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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:
November 24, 2014

CASES BELOW:

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

-and-

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

EXCESS INSURERS' OPENING BRIEF

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November 6, 2014

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Excess Insurers	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); 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); The Continental Insurance Company as successor by merger to Fidelity & Casualty Company of New York; 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.; 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); 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; Westport Insurance Corporation; and Old Republic Insurance Company
Excess Policies	The fifty-five excess policies that Houdaille purchased from 1972 to 1985
Houdaille	Houdaille Industries, Inc.

JA	Joint Appendix
Liberty	Liberty Mutual Insurance Co.
Viking	Viking Pump, Inc.
Viking I	*Viking Pump, Inc. v. Liberty Mut. Ins. Co.*, 2007 WL 1207107 (Del. Ch. Apr. 2, 2007)
Viking II	*Viking Pump, Inc. v. Century Indem. Co.*, 2 A.3d 76 (Del. Ch. 2009); unredacted slip opinion attached hereto as Exhibit A.
Viking III	*Viking Pump, Inc. v. Century Indem. Co.*, 2013 WL 7098824 (Del. Super. Oct. 31, 2013); unredacted slip opinion attached hereto as Exhibit C.
Viking IV	*Viking Pump, Inc. v. Century Indem. Co.*, 2014 WL 1305003 (Del. Super. Feb. 28, 2014); unredacted slip opinion attached hereto as Exhibit D.
Warren	Warren Pumps, Inc., or Warren Pumps, LLC. For ease of reference this brief uses only "Warren" to refer to the various corporate forms in which the company has existed through time.
XA	Appendix to Excess Insurers' Opening Brief

NATURE OF PROCEEDINGS

Houdaille was an industrial conglomerate that purchased primary, umbrella, and excess insurance policies to cover its operations. In 1968 and 1972, respectively, Houdaille acquired Viking and Warren. Both manufactured pumps containing asbestos.

In 1987 — after Houdaille divested Viking and Warren — personal injury claimants began filing suits alleging asbestos exposure. Viking and Warren sought coverage under Houdaille's insurance. Beginning in 2005, Viking and Warren litigated against each other and Houdaille's primary insurance provider, Liberty.

After that dispute was resolved in the Court of Chancery, Viking and Warren sued twenty-three insurers that had previously issued forty-five excess insurance policies to Houdaille over a fourteen-year period. On October 14, 2009, the Court of Chancery granted Warren's and Viking's motion for partial summary judgment. Exhibit A hereto. The suit was then transferred to Superior Court. The Superior Court declined to adjudicate summary judgment motions and the case proceeded to a three-week jury trial in October and November 2012 on the assumption that the insurance policies were ambiguous. On October 31, 2013, after considering post-trial submissions, the Superior Court ruled that the policies were unambiguous and entered final judgment, which the Superior Court later clarified. Exhibits C–H hereto. All parties appealed.

SUMMARY OF ARGUMENT

The excess insurance policies at issue are governed by New York law. The Court of Chancery and the Superior Court committed reversible error by disregarding or misapplying New York law.

I. The Court of Chancery contradicted controlling New York Court of Appeals precedent on how damages stemming from injuries spanning multiple years should be allocated among applicable policies. Specifically, the Court of Chancery held that, under New York law, Viking and Warren could allocate to a single one-year policy period "all sums" resulting from asbestos harms allegedly occurring over multiple years — and thus over multiple policy periods. Here, Viking and Warren seek coverage for "personal injury," which under the Excess Policies means:

> personal injury or bodily injury which occurs *during the policy period* sustained by a natural person, but excluding any such injury included within the definition of advertising injury or damage.[1]

The New York Court of Appeals held in *Consolidated Edison Co. of N.Y. v. Allstate Insurance Co.*, 774 N.E.2d 687 (N.Y. 2002) ("*Con Ed*"), that substantially similar policy language required pro rata allocation — *i.e.*, spreading damages proportionately across all of the implicated years. As the Court of Appeals explained, "the policies provide indemnification for liability incurred as a result of

[1] Addendum A-14,-18,-20,-25,-29,-31,-37,-43,-48,-55,-62,-72,-80 (emphasis added).

an accident or occurrence during the policy period, *not outside that period*." *Id.* at 695 (emphasis added). The Court of Appeals rejected the same "all sums" approach adopted by the Court of Chancery as "not consistent with the language of the policies providing indemnification for 'all sums' of liability that resulted from an accident or occurrence '*during the policy period*.'" *Id.* (emphasis in original; citation omitted).

Rather than applying *Con Ed*'s straightforward holding, the Court of Chancery held that Viking and Warren could seek coverage for all damages from *any* implicated policy period they selected. That is the precise allocation method New York's highest court rejected as inconsistent with policies (like the Excess Policies here) that limit coverage to injury occurring "during the policy period."

Courts, commentators, and practitioners have criticized the Court of Chancery's decision as inconsistent with New York law. One New York trial court stated that the decision "ignores established New York precedent" and "derisively" treats New York Court of Appeals precedent. *Mt. McKinley Ins. Co. v. Corning Inc.*, 2012 N.Y. Misc. LEXIS 6531, at *12–14 (N.Y. Sup. Ct. Sept. 7, 2012). This Court should apply *Con Ed* and reverse the decision below. But if this Court believes that *Con Ed* should not apply here, the Court should certify the issue to the New York Court of Appeals for a definitive ruling on New York law. Certification would prevent different substantive law from governing identical

policies based on a Delaware decision adopting an approach to allocation at odds with that of New York's highest court.

II. The Superior Court erred in ruling that "whether or not the [1980–1985 Liberty primary policies'] deductible was appropriately applied on an actual per-occurrence basis is beside the point" for determining whether those policies were exhausted and the Excess Policies triggered. *Viking III* at 57. Under the policies' plain language and New York law, Warren and Viking had to pay the first $100,000 of each occurrence, which would not count toward eroding the [redacted] aggregate limit of each primary policy. The Superior Court acknowledged that Viking and Warren's reading of the policies was incorrect, stating that "Plaintiffs' argument regarding the deductible as a premium calculation is not in accord with the endorsements' language." *Id.* Yet it then inexplicably adopted Viking and Warren's view.

[redacted] But Liberty still had a duty to pay defense costs for all claims, including those that did not count against its aggregate policy limits. Liberty was able to shed most of its financial burden by not applying the deductible and prematurely exhausting its policies and terminating its corresponding obligation to pay defense costs.

The Superior Court's implicit determination that a settlement among Liberty, Viking, and Warren sufficed to exhaust the Liberty policies was error. Under New York law and the Excess Policies' plain language, the Excess Insurers' coverage obligation cannot be triggered by an underlying insurer's conduct or a settlement among the insured and third parties — especially when they all had incentives not to apply the deductible. Rather, Excess Insurers' coverage obligations are triggered only by actual exhaustion of the underlying policies through proper payment of claims. If the $100,000 per-occurrence deductible is applied according to New York law and the policies' plain language, then the Liberty policies have not been exhausted and the Excess Insurers' coverage obligations have not been triggered.

III. The Superior Court further erred by holding that (a) several Excess Insurers had a duty to pay Warren's and Viking's defense costs despite express language disclaiming that duty; and (b) those Excess Insurers that had a duty to pay Warren's and Viking's defense costs had to pay them in addition to their aggregate policy limits, despite policy language to the contrary. The Superior Court should have reviewed and applied the specific language of the different Excess Policies — and followed New York cases construing similar language — rather than treating bundles of Excess Policies in the same manner regardless of specific policy language differences.

STATEMENT OF FACTS

A. Houdaille Acquires Viking and Warren.

Houdaille was an industrial conglomerate that operated a number of different subsidiaries during the 1970s and 1980s. In 1968, Houdaille acquired Viking as a wholly owned subsidiary. XA243, 249. In 1972, Houdaille acquired Warren. XA59 ¶ 5. Houdaille operated Warren as a subsidiary until 1979, when Warren was merged into Houdaille. *Id*.

In the mid-1980s Houdaille began to divest subsidiaries and operating assets. In 1985, Houdaille transferred the Warren division's properties and assets into a new subsidiary, which was sold to W.P., Inc., a newly created entity. XA59–60 ¶ 6–7. In 1988, Houdaille sold all of Viking's stock to IDEX Corporation, which remains Viking's wholly owning parent company today. XA229.

B. Houdaille's Insurance Coverage

During the relevant time period, Houdaille had primary, umbrella, and excess coverage from various insurers. A chart setting forth these policies and selected provisions is included as an addendum to this brief. While Houdaille obtained fifty-five excess policies, ten are from insolvent insurers and so are not included in the action. *See, e.g.*, JA1937–56.

1. Primary Policies

During the time that it owned Viking and Warren, Houdaille had a series of comprehensive general liability insurance policies issued by Liberty, Travelers, and First State. *See, e.g.*, JA1937–56; *Viking I* at *3. These policies covered Houdaille, as well as "[a]ny other business organization [of which Houdaille] owns an interest therein of more than fifty percent (50%) during the policy period." Addendum A-10,-14,-18,-20,-25,-29,-31,-37,-43,-48,-55,-62,-72,-80.

The primary policies provide coverage on an "occurrence" basis and protect an insured from injury during the policy period if caused by an "occurrence," even if suit is brought after the policy's term. The 1980–1985 Liberty primary policies each contain a $100,000 per occurrence deductible, as discussed in Point II.C.1 below. The total coverage limit for the primary policies increased from [redacted] in 1972 to [redacted] in 1980. Addendum A-9,-42; *Viking I* at *4. Primary coverage for this fourteen-year period totaled [redacted] *Viking IV* at 5.

2. Umbrella Policies

From 1972 to 1985, Liberty provided Houdaille's umbrella insurance coverage. *See, e.g.*, JA1937–56; XA166. Each of the 1980–1985 umbrella policies specifically lists the corresponding 1980–1985 Liberty primary policy that the umbrella policy sits above, and each of those primary policies has a $100,000

per-occurrence deductible. Many of the Excess Policies "follow form" to the umbrella policies. The umbrella policies contain the following provision:

> 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, or with the consent of the company, agrees to pay, as damages, direct or consequential, because of . . . personal injury . . . with respect to which this policy applies and caused by an occurrence.[2]

The umbrella policies define "personal injury" and "occurrence" as follows:

> "personal injury" means personal injury or bodily injury which occurs during the policy period sustained by a natural person, but excluding any such injury included within the definition of advertising injury or damage.
>
> "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.

The umbrella policies also contain 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 [Liberty] 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.

Each of the umbrella policies for the years 1972 to 1985 had a coverage limit of [redacted] for a total of [redacted] in umbrella coverage. *Viking IV* at 5.

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[2] The provisions from the umbrella policies defined in this section can be found at Addendum A-14,-18,-20,-25,-29,-31,-37,-43,-48,-55,-62,-72,-80; *see also* Addendum A-10 (containing similar provisions).

3. Excess Policies

From 1972 to 1985, Houdaille purchased a total of fifty-five excess policies (the "Excess Policies") with different amounts of excess insurance in each year.

Twenty-eight Excess Policies "follow form" to the underlying policies, with many stating "except as otherwise provided."[3] These Excess Policies "follow form" both to coverage and the definitions of "occurrence" and "personal injury." In addition, the twenty-eight Excess Policies "follow form" to the underlying umbrella policies' "non-cumulation" provision. Through the "except as otherwise provided" clause, these Excess Policies variously provide either an express disclaimer of any duty to pay defense costs or that any payment of defense costs is counted toward exhaustion of the policy limits. *See* Point III.C, *infra*.

The other seventeen Excess Policies from solvent insurers have substantially similar definitions of "occurrence" and "personal injury" and also contain a "prior insurance provision" substantially in the following form (in relevant part):

> 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 Insured prior to the inception date hereof, the limit of liability hereon as stated in Items 5 and 6 of the Declarations shall be reduced by any amounts due to the Insured on account of such loss under such prior insurance.
>
> Subject to the foregoing paragraph and to all the other terms and conditions of this Policy in the event that personal injury or property damage arising out of an occurrence covered hereunder is continuing

[3] Addendum A-11,-12,-15,-16,-21,-23,-26,-27,-32,-34,-35,-38,-40,-45, -50,-51,-56,-57,-77; *see also* A-33,-39,-41,-56,-63,-68,-69,-81,-82.

> at the time of termination of this Policy the Company will continue to protect the Insured for liability in respect of such personal injury or property damage without payment of additional premium.[4]

C. Asbestos Suits Against Warren and Viking

Houdaille divested Warren in 1985 and Viking in 1988. The first asbestos claim was filed against Warren in 1987 and against Viking in the early 1990s. XA208, 235. Claimants seek recovery for bodily injuries [redacted] XA56, 60–61. The asbestos was encapsulated in the pumps' gaskets. XA232–33, 239, 256. Although Viking and Warren have each been sued in more than [redacted] asbestos suits (XA208–09, 238) they are peripheral defendants that often [redacted] pay nothing to plaintiffs. XA226, 274. Few of the cases have gone to trial. XA241, 271.

Viking and Warren each sought coverage under the same Houdaille insurance policies for their respective asbestos claims.

D. Proceedings in the Court of Chancery

1. Phase I

In 2005, concerned that Warren was using up the Houdaille coverage, Viking filed an action in the Court of Chancery against Liberty seeking what it

[4] Addendum A-4,-5,-6,-7,-8,-15,-27,-38,-40,-45,-50,-51,-53,-73,-75,-77,-84.

described as an equitable split of the Houdaille policies between Viking and Warren. *Viking I* at *2. Warren intervened. *Id*. Liberty asserted that Warren was not entitled to any of its primary coverage. *Id.*

On cross-motions for summary judgment, the Court of Chancery held that Viking and Warren were each entitled to exercise the rights of an insured under Houdaille's Liberty policies. After the ruling, Liberty, Viking, and Warren "reached a global resolution of the disputes among themselves." *Viking II* at 10. Liberty obtained releases from Warren and Viking, including from paying any future defense costs outside aggregate policy limits or paying any amounts due under policies it issued but that could not be located. The Excess Insurers were not yet parties and did not participate in the settlement discussions.

2. Phase II

After settling with Liberty, Viking and Warren added the Excess Insurers to the suit. During "Phase II," all parties moved for summary judgment regarding (i) allocating responsibility among the Excess Policies for claims with exposure in multiple policy years, and (ii) whether Viking and Warren were entitled to exercise the rights of an insured under the Excess Policies. *Viking II* at 11.

Courts considering how to allocate loss when multiple policy years have been triggered have reached different results. Here, the Court of Chancery looked to New York law because, under relevant choice of law principles, Houdaille's

headquarters in New York gave that state the most significant connection to the policies (which do not specify choice of law). *Viking II* at 13–18.

The New York Court of Appeals and other New York courts have held that where policy language limits coverage to injury "during the policy period," a pro rata approach applies. Under that approach, the total damages are divided by the number of policy years triggered by injury during the policy period and the resulting amount allocated to each year. Uninsured years are the insured's responsibility. *See* Point I.C, below. Despite this controlling New York authority, the Court of Chancery, based on what it described as a "close, holistic reading" of the policy language, ruled that the "all sums" allocation method — which the New York Court of Appeals had rejected — applied. *Viking II* at 69–85.

E. Phase III Proceedings in the Superior Court

On June 11, 2010, the Court of Chancery transferred the case to the Superior Court to adjudicate: (i) whether the Liberty policies were properly exhausted such that the Excess Policies had to pay; (ii) whether and to what extent the Excess Insurers were required to pay defense costs; (iii) the triggering event for occurrence-based policies; and (iv) the effect of non-cumulation or prior insurance clauses. When the parties filed motions for summary judgment, the Superior Court issued an order stating that "the court would not consider pre-trial motions, other

than discovery disputes." *Viking III* at 15. The case proceeded to trial "on the untested assumption that the excess policies were ambiguous." *Id.* at 17.

After a three-week trial, the jury reached a verdict on several issues. The Superior Court then considered post-trial motions. The court "read[] each policy closely and without extrinsic evidence," stating that "[p]lain language in an insurance policy trumps a jury's hindsight." *Id.* at 46. The Superior Court held that "the policies are unambiguous" (*id.* at 4), and made several post-trial rulings:

- "New York law accepts dates of substantial exposure as an 'injury-in-fact' trigger." *Id.* at 50.
- Because the Liberty Policies allowed Liberty to collect the deductible after funding settlements and the jury had an evidentiary basis to find "that Warren and Viking satisfied any outstanding payment" to Liberty, the Liberty Policies were exhausted. *Id.* at 57.
- Horizontal, rather than vertical, exhaustion applies, so that "all primary policies triggered by the loss must pay to their limits — that is, be exhausted — before any excess insurer will become liable." *Viking III* at 59. "New York law clearly requires each layer's exhaustion before reaching the next." *Id.* at 60.
- Some Excess Policies contain full defense obligations in addition to the policy limits, while other Excess Policies contain a defense obligation subject to policy limits. *Id.* at 61–78.

Warren moved to supplement the *Viking III* opinion, while the Excess Insurers moved to clarify the horizontal exhaustion holding. *Viking IV* at 8.

As to Warren's motion, the Superior Court addressed the defense obligations of three policies omitted from the *Viking III* opinion, ruling these policies provided

full defense obligations in addition to policy limits. *Viking IV* at 8–11. On the Excess Insurers' motion, the Superior Court noted that its "decision . . . was unclear" as to whether horizontal exhaustion applies to excess insurance, believing that the question was one of first impression under New York law. *Id.* at 12. After reviewing New York law, other states' law, and prior rulings in the case, the court concluded that New York would "not require horizontal exhaustion of all policies in each excess layer before triggering on risk, higher layer policies." *Id.* at 38.

On June 9, 2014, the Superior Court entered a Final Judgment Order After Trial (the "Final Judgment Order") that listed the Court of Chancery's Phase II rulings and the Superior Court's Phase III rulings after trial. Exhibit E at 2–14.

On June 16, 2014, Warren filed a further motion seeking clarification of the Final Judgment Order. XA501. Warren argued that the court should clarify that injury-in-fact continues after a claimant's last significant exposure to asbestos. Warren also sought to amend the Judgment to impose attorneys' fees on the Excess Insurers. Warren and Viking also filed motions for costs. XA514, 530.

On August 14, 2014 the Superior Court issued a "Final Order" denying the motions for costs filed by Viking and Warren. Exhibit G. On August 20, 2014, the Superior Court issued a further "Final Order" denying Defendants' motion to stay pending appeal and denying Warren's motion to clarify and amend the Final Judgment Order. Exhibit H.

ARGUMENT

I. THE COURT OF CHANCERY ERRED IN RULING THE EXCESS POLICIES PROVIDED FOR ALL-SUMS ALLOCATION.

A. Question Presented

How would New York's highest court allocate responsibility for claims with alleged bodily injury occurring in multiple years, when the policies only cover personal injury occurring "during the policy period"? This question was raised below (XA83–87) and considered by the Court of Chancery (*Viking II* at 48–88).

B. Scope of Review

The Supreme Court reviews *de novo* a trial court's grant of a motion for summary judgment, both as to the facts and the law. *State Farm Mut. Auto. Ins. Co. v. Davis*, 80 A.3d 628, 632 (Del. 2013).

C. Merits of Argument

1. The New York Court of Appeals has ruled that the policy language at issue requires pro rata allocation.

In 2002, the New York Court of Appeals considered the question at issue in this case: whether, in cases where (as here) an alleged harm implicates multiple insurance policies, (i) "each policy is liable for the entire loss" (*i.e.*, the "all sums" approach selected by the Court of Chancery) or (ii) "each policy is responsible only for a portion of the loss" (*i.e.*, a "pro rata" allocation method). *Con Ed*, 774 N.E.2d at 693. The Court of Appeals expressly *rejected* the "all sums" approach as

inconsistent with the policies' coverage limitation to losses occurring "during the policy period." *Id.* at 694–95. Because the same express coverage limitation is contained in the Excess Policies, the Court of Chancery's decision is inconsistent with *Con Ed* and should be reversed.

a. Each Excess Policy either follows the Liberty umbrella policy or contains a provision substantially in the following form:

> 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, or with the consent of the company, agrees to pay, as damages, direct or consequential, because of . . . *personal injury* . . . 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,-80; *see also* Addendum A-10 (containing similar provision).

"Personal injury" is defined as "personal injury or bodily injury which occurs *during the policy period* sustained by a natural person, but excluding any such injury included within the definition of advertising injury or damage." Addendum A-14,-18,-20,-25,-29,-31,-37,-43,-48,-55,-62,-72,-80 (emphasis added). In other words, the policies provide coverage for "all sums" in excess of the retained limit resulting from occurrences that cause personal injury "during the policy period."

b. In *Con Ed*, the New York Court of Appeals considered the appropriate allocation method under policies with substantially similar language and rejected

the "all sums" approach and accepted the "pro rata" method, which the Court of Appeals held was consistent with the policy language.

The policies at issue in *Con Ed* indemnified Con Ed for "all sums" stemming from occurrences "during the policy period." *Id.* at 693. Con Ed argued "that it should be permitted to collect its total liability — 'all sums' — under any policy in effect" during the period of continuing property damage. *Id.* The Court of Appeals rejected that approach as "not consistent with the language of the policies providing indemnification for 'all sums' of liability that resulted from an accident or occurrence '*during the policy period*.'" *Id.* at 695 (emphasis in original; quoting *Olin Corp. v. Ins. Co. of N. Am.*, 221 F.3d 307, 323 (2d Cir. 2000) ("*Olin I*")).

Instead, the Court of Appeals adopted the insurers' "straightforward reading of the phrase 'during the policy period,'" which "limits an insurer's liability to 'all sums' incurred by the insured 'during the policy period.'" *Id.* at 694. The Court of Appeals found that pro rata allocation "is consistent with the language of the policies," because "the policies provide indemnification for liability incurred as a result of an accident or occurrence during the policy period, *not outside that period*." *Id.* at 695 (emphasis added). Thus, where indivisible injury or property damage is found to have occurred during multiple policy periods, but the amount of injury or damage attributable to any specific period cannot be determined, the court allocates compensatory damages on a pro rata basis.

c. The New York Court of Appeals reaffirmed *Con Ed* just last year in *Roman Catholic Diocese of Brooklyn v. National Union Fire Insurance Co. of Pittsburgh*, 991 N.E.2d 666 (N.Y. 2013), again holding that "pro rata" is to be applied to policies limiting coverage to injury that "occurs during the policy period." *Id.* at 676–77; *see also id.* at 677 (Smith, J., concurring).

d. New York's lower courts are in accord. *See Keyspan Gas E. Corp. v. Munich Reinsurance Am., Inc.*, 2014 WL 5285352, at *3 (N.Y. Sup. Ct. Oct. 17, 2014) (where "parties cannot parse out the exact amount of property damage which occurred within each policy period . . . . pro rata allocation is the rational, equitable method to determine how to allocate damages among multiple triggered insurance policies"); *Utica Mut. Ins. Co. v. Erie Ins. Co.*, 966 N.Y.S.2d 790, 793 (N.Y. App. Div. 2013) (excess insurers were obligated to pay defense and indemnity costs on a pro rata basis); *State of N.Y. Ins. Dep't, Liquidation Bureau v. Generali Ins. Co.*, 844 N.Y.S.2d 13, 15–16 (N.Y. App. Div. 2007) (similar); *Travelers Indem. Co. v. Fischbach, LLC*, 2011 WL 1495196, at 4–6 (N.Y. Sup. Ct. Apr. 8, 2011) (similar); *Appalachian Ins. Co. v. Gen. Elec. Co.*, 2008 WL 2840354, at *1 n.4 (N.Y. Sup. Ct. July 17, 2008) (applying pro rata where policy provided for payment of all sums "during the [policy] period"), *aff'd sub nom. Appalachian Ins. Co. v. Riunione Adriatic Di Sicurata*, 875 N.Y.S.2d 57 (N.Y. App. Div. 2009); *Cont'l Cas. Co. v. Emp'rs Ins. Co. of Wausau*, 865 N.Y.S.2d 855, 863 (N.Y. Sup. Ct.

2008) (similar), *rev'd on other grounds*, 923 N.Y.S.2d 538 (N.Y. App. Div. 2011); *Long Island Lighting Co. v. Allianz Underwriters Ins. Co.*, Index No. 604715/97, at 7 (N.Y. Sup. Ct. Dec. 30, 2003) (similar), *modified on reh'g*, Jan. 11, 2005, *aff'd as modified*, 826 N.Y.S.2d 55 (N.Y. App. Div. 2006).

So, too, are federal cases applying New York law. *See Olin Corp. v. Certain Underwriters at Lloyd's London*, 468 F.3d 120, 126 (2d Cir. 2006) (applying New York law) (holding that under *Con Ed* "public policy and equitable considerations' 'clearly indicate [pro rata] allocation as the proper method for distributing liability") ("*Olin II*") (citation omitted); *Sybron Transition Corp. v. Sec. Ins. of Hartford*, 258 F.3d 595, 601 (7th Cir. 2001) (applying New York law) (rejecting joint and several allocation); *Air & Liquid Sys. Corp. v. Allianz Underwriters Ins. Co.*, 2014 WL 4060309 (W.D. Pa. Aug. 15, 2014) (applying New York law) (adopting pro rata allocation).

e. While the "all sums" approach may be *Delaware* law (*see Hercules, Inc. v. AIU Ins. Co.*, 784 A.2d 481, 490–91 (Del. 2001)), New York law applies here. The New York Court of Appeals expressly declined to follow *Hercules*, holding that the coverage limitation to injury occurring "during the policy period" precludes "all sums" allocation. *Con Ed*, 774 N.E.2d at 695.

2. The Court of Chancery erred by rejecting *Con Ed*.

"The 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). The Court of Chancery erred in rejecting the pro rata allocation method adopted by the New York Court of Appeals, and accepting the "all sums" approach that the Court of Appeals — and every other New York court — rejected.

a. First, the Court of Chancery acknowledged that *Con Ed* was the "leading case on this issue" (*Viking II* at 64), but did not follow it. The Court of Chancery expressed disagreement with *Con Ed*, noting "that the linguistic analysis in *Consolidated Edison* is extremely abbreviated and, at least to this mind, hardly compelled by [the] words 'during the policy period.'" *Id*. at 65. The Court of Chancery's textual analysis is beside the point because Delaware courts must apply the holdings of New York's highest court on questions of New York law.

b. Second, the Court of Chancery erred in holding that *Con Ed* does not apply because the Excess Policies contain "non-cumulation" provisions stating that when an actual injury occurs both within and outside a policy period, the insured cannot increase its insurance coverage by combining different years' policy limits. *See* p. 8–9, *supra*. The Court of Chancery considered these provisions "[o]f

paramount importance in deciding this case." *Viking II* at 74; *see also id.* at 75 ("use of the pro rata method would render the Non-Cumulation and Prior Insurance Provisions needless."); *id.* at 76 n.168 (describing supposed problems of combining pro rata allocation with Non-Cumulation and Prior Insurance Provisions (hereinafter, "Non-Cumulation Provisions")). In fact, they are irrelevant under a pro rata allocation model, for multiple reasons.

i. The Court of Chancery stated that because "the Non-Cumulation and Prior Insurance Provisions are designed for a situation in which different policies are responding to the same injury," the "very presence" of the provisions "suggest[s] that the words 'during the policy period,' do not have the drastic effect the Excess Insurers contend for." *Id*. at 73-74. According to the Court of Chancery, those provisions require that "the plaintiff's injury is treated as indivisible and resulting from one occurrence," and this is inconsistent with "pro rata." *Id.* "After proration, the very premise upon which [those provisions] are based is absent, because there is no common injury," since "the asbestos plaintiff is deemed to have suffered a bunch of divisible injuries." *Id.* at 75.

The Court of Chancery had it backwards. As *Con Ed* stated, "[p]roration of liability among the insurers acknowledges the fact that there is uncertainty as to what actually transpired during any particular policy period." 774 N.E.2d at 695. Pro rata does not render the injury divisible as

a matter of fact, but divides liability for the injury as a matter of law. The Non-Cumulation Provisions limit an insured to a single limit for indivisible injury — preventing double recovery. They do not replace pro rata allocation, but simply adjust total limits under a pro rata allocation approach.

ii. The Court of Chancery disregarded New York case law applying pro rata allocation to policies with non-cumulation provisions. In *Long Island Lighting Co. v. Allianz Underwriters Ins. Co.*, the insured's counsel unsuccessfully advanced the same non-cumulation argument, arguing that "[t]he Court of Appeals' reasoning in *Con Edison* suggests strongly that the presence of such non-cumulation language in the policies before them would have led the Court to a different result." *See* XA146.[5] The Court of Chancery did not follow *Long Island Lighting Co.*, stating that "the court did not provide a reasoned explanation sufficiently transparent to determine whether similar logic applies in this situation." *Viking II* at 78 n.171. But *Long Island Lighting Co.* followed *Con Ed* and rejected the very argument on which the Court of Chancery relied. *See also Olin Corp. v. Am. Home Assurance Co.*, 704 F.3d 89, 102–03 (2d Cir. 2012)

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[5] The non-cumulation language was as follows:

> If collectable insurance under any other policy(ies) of the company is available to the insured covering a loss also covered hereunder (other than underlying insurance of which the insurance afforded by this policy is in excess), the company's total liability shall in no event exceed the greater or greatest liability applicable to such loss under this or any other such policy(ies).

XA140.

(applying New York law) (holding that non-cumulation provision, referred to as "Condition C," was consistent with pro rata allocation under *Con Ed*).

c. Third, the Court of Chancery's "all sums" ruling undermines New York law that if an insurer becomes insolvent, the proper "[a]llocation results in the insured bearing the [liability] of any of its insurers' inability to pay." *Olin I*, 221 F.3d at 323. Other insurers are not required to provide the coverage. *See Steyr-Daimler-Puch A.G. v. Allstate Ins. Co.*, 543 N.Y.S.2d 538, 540 (N.Y. App. Div. 1989) ("An excess carrier is not required to assume the responsibility of a primary carrier who has become insolvent . . . ."); *see also Ambassador Assocs. v. Corcoran*, 562 N.Y.S.2d 507, 507 (N.Y. App. Div. 1990) (similar), *aff'd on opinion*, 581 N.Y.S.2d 276 (N.Y. 1992); *Pergament Distribs., Inc. v. Old Republic Ins. Co.*, 513 N.Y.S.2d 467, 469 (NY. App. Div. 1987) (similar).

Indeed, the Superior Court recognized this:

> Some excess policies apply above the limits of other excess policies that cover some or all of the same time period but were sold by insurers that are now insolvent. Warren and Viking can access such overlying excess policies, [but only] so long as the amounts paid toward settlements or judgments of the asbestos claims that are allocated to the insolvent policy . . . equal or exceed the applicable "per occurrence" or aggregate limits of the insolvent policy. . . . Plaintiff must provide proof to the overlying excess insurer that allocated indemnity and/or defense costs have exhausted the insolvent policy's limits.

Ex. E ¶ 7.

But the Court of Chancery's "all sums" approach undermines New York law regarding who bears responsibility for insolvent insurers' shares. By selecting a year in which the excess tower has no insolvent insurers, Viking and Warren can recover from carriers high in the tower, effectively making those carriers responsible for coverage in another year issued by an insolvent insurer below them in the tower. The Court of Chancery provided no indication that it considered the conflict between its ruling and New York law regarding insolvent insurers.

d. Finally, the Court of Chancery assumed that a New York court would seek to impose on insurers "the same sort of joint and several liability that the insured would [face] in the same predicament." *Viking II* at 66. In fact, New York has substantially limited common law tort joint and several liability in favor of a comparative fault system that seeks to avoid having one defendant pay an entire judgment where others are comparatively at fault. MCKINNEY'S CPLR § 1601; *Tancredi v. A.C.& S, Inc. (In re N.Y.C. Asbestos Litig.)*, 775 N.Y.S.2d 520 (N.Y. App. Div. 2004) (solvent defendants do not pay the shares of insolvent defendants). Given New York's modification of joint and several liability, it is unlikely that a New York court would increase the burden on insurers by analogy to joint and several tort liability.

e. Multiple authorities have criticized the Court of Chancery's decision as departing from New York law. In *Mt. McKinley Insurance Co. v. Corning Inc.*,

2012 N.Y. Misc. LEXIS 6531 (N.Y. Sup. Ct. Sept. 7, 2012), a New York trial court stated that it "disagrees with the Delaware court's finding" because it "ignores established New York precedent." *Id.* at *14. The court noted that *Viking II* "derisively" cited, and "took issue with," precedent from the Court of Appeals, "mock[ed]" a Second Circuit opinion on point, and "expressed its wonderment" with the New York Court of Appeals. *Id*. at *12–13. Declining to apply *Viking II*, the court "note[d] that no New York court has adopted the interpretation of policy language in, or holding of" that decision. *Id.* at *14.

One leading treatise on insurance law stated that the Court of Chancery's decision was "virtually impossible to square with the ruling of the New York Court of Appeals in *Consolidated Edison*." BARRY R. OSTRAGER & THOMAS R. NEWMAN, HANDBOOK ON INSURANCE COVERAGE DISPUTES § 9.04[b] at 77 (15th ed. 2010); *see also Viking II* at 62 n.141 & 73 n.164 (citing 14th edition of OSTRAGER & NEWMAN). Another New York insurance law treatise similarly stated that *Viking II* "appears to be in conflict with" *Con Ed* as it "made several determinations that are [] at odds with New York precedent." 1-15 NEW APPLEMAN NEW YORK INSURANCE LAW § 15.04 (2)(d) (2d ed. 2014).[6]

[6] Practitioner commentary is in accord. *See* MARY BETH FORSHAW AND BRYCE L. FRIEDMAN, ALLOCATION ALERT: DELAWARE CHANCERY COURT RULES THAT NEW YORK LAW REQUIRES "ALL SUMS" METHOD OF ALLOCATION (Dec. 2009) (noting *Viking II* "ignores what was thought to be settled New York allocation law"); WILLIAM P. SHELLEY and JOSEPH A. ARNOLD, DELAWARE CHANCERY COURT INTERPRETS NEW YORK LAW TO APPLY "ALL SUMS" METHOD OF ALLOCATION IN ASBESTOS BODILY INJURY COVERAGE ACTION, at 2 (Oct. 20, 2009)

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

This Court should apply New York law and reverse the Court of Chancery's holding that "all sums" allocation applies. But if this Court does not find existing New York authority controlling, it should certify the question to the New York Court of Appeals. Section 500.27(a) of the New York Court of Appeals Rules of Practice authorizes certification of cases to that Court "[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 . . . ." *Quadrant Structured Prods.*, 2013 WL 5962813, at *1 (certifying question of New York law); *Teachers' Ret. Sys. of La. v. PriceWaterhouseCoopers, LLP*, 998 A.2d 280 (Del. 2010) (same).

If this Court concludes that existing New York authority does not control, certification is particularly appropriate here. The Court of Chancery's approach to allocation under New York law will encourage policyholders to file coverage suits governed by New York law in Delaware to obtain a more favorable substantive

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(stating Court of Chancery "launched an attack on the *Con Ed* decision (from New York's highest court)" and then "cast[] aside the conclusion reached in *Con Ed*," "reopen[ing] what was deemed settled law on allocation in New York"); ROBERT D. GOODMAN AND STEVE VACCARO, A VIKING ON CHOPPY WATERS (Jan. 2010) (noting that in "purportedly applying New York law" *Viking II* "appl[ied] presumptions, unprecedented in New York law" that led to "novel route" that "not only distorts New York's allocation rules in favor of contrary Delaware law" but raises "questions as to whether the [Court of Chancery] was faithfully applying New York law"); PHILIP H. HECHT, BACK TO BASICS: DELAWARE COURT APPLIES "ALL SUMS" ALLOCATION METHODOLOGY UNDER NEW YORK LAW (Nov. 2009) (stating *Viking II* "depart[ed] from the decisions of certain New York courts").

law for their case. Such forum shopping that would effectively alter New York law should not be encouraged. The substantive law governing identical insurance policies should not be different depending on where suit is filed.

New York has a significant interest in the consistent application of New York insurance law. As one of the "most influential [states] in the field of insurance" (Kirill P. Strounnikov, *Pre-Appearance Security Requirements for Unlicensed Reinsurers in the United States*, 7 CONN. INS. L.J. 465, 466 (2001)), New York "is uniquely entwined with the insurance industry," making "the insurance law of New York [] critically important not only to the citizens and corporations of New York, but also to the insurance industry as a whole and to other states looking for guidance" (Eric Tausend, *"No-Prejudice" No More: New York and the Death of the No-Prejudice Rule*, 61 HASTINGS L.J. 497, 500, 516 (2009)). Consistent application of New York law in this area, as enunciated by the New York Court of Appeals, is important for the sound functioning of insurance markets. If this Court does not follow *Con Ed*, then it should certify the question to give New York's highest court the final say as to New York substantive law.

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

A. Question Presented

Did the Superior Court err in holding that the Liberty coverage for 1980–1985 was exhausted, triggering the Excess Policies, where Liberty's underlying primary policies provide that its obligation applies only for damages and allocated loss expenses in excess of a $100,000 per-occurrence deductible, and Liberty did not bill for or collect the deductible amounts? This question was raised below (JA1561–70) and considered by the Superior Court (*Viking II* at 52–61).

B. Scope of Review

"[T]his Court reviews the trial court's interpretation of contract terms *de novo*. Where, as here, the plain language of a contract is unambiguous *i.e.*, fairly or reasonably susceptible to only one interpretation, we construe the contract in accordance with that plain meaning and will not resort to extrinsic evidence to determine the parties' intentions." *BLGH Holdings LLC v. enXco LFG Holding, LLC*, 41 A.3d 410, 414 (Del. 2012).

C. Merits of Argument

1. Under New York law, a plain reading of the Deductible Endorsement in the Liberty 1980–1985 policies demonstrates that payments under $100,000 do not erode aggregate limits.

Under bedrock New York contract law, the Deductible Endorsement in the Liberty 1980–1985 policies should be applied based on how the policies were

written. Contract interpretation is "a search for the intent of the parties to the contract" and "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 (N.Y. App. Div. 2007). Allowing the primary carrier and policyholders to disregard the deductibles alters one of the Excess Policies' core contractual terms: that they provide coverage above policies with defined per-occurrence deductibles.

Here, the Liberty 1980–1985 policies expressly require the insured to absorb the first $100,000 of each underlying judgment or settlement resulting from any occurrence. Specifically, each of the Liberty primary policies for 1980–1985 contains the following "Deductible Liability Endorsement":

> [Liberty's] obligation . . . applies only to the amount of such damages and "allocated loss expense" in excess of a deductible amount of $100,000, because of all "personal injury" and "property damage" combined, as the result of any one occurrence.
>
> [Liberty] shall be liable only for an amount equal to the "Personal Injury" and "Property Damage", "Each Occurrence" limit stated in the policy minus the applicable amount of deductible damages (excluding allocated loss adjustment expense) under the above Paragraph 1, and . . . only for the difference between the "Personal Injury" or "Property Damage" aggregate limits stated in the policy and the sum of the deductible damages (excluding allocated loss adjustment expenses) applicable.

Addendum A-42,-47,-54,-61,-71,-79.[7]

[7] Each 1980–1985 Liberty primary policy also includes a $500,000 "per occurrence" limit of liability and a [redacted] "aggregate" limit of liability for "personal injury." Addendum A-42,-47,-54,-61,-71,-79.

Under New York law, "a deductible is an amount that an insurer subtracts from a policy amount, reducing the amount of insurance." *N.Y. State Thruway Auth. v. KTA-Tator Eng'g Servs., P.C.*, 913 N.Y.S.2d 438, 440 (N.Y. App. Div. 2010). Deductible also has a well understood meaning in the insurance industry: a "portion of covered loss that is not paid by the insurer." INTERNATIONAL RISK MANAGEMENT INSTITUTE INC., GLOSSARY OF INSURANCE & RISK MANAGEMENT TERMS 44 (6th ed. 1996); *see also* HARVEY W. RUBIN, DICTIONARY OF INSURANCE TERMS 103 (2d ed. 1991) (defining deductible as the "amount of loss that insured pays in a claim").

The meaning of "occurrence" in the Deductible Endorsement is also settled. The Court of Chancery ruled that "each asbestos plaintiff's exposure and injury [i]s a single 'occurrence.'" *Viking II* at 54. Therefore, Liberty has no obligation to make any payment that could erode its limits unless any single asbestos bodily injury claim exceeds $100,000 in indemnity costs. And there is no dispute that defense cost payments do not erode the limits of the Liberty primary policies.

Tokio Marine & Fire Insurance Co. v. Insurance Co. of North America, 693 N.Y.S.2d 520 (N.Y. App. Div. 1999), provides helpful guidance. The general liability policy there had a $1 million limit and $250,000 deductible. When the insured settled a claim for more than $1 million, the court required it to contribute $250,000 and the insurer $750,000. *Id.* at 520. Similarly, Liberty is liable only for

the difference between the policy's per-occurrence limit ($500,000) and the amount "*in excess of* a deductible amount of $100,000." Addendum A-42,-47, -54,-61,-71,-79 (emphasis added). The Court of Chancery recognized that Liberty has no duty "to pay any indemnity or defense costs until the amount of the claim exceed[s] the deductible." *Viking I* at *14 n.14; *accord Spector v. Cushman & Wakefield, Inc.*, 2012 N.Y. Misc. LEXIS 2794, at *11 n.4 (N.Y. June 13, 2012) ("Where the claim amount is within the deductible, the insured must refund the amount to the insurer.").

Thus, under the $100,000 per-occurrence deductible in each 1980–1985 Liberty primary policy, Viking or Warren must bear the first $100,000. Importantly, such claims do not erode Liberty's aggregate limits. [redacted]

Viking and Warren do not dispute that the Excess Policies apply only if Liberty's underlying primary coverage is exhausted. XA17–18, 42. If Liberty's policies have not been properly exhausted by the application of deductibles, the Excess Policies are not triggered.

2. The Premium Endorsement neither negates nor renders ambiguous the Deductible Endorsement's plain meaning.

The Superior Court erroneously adopted Viking and Warren's contention that the Deductible Endorsement has nothing to do with deductibles or when Liberty's payments count toward exhaustion and governs only calculation of premiums under the separate Premium Endorsement. XA291. This is contrary to the policies' plain meaning and renders the Deductible Endorsement a nullity.

The Premium and Deductible Endorsements fit hand-in-glove to compensate Liberty for the cost of handling claims that fall in the per-occurrence deductibles. By its terms, the Premium Endorsement provides that Liberty shall collect a "premium for the expenses of handling deductible losses," and supplies a formula for calculating additional premiums based on "deductible amounts incurred." Addendum at A-42,-47,-54,-61,-71,-79. This allows Liberty to charge a fee for handling claims for which the liability is ultimately the policyholders' responsibility because they fall within the deductible. Nothing in the Premium Endorsement amends — let alone negates — the unambiguous Deductible Endorsement. The Premium Endorsement simply provides a mechanism to pay Liberty an additional fee for handling those claims.

Air Products & Chemicals, Inc. v. Hartford Accident & Indemnity Co., 707 F. Supp. 762 (E.D. Pa. 1989), is instructive. There, the court analyzed a Liberty policy with a "'corridor' deductible plan," under which the insured was "liable for

damages falling within a 'corridor' amount of '$450,000 for all damages in excess of $50,000 because of all personal injury and property damage as the result of any one occurrence.'" *Id.* at 776 n.13. Like the Premium Endorsement here, the deductible plan "required [the insured] to pay a premium *for the 'handling' of deductible losses by Liberty*."[8] *Id.* (emphasis added). Liberty argued that the insured must pay (i) all losses falling within the $450,000 deductible; and (ii) a premium consisting of "a 35% *handling charge* on all amounts paid within the deductible." *Id.* at 777 (emphasis added). Notably, the insured did not object to these requested rulings and the court granted *Liberty's* motion on those points. *Id.*

Similarly, *Arch Insurance Co. v. R.A. Bright Construction, Inc.*, 2009 WL 1507574 (N.D. Ill. May 28, 2009), construed a "loss sensitive" policy like the Liberty primary policies. *Compare id.* at *3 (describing a "large deductible" policy as a "loss sensitive" policy) *with Viking I* at *4 (identifying "high deductibles" as "'loss-sensitive' features of Houdaille's primary policies"). The *Arch* court observed that, "*[i]n addition to paying all losses under the deductible*, the insured must *also* pay a reduced 'deductible premium,' which is estimated at the beginning of the policy term and finalized based on an end-of-term audit." *Arch*, 2009 WL 1507574, at *3 (emphasis added). *Air Products* and *Arch* confirm that "the premium for the expenses of handling the deductible losses" that Viking

[8] *Compare* Addendum A-42,-47,-54,-61,-71, and -79 (defining "The Deductible Expense" as "the premium for the expense of *handling the deductible losses*") (emphasis added).

and Warren must pay under the Premium Endorsement does not supplant or negate their obligation "to pay all loss amounts falling within the . . . deductible." *Air Prods.*, 707 F. Supp. at 777.

To say the deductible is just a tool to calculate premiums — as Viking and Warren contended — ignores the meaning of the term "deductible" under New York law. Viking and Warren's policy interpretation frees them from paying for every asbestos settlement or judgment under $100,000 and relieves Liberty of additional years of paying defense costs. But that shared desire does not change the Deductible Endorsement's meaning or make it ambiguous. *DiPasquale v. Gutfleish*, 902 N.Y.S.2d 38, 40 (N.Y. App. Div. 2010) ("Clear contractual language does not become ambiguous simply because the parties to the litigation argue different interpretations.") (citation omitted).

3. Liberty's failure to apply the deductible cannot accelerate exhaustion of its policies and trigger the Excess Policies.

Liberty chose not to apply the deductibles in the 1980–1985 primary policies, claiming that the deductibles did not "have any impact on whether the limits of the policies are exhausted." XA291, 296, 262, 264. And Viking and Warren contended below that the deductible is just a tool to calculate premiums. X294–95. But Viking, Warren, and Liberty each had incentives to avoid applying the deductible in the manner called for by the Liberty policies' plain language.

a. Viking and Warren had obvious incentives to avoid paying the $100,000 deductible to which they agreed. Each asbestos claim represents a single "occurrence" under the policies. *Appalachian Ins. Co. v. Gen. Elec. Co.*, 863 N.E.2d 994, 1000–01 (N.Y. 2007). Thus, each asbestos claim triggers its own per-occurrence deductible. Liberty had no responsibility for claims under $100,000, which did not erode Liberty's [redacted] annual aggregate policy limit as a matter of law. Viking's and Warren's motivation to avoid the deductible was particularly strong here, as almost all of Viking's and Warren's claims have settled for under $100,000. XA277, 316, 317. [redacted] of the claims involve less than $100,000. XA277. Viking's largest settlement was for [redacted]. XA319.

b. Liberty also benefited from not applying and collecting the deductible amounts. Much of Liberty's financial responsibility for the asbestos cases is for defense costs that do not exhaust aggregate limits. As the Superior Court found: "Liberty's policies . . . unambiguously contain a duty to defend without eroding policy limits." *Viking III* at 64. "[U]nder any analysis, the Liberty policies include an unlimited duty to defend." *Id.* at 67; *see also* XA56 ¶ 5 (General Counsel of Viking's parent company explaining that "[t]he overwhelming majority" of Liberty's payments "have been toward defense costs, which are payable outside the limits of Liberty's policies. Thus, Liberty's payments to Viking have had very little impact on exhaustion of limits of Liberty's policies.").

When Liberty's aggregate policy limits are reached, its obligation to pay defense costs ends. XA179, 213–214 ¶ 8. Thus, by ignoring the deductible, Liberty could prematurely declare its policies exhausted and its defense cost obligations over earlier than they really were.

4. The Superior Court erroneously ruled the Liberty policies were exhausted by a settlement that did not appropriately take the Deductible Endorsement into account.

Viking and Warren did not pay the Liberty policies' $100,000 per-occurrence deductible. XA499. [redacted] JA1607; XA246–47, 284–85, 288. The Superior Court accepted this as exhausting the policies without applying the deductible's plain language. That was error, for multiple reasons.

a. The 1980–1985 Liberty primary policies contain a deductible, and "the parties agree that the deductible language is unambiguous — the parties agreed to a $100,000, off-the-top, per-occurrence deductible." *Viking III* at 56. Yet the Superior Court concluded "whether or not the deductible was appropriately applied on an actual per-occurrence basis is beside the point." *Id.* at 57.

That was error. "[W]hether or not the deductible was appropriately applied" is the key question in determining whether Liberty's policies have been exhausted and excess coverage triggered. Under the deductible's plain language, Liberty's 1980–1985 policies have not been exhausted because settlements or judgments (or

defended and dismissed cases) within the $100,000 per occurrence deductible do not erode Liberty's aggregate limits. And 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. *Con Ed*, 774 N.E.2d at 690; *Am. Home Assurance Co. v. Int'l Ins. Co.*, 684 N.E.2d 14, 18 (N.Y. 1997).

b. Warren's and Viking's settlements with Liberty do not affect the Excess Insurers' obligations, which must be based on the language in their policies rather than a deal between Liberty and Viking or Warren — to which the Excess Insurers were not parties. Under New York law, unambiguous policy language rather than the underlying insurer's claims handling decisions govern coverage 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).

In *Forest Laboratories, Inc. v. Arch Insurance Co.*, 953 N.Y.S.2d 460, 465–66 (N.Y. Sup. Ct. 2012), a New York trial court held that an excess insurer was not required to pay where insurers lower in the tower settled for less than their full policy limits. After settling with its primary and all but one excess insurer for less than full policy limits, the insured turned to the last non-settled excess insurer and sought the full amount of that excess policy. 953 N.Y.S. 2d at 462. The court

ruled the excess policy "pa[id] only after the underlying insurers pa[id] up to their policy limits." *Id*. at 465–66. Because "the underlying insurers never paid their full policy amounts, due to settlements" the final excess policy "was never reached, and . . . [was] not liable to make up the difference . . . ." *Id*. at 466.

The Appellate Division affirmed, holding that "[t]he motion court properly determined that the express terms of [the excess] policy providing excess coverage to plaintiff required the previous layer of excess coverage to be exhausted through actual payment of that policy's limit prior to [the insurer] being required to pay." *Forest Labs., Inc. v. Arch Ins. Co.*, 984 N.Y.S.2d 361, 362 (N.Y. App. Div. 2014).

Other cases have reached the same result. *See JP Morgan Chase & Co. v. Indian Harbor Ins. Co.*, 947 N.Y.S.2d 17, 13 (N.Y. App. Div. 2012) (applying Illinois law) ("reject[ing] the notion that 'when an insured settles with its primary insurer for an amount below the primary policy limits . . ., primary coverage should be deemed exhausted and excess coverage triggered, obligating the excess insurer to provide coverage under its policy.'" (quoting *Qualcomm, Inc. v. Certain Underwriters at Lloyd's London*, 73 Cal. Rptr. 3d 770, 772 (Cal. Ct. App. 2008))); *Citigroup Inc. v. Fed. Ins. Co.*, 649 F.3d 367, 373 (5th Cir. 2011) (excess policies were not triggered by below-limit settlements with primary insurer); *Great Am. Ins. Co. v. Bally Total Fitness Holding Corp.*, 2010 WL 2542191 (N.D. Ill. June

22, 2010) (similar); *Comerica Inc. v. Zurich Am. Ins. Co.*, 498 F. Supp. 2d 1019, 1034 (E.D. Mich. 2007) (similar).

c. The Superior Court erred in holding that "the jury's finding" that Liberty's policies had been exhausted "merely reflects the policies' clear language." *Viking III* at 58. Having found the policies unambiguous, the Superior Court should not have looked to the jury's factual finding. *Brad H. v. City of New York*, 951 N.E.2d 743, 746 (N.Y. 2011) (court may not consider extrinsic evidence of the policies' alleged meaning unless it finds an ambiguity); *see also Van Kipnis v. Van Kipnis*, 900 N.E.2d 977, 980 (N.Y. 2008) (similar).

Nor can the Superior Court's holding be reconciled with its own conclusion, only a page before, that "Plaintiffs' argument regarding the deductible as a premium calculation" — *i.e.*, the argument and testimony that Viking and Warren presented at trial — "is not in accord with the endorsements' language." *Viking III* at 57. The Superior Court did not explain what "clear language" shows that Liberty's policies have been exhausted.

d. Allowing Viking, Warren, and Liberty to disregard the deductible provision changes a core contractual term: that the Excess Insurers provide coverage above primary policies with per-occurrence deductibles. A significant amount of loss — up to $100,000 per occurrence — will fall within the deductibles and be borne by the insured. No matter what the Superior Court may have thought

of that contractual arrangement, it could "not make or vary the contract of insurance to accomplish its notions of abstract justice or moral obligation." *Teichman by Teichman v. Cmty. Hosp. of W. Suffolk*, 663 N.E.2d 628, 630 (N.Y. 1996) (quotation omitted). The New York Court of Appeals has held that if the only reasonable construction of the policy "is one favorable to the insurer-drafter of the agreement, there should be no reluctance to follow it." *Loblaw, Inc. v. Emp'rs' Liab. Assurance Corp., Ltd.*, 442 N.E.2d 438, 441 (N.Y. 1982).

For example, in *Stonewall Insurance Co. v. Asbestos Claims Management Corp.*, 73 F.3d 1178 (2d Cir. 1995) (applying New York law), the Second Circuit declined to follow "other courts [that] have found one occurrence in the mass tort context, a result that maximizes coverage when the insured is confronted with numerous claims that, considered separately, would not exceed the deductible amount." *Id*. at 1213. Finding the "per occurrence" deductible unambiguous, the court "decline[d] to interpret those provisions in a manner contrary to the intent of the parties, simply to achieve a result favorable to the insured." *Id*. at 1214.

Similarly, in *London Market Insurers v. Superior Court*, 53 Cal. Rptr. 3d 154 (Cal. Ct. App. 2007), the court noted that "although asbestos claims against [the insured] collectively exceed tens of millions of dollars, many individual claims apparently are within the applicable deductibles. Thus, if each claim is treated as a separate occurrence, [the insured] may have no coverage for a

substantial number of claims." *Id*. at 158 n.2. But that did not stop the court from adopting the "multiple occurrences" construction that reduced coverage.

Requiring actual exhaustion of the primary layer before triggering excess insurers' coverage obligations enforces the contractual language. As the New York Court of Appeals has stated: "'[p]rimary' policy premiums are higher, relatively speaking, than 'excess' premiums, because the primary insurer contemplates defending a potential lawsuit when it contracts with the insured." *GMAC v. Nationwide Ins. Co.*, 828 N.E.2d 959, 962 (N.Y. 2005). Upholding the exhaustion ruling below would allow Liberty to relieve itself prematurely of its "duty to defend" and "would provide a windfall to [Liberty] insofar as the costs of defense — litigation insurance — are contemplated by, and reflected in, the premiums charged for primary coverage" as opposed "to a true excess, or 'umbrella' policy, where the duty to defend is not as readily triggered." *Id*. at 962. What is worse, this would be done at the Excess Insurers' expense.

The Superior Court's ruling that Liberty had exhausted its primary and umbrella layers of coverage for the years 1980–1985 should be reversed as contrary to the policies' plain language and New York law.

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

If this Court disagrees that the existing New York authority is controlling, it can certify the question to the New York Court of Appeals. *See* Point I.C.3 above.

III. THE SUPERIOR COURT ERRED IN RULING ON DEFENSE COSTS.

A. Question Presented

Were Excess Policies with language disclaiming the duty to pay defense costs nonetheless required to pay defense costs? This question was raised below (JA1576–82) and determined by the court (*Viking III* at 61–78, *Viking IV* at 8–11).

B. Scope of Review

"[T]his Court reviews the trial court's interpretation of contract terms *de novo*. Where, as here, the plain language of a contract is unambiguous *i.e.*, fairly or reasonably susceptible to only one interpretation, we construe the contract in accordance with that plain meaning and will not resort to extrinsic evidence to determine the parties' intentions." *BLGH Holdings*, 41 A.3d at 414.

C. Merits of Argument

A follow-form excess policy that differs in material respects from the underlying policy may provide "coverage in conformance with the provisions of the [underlying] [p]olicy, except to the extent that the [excess policy] contain[s] limitations or restrictions beyond those outlined in the underlying insurance." *XL Speciality Ins. Co. v. Agoglia*, 2009 WL 1227485, at *2 (S.D.N.Y. Apr. 30, 2009) (applying New York law), *aff'd*, 370 F. App'x 193 (2d Cir. 2010); *see also Metro. Transp. Auth.*, 891 N.Y.S.2d at 376–77 ("Defendant excess insurer issued a follow-form policy, which incorporated the terms and conditions of an underlying []

policy to the extent not contradicted by the excess policy's express terms."). The terms of the excess policy will prevail over inconsistent terms of the policy whose form it follows. *200 Fifth Ave. Owner, LLC v. N.H. Ins. Co.*, 2012 N.Y. Misc. LEXIS 2731, at *15–16 (N.Y. Sup. Ct. 2012).

In this case, most of the Excess Policies provide that they follow the terms, definitions, exclusions, and conditions of the Underlying Umbrella policies "except as otherwise provided herein." Addendum A-11,-12,-15,-16,-21,-23,-26,-27,-32, -34,-35,-38,-40,-45,-50,-51,-56,-57,-77; *see also* A-33,-39,-41,-56,-63,-68,-81,-82. With regard to defense costs, certain Excess Policies provide otherwise.

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

Under its umbrella policies, Liberty has defense obligations only for claims "not covered" by underlying insurance. *See, e.g.*, JA3721. 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." *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); *see also* BARRY R. OSTRAGER & THOMAS R. NEWMAN, HANDBOOK ON INSURANCE COVERAGE DISPUTES § 13.13[d] (16th ed. 2013) (similar). Therefore, even if the primary policies were fully exhausted, the underlying asbestos claims would remain "covered" by the primary policy so that Liberty would have no defense obligations under its umbrella

policies.[9]

That Liberty defended the claims is irrelevant. First, Liberty's conduct is extrinsic evidence that a court should not consider here. *See* Point II.C.4, *supra*. Second, even if the policies were ambiguous, "[a] following-form excess insurer is not bound by the primary insurer's coverage decisions." ALLAN D. WINDT, INSURANCE CLAIMS & DISPUTES: REPRESENTATION OF INSURANCE COMPANIES AND INSURED § 6.45, 50 n.70 (3d ed. 1995). Third, Liberty has advocated Excess Insurers' exact position elsewhere. *See, e.g., Liberty Mut. Ins. Co. v. Pac. Indem. Co.*, 579 F. Supp. 140, 144−45 (W.D. Pa. 1984) (finding in favor of Liberty's position based on analysis that costs were "covered" under a primary policy even though it was already exhausted); *see also* JA1659.

2. Certain Excess Policies contain express defense exceptions.

a. Six Excess Policies expressly disclaim any duty to provide defense costs.[10] Courts have held that substantially similar provisions expressly exclude any duty to pay defense costs. *See In re Sept. 11th Liab. Ins. Coverage Cases*, 458 F. Supp. 2d 104, 124 (S.D.N.Y. 2006) (applying New York law) ("U.S. Fire's full

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[9] The following policies follow form to Liberty without other defense language and should have no defense obligations on this basis: Fidelity Policy SRX1889565 (JA4157); National Union Policy 9601115 (JA4484); Commercial Union Policy CY-9502-120 (JA4006); Republic Policy CDE0835 (JA4301); Vanguard Policy CDE1462 (JA4460); and Puritan Policy ML652652 (JA3749).

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

policy . . . repeated the exclusion of defense costs, providing: Except as otherwise stated herein, and except with respect to [] any obligation to investigate or defend any claim or suit."); *WDC Venture v. Hartford Accident & Indem. Co.*, 938 F. Supp. 671, 675 (D. Haw. 1996) ("Here, the language of the Westchester Policy states that it follows the underlying Hartford policy, except with respect to 'any obligation to investigate or defend any claim or suit.' This provision clearly excludes Westchester from any liability for the costs of the investigation or defense.") (internal citations omitted).

The Superior Court erred by failing to apply the plain language of these policies' exclusion to which courts have given effect under New York law. The Superior Court's initial decision did not even mention International Policies 5220113076, 5220282357, and 5220489339, which expressly except defense payments by providing: "*except with respect to (1) any obligation to investigate or defend any claim or suit* . . . the insurance afforded by this policy shall apply in like manner as the underlying insurance . . . ." JA4000, JA4117, JA4429. Courts have enforced such limiting language. *See, e.g.*, *In re Sept. 11th Liab. Ins. Coverage Cases*, 458 F. Supp. 2d at 124.

In light of the omission, Warren moved for clarification. XA501. Without discussing the three policies' plain language, the Superior Court held that the omission was "inadvertent" and "[a]ll three International policies provide full

defense obligations in addition to policy limits." *Viking IV* at 9. That was error. *See In re Sept. 11th Liab. Ins. Coverage Cases*, 458 F. Supp. at 124; *WDC Venture*, 938 F. Supp. at 675.[11]

b. Certain policies contain assistance and cooperation clauses that give the insurer the right, but not the obligation, to assume the defense. These provisions state as follows:

> The [insurers] *shall not be called upon to assume charge of the settlement or defense of any claim made, suit brought or proceeding* instituted against the [insured] but the [insurers] shall have *the right* and shall be given the opportunity to associate with the [insured] or the [insured's] underlying insurers, or both, in the defense and control of any claim, suit or proceeding relative to an occurrence where the claim or suit involves or appears reasonably likely to involve the [insurers] . . . .[12]

Similarly, certain Excess Policies with "consent" clauses disclaim responsibility to pay defense costs incurred without the insurer's consent.[13]

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[11] To the extent that the International Policies are found to be obligated to pay defense, any such obligation should be subject to aggregate limits because that is how the Superior Court adjudicated the defense obligations of the other policies containing "Assistance and Cooperation with Consent" language (*Viking III* at 74–76, 80), as discussed below. In fact, the Superior Court included the International Policies with the other assistance-and-cooperation policies at the outset of its defense-payment analysis. *Id.* at 63 n.241.

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

[13] Addendum A-41,-69,-81 ("no obligation shall be incurred on behalf of the insurer *without its consent* being first obtained . . . .") (emphasis added); Addendum A-16,-26,-32,-34,-35 ("In the event of claim or claims arising which appear likely to exceed the Underlying Limit, no Costs shall be incurred by the Assured *without the written consent* of the Underwriters.") (emphasis added); Addendum A-56,-63 ("Loss and legal expenses incurred by the Insured *with the consent* of the company in the investigation or defense of claims, including court costs and interest . . . .") (emphasis added); *see also* Addendum A-82.

The Superior Court misread these provisions to "contemplate[] a duty to defend claims against the insureds" because the provisions allow the insurer to "associate" with the insured's defense while "not requiring the insurer to take charge of it." *Viking III* at 73. The Superior Court stated its holding was reinforced by the "policies' failure to define 'ultimate net loss.'" *Id*. at 74. According to the court, that meant "there is nothing suggesting that 'ultimate net loss' would not include defense costs." *Id*.

That was error. Courts applying New York law interpreting similar assistance and cooperation clauses have held that excess insurers have "no obligation to defend." *M.H. Lipiner & Son, Inc. v. Hanover Ins. Co.*, 869 F.2d 685, 688 (2d Cir. 1989). A "right" to associate in the insured's defense is not an obligation. Therefore, such policies impose no duty to defend and "clearly disclaim[s] coverage of defense costs." *In re Sept. 11th Liab. Ins. Coverage Cases*, 458 F. Supp. 2d at 123 (interpreting similar "assistance and cooperation" language under New York law). And courts interpret the "consent" clauses 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." *Stonewall*, 73 F.3d at 1219. Although cited to it (JA1579, 1581–82), the Superior Court did not discuss or follow *Lipiner* or the *September 11th Insurance Cases*.

c. Five Excess Policies define "[t]he words 'ultimate net loss'" to "exclude all expenses and Costs" and define "Costs" as "interest accruing after entry of judgment, investigation, adjustment *and legal expenses* . . . ."[14] Similarly, three Excess Policies protect against "loss" but define "loss" to "exclude all expenses and costs."[15] New York courts have recognized that such policy definitions "exclud[ing] all expenses and Costs" exclude any obligation to pay defense costs. *Home Ins. Co. v. Am. Home Prods. Corp.*, 902 F.2d 1111, 1113–14 (2d Cir. 1990) (applying New York law); *accord Stonewall*, 73 F.3d at 1218 (applying New York law) (holding that insurers had "no duty to pay defense costs" where the term "ultimate net loss" was amended to delete the term "expenses" and "unambiguously includes only damages and not defense costs"). The Excess Policy "loss" and "ultimate net loss" definitions here are no different than those in *Home* or *Stonewall*.

But the Superior Court did not even consider these provisions in ruling on defense obligations, discussing them only in the context of the applicability of policy limits. *See Viking III* at 76–78. The error is highlighted by the Superior Court's ruling (discussed at Point III.C.2.b, *supra*) that where policies did not define "ultimate net loss," the silence implied that defense costs were included. *Viking III* at 74. Yet where the definition of "loss" and "ultimate net loss"

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

[15] *See* Addendum A-22,-27; *see also* Addendum A-33.

expressly excluded defense costs, the Superior Court reached the same result. The Superior Court's conclusion that all Excess Insurers were liable for defense costs — contrary to the policy language and the relevant case law — was error and does not reflect New York law.[16]

[16] In an opening brief being filed today in this consolidated appeal, another excess insurer is arguing that Houdaille did not validly assign coverage rights under the excess policies to Viking and Warren. *See* Travelers Casualty and Surety Company's Opening Brief, Point I; *see also* Addendum A-10,-14,-18,-20, -25,-29,-31,-37,-43,-48,-55,-62,-72,-80 (anti-assignment provisions in umbrella policies); A-38,-51,-60,-66,-73,-75,-78,-84,-85 (anti-assignment provisions in excess policies). Excess Insurers join Point I of Travelers' opening brief, which Excess Insurers incorporate herein. Excess Insurers also agree with Point II of Travelers' opening brief, that "Losses Arising From Continuing Injury Are Subject To Pro Rata Allocation."

CONCLUSION

For the foregoing reasons, 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 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.

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