to prevent parties from contractually prohibiting post-loss assignments"); *Del Monte Fresh Produce, Inc. v. Fireman's Fund Ins. Co*., 183 P.3d 734 (Haw. 2007) (strictly enforcing anti-assignment provision).

The decision in *U.S. Filter* is particularly instructive. There, the underlying liabilities were personal-injury claims arising from exposure to silica. 895 N.E.2d at 1179. At the time of the purported assignment, all of the alleged personal injuries were "unreported" and "unrealized." *Id.* And in no sense did the manufacturer's claim for coverage constitute a fixed or identifiable "chose in action." *Id*. at 1180-81. That sort of speculative coverage right, the Court held, could not "generate an assignable coverage benefit" in the face of an express anti-transfer provision. *Id.* at 1180. Permitting assignment could increase the insurer's "risk" and might result in the insurer being called in to defend multiple insureds in multiple suits. *Id.*; *see also Henkel*, 62 P.2d at 75 ("An additional burden may arise whenever the predecessor corporation still exists or can be revived because of the ubiquitous potential for disputes over the existence and scope of the assignment.") (internal citation omitted). The lack of a "fixed" and "identifiable" claim thus doomed the transfer under the policy's express consent-to-assignment provision. *U.S. Filter*, 895 N.E.2d at 1180 (citing *Globecon*, 434 F.3d at 172-73).

### iii. New York Caselaw Is Consistent With And Points Toward The Rule Of *U.S. Filter* And *Henkel*

The New York Court of Appeals has not yet had an opportunity to consider whether consent-to-assignment provisions should be enforced against transfers of speculative and inchoate coverage claims of the sort at issue here. But existing

New York law strongly suggests that, when the time comes, the Court of Appeals will hold that a "coverage benefit" must be "fixed" and "identifiable" before it may trump an express consent-to-assignment provision.

As the Second Circuit has noted, New York courts considering the validity of post-loss assignments in other contexts have frequently drawn the same distinction drawn by the *U.S. Filter* Court: "fixed losses" are generally assignable; "speculative losses" are barred by anti-assignment provisions. *Globecon*, 434 F.3d at 172 (discussing business-interruption insurance). In addition, New York appellate courts have routinely applied consent-to-assignment provisions to invalidate *post-loss* transfers of health-insurance rights. *See New Medico Assocs., Inc. v. Empire Blue Cross & Blue Shield*, 701 N.Y.S.2d 142, 144 (App. Div. 1999) (enforcing "clear and unambiguous provision which prohibit[ed] the assignment of benefits or moneys due" under health-insurance policy); *Spinex Labs., Inc. v. Empire Blue Cross & Blue Shield*, 622 N.Y.S.2d 154 (App. Div. 1995) (same); *Cole v. Metro. Life Ins. Co.*, 708 N.Y.S.2d 789, 790 (App. Div. 2000) (assignment of health-insurance claims ineffective where "'the contract contains clear, definite and appropriate language declaring the invalidity of such assignments'") (citation omitted). And in the marine-insurance context, as well, courts applying New York law have held that consent-to-assignment provisions may properly bar transfers of

insurance rights even *after* loss. *Oberton v. Steamship Owners Mut. Prot. & Indem. Ass'n*, 1992 U.S. Dist. LEXIS 2183, at *10 (S.D.N.Y. Feb. 19, 1992) ("there is no merit to plaintiff's argument that assignment is permitted in this instance because Oberton's injury took place before the assignment").

These cases clearly demonstrate that, contrary to the Chancery Court's conclusion, New York courts do not recognize any bright-line rule permitting transfer "after the underlying liability has occurred." *See Viking Pump*, 2 A.3d at 104. Rather, as then-Judge Mukasey has explained, "courts addressing whether post-loss assignments of insurance claims will be recognized" under New York law typically focus on two principal considerations:

> (i) the characteristics of the assignee (*i.e.*, who the policy is transferred to, as well as their conduct), and
>
> (ii) the nature of the claim (*i.e.*, whether it is fixed and measurable, as opposed to speculative and contingent).

*SR Int'l Bus. Ins. Co. v. World Trade Ctr. Props., LLC*, 394 F. Supp. 2d 585, 596 (S.D.N.Y. 2005).

These considerations closely track the factors relied upon in both *U.S. Filter* and *Henkel*. *See Henkel,* 62 P.3d at 75; *U.S. Filter*, 895 N.E.2d at 1179-80 (claims must be "fixed," "identifiable with some precision," and "not speculative" to oust an express consent-to-assignment provision). And if given the opportunity, the



[redacted]

New York Court of Appeals would likely accept and apply the approach laid out in those decisions as a matter of New York law.[13]

**b. The Consent-To-Assignment Provisions Bar Houdaille's Purported Assignments**

**i. The Asbestos Liabilities (And Coverage Claims) Were Unknown, Inchoate, And Speculative**

Here, the asbestos personal-injury claims for which Viking and Warren now seek coverage were in no sense "fixed" or "measurable" at the time of the purported assignments because they had yet to be asserted. *See SR Int'l*, 394 F. Supp. 2d at 596; *U.S. Filter*, 895 N.E.2d at 1179-80. Asbestos claims, much like the silica-exposure claims at issue in *U.S. Filter*, "typically are of the 'long tail' variety," and they generally "surface long after the policy period." *See Global Reinsurance Corp. v. Equitas Ltd.*, 969 N.E.2d 187, 189 (N.Y. 2012). The asbestos claims here are no exception. [redacted]

[13] As the foregoing demonstrates, the Chancery Court's conclusion that all of the "New York law on this issue . . . is . . . contrary" to *Henkel* and *U.S. Filter*, *see* 2 A.3d at 104, is incorrect. In fact, only one New York intermediate appellate court has addressed whether unaccrued rights to coverage for third-party personal injury claims may be transferred in the face of an anti-assignment provision. That decision simply cited the Chancery Court's decision below and applied it without any extensive analysis. *See Arrowood Indem. Co. v. Atl. Mut. Ins. Co.*, 948 N.Y.S.2d 581 (App. Div. 2012). The decision does not provide any definitive resolution of New York law on this issue, and this Court should not follow it here.



[redacted]

[redacted]

Accordingly, at the time of the alleged assignments, Houdaille's *coverage claims* had not been reported and were not "identifiable with" anything approaching "precision." *See U.S. Filter*, 895 N.E. 2d at 1180 ("at a minimum the losses must have been reported to give rise to a chose in action"). They plainly did not constitute assignable choses in action.[14]

### ii. The Multiple Assignees And Potential Assignees Substantially Increase The Excess Carriers' Risk

Furthermore, Houdaille's many and varied assignments (and alleged assignments) of insurance rights also materially increase the excess carriers' risk. *See S.R. Int'l*, 394 F. Supp. 2d at 596; *Henkel,* 62 P.3d at 75.

When they issued their policies, Houdaille's insurers agreed to provide insurance to Houdaille. But now, through a dizzying array of transactions, agreements, amendments, and alleged assignments, the excess carriers are faced with multiple and competing claims to the Houdaille insurance. In an amendment

[14] Even if the Court were to hold that so long as the loss to the *tort claimant* occurred prior to the purported assignment, the anti-assignment clause does not apply, there is, at a minimum, a question of fact as to whether any of the claimants had suffered injury-in-fact prior to the purported assignments. *See Aero-Motive*, 318 F. Supp. 2d at 540.



[redacted]

to the Warren APA, Houdaille purported to [redacted] TA969-70. Through the Viking AAA, Viking claims to have obtained Houdaille's insurance rights. *See* TA1036-42. Then, in a Stock Purchase Agreement, Houdaille purported to retain those same rights for itself. TA1065-67; *see also* TA1074 ([redacted]. TA724.

Thus, the excess insurers are at risk that at least three entities—Viking, Warren, and John Crane—will claim rights to Houdaille's insurance (and, in fact, Viking and Warren already have). It also remains possible that the "predecessor corporation," Houdaille, could someday "be revived" and initiate its own "dispute[] over the existence and scope of the [purported] assignment[s]." *See Henkel*, 62 P.3d at 75. This is not what the excess carriers signed up for. And this Court should not now put them "in the place of the Sorcerer's Apprentice, impossibly trying to keep track of insureds while they multiply." *See* Patrick F.



[redacted]

Hofer, *Corporate Succession and Insurance Rights After Henkel: A Return to Common Sense,* 42 Tort Trial & Ins. Prac. L.J. 763, 793 (2007).

The Chancery Court dismissed these concerns and asserted that, under its interpretation, "John Crane and Houdaille" had been "divest[ed] . . . of all . . . rights." 2 A.3d at 104. But just because the Chancery Court says it does not make it so. That conclusion is unlikely to have any collateral estoppel effect on John Crane—which did not actively participate in the summary-judgment proceedings—and it almost certainly would have no collateral estoppel effect on a resurrected Houdaille. The Chancery Court's assurances that the assignments will yield "little increase in insured against risks," *see id*., are cold comfort.

And, in any event, the excess insurers still face the competing claims to coverage by Viking and Warren which, at the very least, substantially increase the excess insurers' defense costs. Both Viking and Warren have their own national coordinating counsel and separate local counsel in thousands of cases. Moreover, Viking and Warren are frequently named as defendants *in the same cases*, each one represented by its separate counsel. TA984. Clearly, the cost of defending these claims will far exceed the cost of defending a unified Houdaille.

Indeed, the history of this litigation itself demonstrates the increased costs to insurers resulting from multiple and competing transfers. When Viking originally

initiated this litigation in 2005, its claim was that Liberty had breached its obligation to act as an "even-handed insurer" by allowing Warren to "us[e] up too much of the Houdaille policy limits." *Viking Pump, Inc. v. Liberty Mut. Ins. Co*., 2007 Del. Ch. LEXIS 43, at *6 (Del. Ch. Apr. 2, 2007). Viking pressed a similar argument as to the excess carriers. And, the Court's Judgment incorporated the jury's finding that certain excess carriers breached a similar duty of evenhandedness by paying Warren's insurance claims "under a reservation of rights," while denying coverage to Viking. JA1873; *see also Viking Pump, Inc. v. Century Indem. Co.*, 2013 Del. Super. LEXIS 615, at *50-51 (Del. Super. Oct. 31, 2013). Foisting this new and costly duty of "even-handed" apportionment on the excess carriers, notwithstanding the policies' express consent-to-assignment requirements, would clearly work a substantial "additional burden" and would greatly increase their exposure to litigation. *See Henkel*, 62 P.2d at 75.

In sum, because Houdaille's coverage claims were speculative and contingent at the time of the purported transfers, and because those transactions have materially increased the insurers' risk, the Court should enforce the excess policies' consent-to-assignment provisions and should reverse the judgment below.

### c. The Court Should Certify This Issue To The New York Court Of Appeals

In the alternative, Travelers Casualty also requests that the Court certify this issue to the New York Court of Appeals. Under Section 500.27(a) of the New York Court of Appeals' Rules of Practice, certification is appropriate "[w]henever it appears to . . . a court of last resort of any other state that determinative questions of New York law are involved in a case pending before that court for which no controlling precedent of the Court of Appeals exists . . . ." 2 N.Y. Comp. Codes R. & Regs., tit. 22 § 500.27(a). The enforceability of consent-to-assignment provisions is an important, unsettled, and determinative question of New York state law that should be settled by New York's highest court.

Courts have, in recent years, certified similar questions concerning the enforceability of consent-to-assignment provisions to other state courts of last resort. *See In re Katrina Canal Breaches Litig*., 63 So. 3d 955 (La. 2011) (answering certified question from Fifth Circuit on whether "public policy . . . prevent[s] parties from contractually prohibiting post-loss assignments"); *Wehr Constructors, Inc. v. Assurance Co. of Am*., 2012 Ky. LEXIS 495 (Oct. 25, 2012) (considering certified question from federal district court on "[w]hether an anti-assignment clause in an insurance policy" is enforceable under Kentucky law). This Court should do the same.



[redacted]

### *2. The Purported Assignments To Warren And Viking Did Not Transfer Any Rights To The Excess Policies*

In addition, this Court can also reverse the judgment below, without even reaching any question of New York public policy, on the ground that no assignment of rights to the excess policies was ever even attempted.

#### a. Assignment Of Insurance Rights Requires A Clear And Objective Manifestation Of Intent To Assign

Under well-settled principles of contract interpretation, the existence of an assignment requires an objective "intention on one side to assign a right . . . and an intention on the other to receive" that right. *SourceTrack, LLC v. Ariba, Inc*., 958 So.2d 523, 526 (Fla. Dist. Ct. App. 2007) (internal quotation marks and citation omitted). "[A]lthough no particular formula is needed, . . . there is a need for some 'act or words' that manifest an intent to assign." *Prop. Asset Mgmt., Inc. v. Chicago Title Ins. Co.,* 173 F.3d 84, 87 (2d Cir. 1999) (citation omitted).

The Second Circuit's *Chicago Title* decision is instructive. There, the Court upheld an insurer's denial of a claim to a title insurance policy because the loan on which the policy had been issued ceased to exist before it was assigned to the plaintiff. *Id.* at 88. Plaintiff argued that, before the loan ceased to exist, its sister corporation had received the policy in an assignment, the intent of which was to grant plaintiff "all the rights . . . to enforce the title insurance policy." *Id.* at 87.

The Court, however, rejected that argument and held that *"some 'act or words' that manifest an intent to assign"* are necessary. *Id.* (emphasis added). The Court further noted that strict adherence to these requirements is particularly important "where the putative assignor and assignee" are affiliated entities. *Id.* "If intent alone were enough to assign," the Court observed, "the holder of a contract could choose at will which of its corporate personalities would be the beneficiary of any given contract on any given day." *Id.*

**b. The Viking AAA and Viking Stock Purchase Agreement Did Not Effect An Assignment Of The Excess Policies To Viking**

Here, nothing in the pertinent divestiture agreements between VPH and Houdaille objectively manifests any "intention on one side to assign a right" to excess coverage or "on the other to receive" that right. *See SourceTrack*, 958 So.2d at 526 (internal quotation marks and citation omitted).[15] Nothing in the Viking AAA expressly—or even implicitly—identifies the excess policies as among the rights to be transferred. The agreement simply purports to transfer all [redacted] to conduct the Viking Pump business. TA1036 (emphasis added). Excess insurance rights, while perhaps prudent, are in no sense required—legally or otherwise—for the manufacture and sale of pumps.

[15] The Viking AAA states that it is to [redacted] TA1040.



[redacted]

Particularly in a situation "where the putative assignor and assignee" were affiliated entities, a much more particular and clear designation was needed. *See Chicago Title,* 173 F.3d at 87.

Moreover, the IDEX Stock Purchase Agreement—executed three years later—confirms that no assignment to VPH was intended or completed at the time of the Viking AAA. [redacted] TA1065-66. [redacted] TA1074 (emphasis added). Plainly, the parties intended for Houdaille to keep its coverage. Neither the Viking AAA nor the Stock Purchase Agreement manifests any objective "intention on one side to assign a right" or "on the other to receive" that right. *See SourceTrack*, 958 So.2d at 526.



[redacted]

### c. Similarly, The Warren ASA Failed To Effect Any Assignment Of The Excess Policies To Warren

In the Warren ASA, as well, the parties failed to "manifest an[y] intent to assign" rights to the excess policies. *See Chicago Title,* 173 F.3d at 87 (applying New York law).[16]

Under the terms of the amendment to the Warren ASA, Houdaille, WPH, and WP, Inc. "[redacted] TA969-70. On the surface, the reference to [redacted] *see id*., could be understood as an attempted assignment of rights to the excess policies. But the relevant context makes clear that the parties had no such intent.

[redacted] Houdaille made efforts to obtain consents with respect to a number of contracts, but not with respect to the excess

[16] The Warren ASA is governed by the "laws of the State of New York." TA865.



[redacted]

insurance policies. [redacted] All of this suggests that Houdaille was not, in fact, attempting to effect any assignment of rights.

Moreover, the overall context of the agreement also suggests that the amendment to the Warren ASA was intended only as a transfer of rights to the Liberty umbrella policies, which sat directly above the [redacted] *See* TA969-70. [redacted] *See* TA791-95. Given this context, Houdaille and Liberty likely intended to allow WP, Inc. access to a level of coverage substantially similar to the claims-made coverage that WP, Inc. was unable to secure.

And even if there were some doubt about the matter, the Warren and Viking agreements are at least ambiguous, so their meaning must be resolved by the trier of fact. *See Riverbend Cmty., LLC v. Green Stone Eng'g., LLC*, 55 A.3d 330, 334 (Del. 2013) ("where reasonable minds could differ as to the contract's meaning, . . .a factual dispute results and the fact-finder must consider admissible extrinsic evidence, making summary judgment improper") (internal quotation omitted).



[redacted]

## II. LOSSES ARISING FROM CONTINUING INJURY ARE SUBJECT TO PRO RATA ALLOCATION

### A. Question Presented

Under New York law, are injuries spanning multiple policy periods subject to "pro rata" allocation, or should losses instead be allocated under the "joint and several" rule twice rejected by the New York Court of Appeals?[17]

### B. Standard Of Review

A lower court decision granting "summary judgment based on the construction of a written contract" is subject to plenary review. *Stuart Kingston Inc. v. Robinson*, 596 A.2d 1378, 1383 (Del. 1991).

### C. Merits Of Argument

#### *1. New York Is A Pro Rata Jurisdiction*

The question of how to allocate liability when an injury spans multiple policy periods has long been controversial. Some courts—including this Court—adopt an "all sums" rule that holds insurers "jointly and severally liable." *E.g., Hercules, Inc. v. AIU, Ins. Co*., 784 A.2d 481, 491 (Del. 2001). Courts in a "growing plurality" of jurisdictions, by contrast, allocate liability to each triggered

[17] *See* TA110 (transaction no. 24671258) (raising the question in the court below); *Viking Pump*, 2 A.3d at 107-30 (deciding the question).

policy period according to its "pro rata" share of the loss. *See Boston Gas Co. v. Century Indem. Co*., 529 F.3d 8, 13-14 (1st Cir. 2008) (citing cases). Whatever the rule may be in other jurisdictions, there is no doubt about where New York comes down: "New York is a pro rata jurisdiction." *See* Maniloff &. Stempel, *General Liability Insurance Coverage: Key Issues in Every State* 481 (2d ed. 2012).

The New York Court of Appeals has expressly endorsed pro rata allocation for claims involving multiple triggered policies. *Consol. Edison Co. of N.Y. v. Allstate Ins. Co*., 774 N.E.2d 687, 693 (N.Y. 2002). In doing so, the Court has rejected "joint and several allocation" as "not consistent" with standard policy language—included in all of the policies at issue here—"providing indemnification for 'all sums' of liability" payable as a result of injury "'*during the policy period*.'" *Id*. at 695. To adopt a joint-and-several approach in the face of this language, the *Con. Ed*. Court held, would improperly extend coverage beyond the "particular policy period" at issue. *Id.* And "joint and several allocation [would also be] particularly inappropriate" where, as here, the injury attributable to any one policy period is unknown and cannot readily be identified. *Roman Catholic Diocese of Brooklyn v. Nat'l Union Fire Ins. Co.*, 991 N.E.2d 666, 676 (N.Y. 2013). In the New York high Court's view, "'proration of liability among insurers'" avoids these problems and properly "'acknowledges the fact that there is uncertainty as to what

actually transpired during any particular policy period.'" *Id.*at 677 (quoting *Con. Ed*., 774 N.E.2d at 695).[18]

Both New York state courts and federal courts within the Second Circuit have uniformly recognized that this clear and binding precedent "adopt[s] a 'pro rata allocation'" as the governing standard in cases where policies require insurers "to pay for losses arising 'during the policy period." *E.g., Serio v. Pub. Serv. Mut. Ins. Co*., 759 N.Y.S.2d 110, 114, 116 (App. Div. 2003) ("Each insurer undertook to insure against . . . lead-paint injuries during a particular policy period. Each insurer should thus be responsible for paying its share of the loss that arose during their respective policy periods."); *Olin v. Certain Underwriter's at Lloyd's*, 468 F.3d 120, 126 (2d Cir. 2006) (*Con. Ed.* made clear property damage taking place over a number of policy periods is subject to pro rata allocation).

### *2. This Court Should Apply New York's Pro Rata Allocation Rule And Should Reverse The Judgment Below*

The Court of Appeals' binding precedents in *Con. Ed.* and *Diocese of Brooklyn* compel pro rata allocation in this case. The excess carriers undertook to indemnify Houdaille against losses attributable to "personal injury or bodily injury

[18] The Court in *Diocese of Brooklyn* was badly fractured and could not produce a majority opinion. But on one issue, there was unanimity: pro rata allocation applied. . 991 N.E.2d at 676-77 (plurality op.); *id.* at 677 (Smith, J., concurring in the judgment); *id.* at 678 (Graffeo, J., dissenting in part).

which occurs *during the policy period*." *E.g.*, TA1157 (emphasis added). Under the clear teaching of *Con. Ed.*, imposing joint and several liability on the excess carriers would defy this limitation and would expand the carriers' coverage obligations beyond the "particular policy period" at issue. 774 N.E.2d at 694-95.

There is no dispute that the underlying asbestos personal injuries in this litigation are classic examples of claims for which it is "impossible to determine the extent of the . . . damage" attributable to a particular policy period. *Id. at* 694. And under New York law, this makes it "particularly inappropriate" to impose "joint and several allocation" on insurers who undertook to pay for losses "during the policy period." *See Diocese of Brooklyn*, 991 N.E.2d at 676. This straightforward application of the New York Court of Appeals' binding precedents mandates reversal.

### *3. The Chancery Court's Contrary Decision Cannot Be Squared With New York Law*

#### a. The Court's Criticisms Of The Governing New York Precedents Reinforce The Case For Reversal

The Court below readily acknowledged that *Con. Ed*. rejected "joint and several allocation" as "not consistent" with "'*during the policy period*'" language of the sort at issue here. *Viking Pump*, 2 A.3d at 84, 109, 118. The Chancery Court responded, however, with a sharp critique of the New York Court of

Appeals' legal reasoning. *See id*. at 118. As the Chancery Court saw it, "the words 'during the policy period' d[id] not," in fact, "shed much light on what method of allocation [was] intended." *Id.*; *contra Con. Ed*., 774 N.E.2d at 694-95. Moreover, the New York Court of Appeals' contrary "linguistic analysis in [*Con. Ed*.]" had been "extremely abbreviated" and, in the Chancery Court's estimation, "not at all clear." *Viking Pump,* 2 A.3d at 118. Faced with this "terse reasoning" by the New York high Court, the Chancery Court concluded that *Con. Ed*.'s holding could not have been intended to establish any rule of general applicability. *Id*. at 119.[19]

This sort of critique of New York's interpretation of its own law is at odds with basic principles of comity, and it should be rejected by this Court. Under the decision below, the proper method of allocation in this case is a question of New York "state law, on which New York has the last word." *See United States v. Pink*, 315 U.S. 203, 216 (1942). If that State's highest Court thinks that "joint and several allocation is not consistent" with contractual language covering harm "during the policy period," *see Con. Ed*., 774 N.E.2d at 695, then that is the end of

[19] The Chancery Court also "explicitly eschew[ed] reliance" on the allocation decisions of the U.S. Court of Appeals for the Second Circuit—all of which adopt pro rata allocation—because it viewed them as based on little more than the "policy predilections" of federal appellate judges. *Viking Pump*, 2 A.3d at 116-17 & n.142.

the matter for purposes of New York state law. It is not for the Delaware Court of Chancery or anyone else to cast aside New York's binding precedent based on the perceived quality or "terse[ness]" of its reasoning. *Viking Pump*, 2 A.3d at 119.

**b. The Presence Of Non-Cumulation Language Provides No Basis For Abandoning Pro Rata Allocation.**

After critiquing the quality of the Court of Appeals' reasoning, the Chancery Court attempted to distinguish *Con. Ed.* on the ground that the excess policies either "follow form to a 'Non-Cumulation Provision'" in the Liberty umbrella policies or contain a separate Condition C. *Viking Pump*, 2 A.3d at 121-25. These provisions do not warrant abandoning New York's established pro rata rule.

According to the Chancery Court, the "very presence" of the non-cumulation and prior-insurance provisions demonstrates "that the words 'during the policy period'" do not mean what the *Con. Ed.* Court said they mean. *Viking Pump*, 2 A.3d at 122-23. New York courts disagree and have specifically rejected identical attempts to undermine *Con. Ed.* based on non-cumulation language. *See Olin Corp. v. Am. Home Assurance Co*., 704 F.3d 89, 102-03 (2d Cir. 2012); *Long Island Lighting Co. v. Allianz Underwriters Ins. Co.*, No. 604715/97, slip op. at 7 (N.Y. Sup. Ct. Dec. 30, 2003) (copy of slip opinion attached hereto as Exhibit 4),

*modified on reh'g,* 2005 N.Y. Misc. LEXIS 21(Sup. Ct. Jan. 11, 2005), *aff'd as modified*, 771 N.Y.S.2d 123 (App. Div. 2006).[20]

In the Second Circuit's recent decision in *Olin*, for example, the Court specifically noted that some "courts in other jurisdictions"—including Delaware—have taken the view that non-cumulation language "is 'inconsistent' with the pro rata approach." 704 F.3d at 102 (citing *Hercules, Inc. v. AIU Ins. Co*., 784 A.2d 481, 493-94 (Del. 2001)). The Second Circuit recognized, however, that binding New York precedent foreclosed any such conclusion as a matter of New York law. "The New York Court of Appeals in *Consolidated Edison* ha[d] expressly rejected . . . joint and several allocation," the Court observed, and had instead "endorsed the pro rata allocation method" for policies with standard "'all sums'" and "during the policy period" language. *Olin,* 704 F.3d at 102-03. As a result, the presence of a prior-insurance provision provided no basis for "trigger[ing] joint and several

[20] The Chancery Court acknowledged in a footnote that *Long Island Lighting* declined to distinguish *Con. Ed*. and applied pro rata allocation notwithstanding the presence of non-cumulation language. 2 A.3d at 125 n.171. In keeping with its general approach to New York caselaw, the Chancery Court criticized *Long Island Lighting*'s insufficiently "transparent" reasoning and then declined to follow it. *Id.*

liability in lieu of the pro rata allocation methodology" endorsed in *Con. Ed. Id.* at 103. That conclusion applies with equal force here.[21]

#### *4. At A Minimum, The Court Should Certify This Question To The New York Court Of Appeals*

As noted above, New York accepts certification of "determinative questions of New York law . . . for which no controlling precedent of the Court of Appeals exists . . . ." 2 N.Y. Comp. Codes R. & Regs., tit. 22 § 500.27(a). Here, "controlling precedent of the Court of Appeals" *does* exist. *Con. Ed*., 774 N.E.2d at 695. This Court need do no more than apply that precedent and reverse. But if this Court is of a different view, then it should give the Court of Appeals an opportunity to answer this unquestionably important and determinative question of New York law. *See, e.g.*, *Boston Gas Co. v. Century Indem. Co*., 529 F.3d 8 (1st Cir. 2008) (certifying allocation question to Massachusetts Supreme Judicial Court).

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[21] That is not to say, however, that non-cumulation and prior-insurance provisions are ineffective or inapplicable under a pro rata methodology. To the contrary, the *Olin* decision provides an example of how Condition C—the provision included in 17 of the excess policies here—may operate and apply under pro rata allocation. *See Olin*, 704 F.3d at 99-103 (discussing Condition C's "continuing coverage" provision). The *Olin* Court held that Condition C applies after the loss is allocated on a pro rata basis. Nonetheless, neither the Liberty umbrella policies nor the Aetna XN Policies contain a "continuing coverage" provision of the sort included in Condition C.

Indeed, certification may be particularly appropriate here given the Chancery Court's candid expression of its views on New York law in this area. As one New York judge has put it, the Chancery Court's decision in this case "critiqu[es] the Court of Appeals," "mock[s] the Second Circuit[]," and "ignores established New York" law. *Mt. McKinley Ins. Co. v. Corning Inc.*, 2012 N.Y. Misc. LEXIS 6531, at *12-14 (Sup. Ct. Sept. 7, 2012). It would be less than sporting to affirm that decision without at least offering the New York Court of Appeals a right of reply.

## CONCLUSION

The Court should reverse the judgment.

Respectfully submitted,

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