SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. EILEEN BRANSTEN Justice PART 3

Index Number : 602454/2002
MT. MCKINLEY INSURANCE
vs.
CORNING
SEQUENCE NUMBER : 098
PARTIAL SUMMARY JUDGMENT

INDEX NO. 602454/02
MOTION DATE 9/13/12
MOTION SEQ. NO. 98

The following papers, numbered 1 to 3, were read on this motion to/for partial summary judgment

Notice of Motion/Order to Show Cause — Affidavits — Exhibits No(s). 1
Answering Affidavits — Exhibits No(s). 2
Replying Affidavits No(s). 3

Upon the foregoing papers, it is ordered that this motion is

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 9/17/12

J.S.C.
HON. EILEEN BRANSTEN

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☒ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART THREE

----------X

MT. MCKINLEY INSURANCE COMPANY, formerly known as GIBRALTER CASUALTY COMPANY and EVEREST REINSURANCE COMPANY, formerly known as PRUDENTIAL REINSURANCE COMPANY,

Plaintiffs,

-against-

CORNING INCORPORATED, et al.,

Defendants.

Index No.: 602454/02
Mot. Date: 4/13/12
Mot. Seq. Nos.: 98-110
112-117

----------X

PRESENT: HON. EILEEN BRANSTEN:

The matter at bar concerns a declaratory judgment action for insurance coverage for personal injury claims resulting from exposure to asbestos. The insurance policies at issue consist of primary, umbrella and excess comprehensive general liability ("CGL") policies issued to defendant Corning Incorporated ("Corning"), covering the time period from 1962 through 1985.

Lumbermens Mutual Casualty Company ("Lumbermens") and Century Indemnity Company ("Century") are the primary insurers. The remaining umbrella and excess insurers relevant to the instant motion are described below.

BACKGROUND

In motion sequence number 98, Lumbermens moves for partial summary judgment regarding allocation (the "allocation motion"). The motion, and the motions relating to and/or joining in Lumbermens' allocation motion, concern Lumbermens' alleged

obligation to provide insurance coverage to Corning for personal injury claims resulting from exposure to asbestos-containing products supplied by Corning's former subsidiary, Corhart Refractories Company ("Corhart", and, the claims, the "Corhart Claims"). Specifically, Lumbermens and Century, followed by the excess and umbrella insurers, seek a declaration of the proper method of allocation of responsibility for indemnity losses amongst the insurers. Lumbermens and Corning, with limited joinder, further move for a declaration of the proper method of allocation of defense costs. Lumbermens, Corning and the joining and moving excess and umbrella insurers, seek a determination that any duty to indemnify (or defend, where appropriate) is allocated pro rata across applicable policies based on the time that the insurance policies covered the risk ("time on the risk").

The following parties, enumerated by motion sequence number, join in Lumbermen's motion and/or make related motions for allocation:

Motion Sequence Number	**Moving Parties**
99	Continental Casualty Co. and Continental Insurance Co. ("Continental") - Joins with Lumbermens and moves for partial summary judgment regarding allocation[1]
100	Mt. McKinley Insurance Co. and Everest Reinsurance Co. ("Mt. McKinley") - Moves for partial summary judgment regarding allocation

[1] All moving memoranda of law will be enumerated as "Party Name Memo" All reply memoranda of law will be enumerated as "Party Name Reply Memo"

101	Travelers Casualty and Surety Co. ("Travelers") - Joins with Lumbermens and moves for partial summary judgment regarding allocation - Joins with Hartford's Reply Brief
102	North River Insurance Co. ("North River") - Moves for relief related to Lumbermens' motion for partial summary judgment regarding allocation
103	London Market Insurers ("London Market") - Moves for relief related to Lumbermens' motion for partial summary judgment regarding allocation
104	Hartford Accident and Indemnity Co., First State Insurance Co. and New England Reinsurance Corp. ("Hartford") - Moves for partial summary judgment regarding allocation
105 and 108	Allstate Insurance Co., Fireman's Fund Insurance Co. and American Centennial Insurance Co. ("Allstate") - Moves for partial summary judgment regarding allocation - Joins with the Chartis Companies' motion for partial summary judgment regarding allocation (110)
106	Westport Insurance Corp. ("Westport") - Moves for partial summary judgment regarding allocation
107	Federal Insurance Co. ("Federal") - Moves for partial summary judgment regarding allocation
109	Century Indemnity Co. and Westchester Fire Insurance Co. (Together, "Century") - Moves for partial summary judgment regarding allocation

110	AIU Insurance Company, American Home Assurance Company and National Union Fire Insurance Company of Pittsburgh, PA (the Chartis Companies") - Moves for partial summary judgment regarding allocation[2]
112	Old Republic Insurance Co. ("Old Republic") - Moves for partial summary judgment regarding allocation, partially joins the Chartis Companies motion for partial summary judgment regarding allocation (110) and partially joins Lumbermens' motion for partial summary judgment regarding allocation (98)
113	Great American Insurance Co. ("Great American") - Moves for partial summary judgment regarding allocation
114	Hudson Insurance Co. ("Hudson") - Moves for partial summary judgment regarding allocation - Joins with Hartford's Reply Brief
115	Arrowood Indemnity Co. ("Arrowood") - Moves for partial summary judgment regarding allocation - Joins with Hartford's Reply Brief
117	Allianz Insurance Co. ("Allianz") - Moves for partial summary judgment on allocation by adopting and joining in Hartford's and the Chartis Companies' motions for partial summary judgment regarding allocation

In motion sequence number 116, Corning opposes Lumbermens', Century's and the joiners' allocation motions, as well as the joiners' related motions, in an omnibus opposition memorandum of law ("Corning Opp. Memo") and supporting papers. Corning

---

[2] Only certain of the Chartis Companies move for partial summary judgment on allocation.

further cross-moves for partial summary judgment for joint and several allocation against the Moving Insurers[3] (the "cross motion") and moves for summary judgment against the Non-Moving Insurers for joint and several allocation.[4] Corning cross-moves against Lumbermens and Century (the "Primary Insurers") regarding allocation of defense costs, and cross-moves and moves the Moving Insurers and the Non-Moving Insurers regarding indemnity costs. Corning Reply Memo,[5] p. 1.

Lumbermens, Century, Hartford and the Excess Insurers[6] each submitted a reply memorandum in further support of their motions for summary judgment regarding allocation and in opposition to Corning's cross-motion for partial summary judgment regarding allocation.[7] The following parties join in the Excess Insurers' reply:

---

[3] *See* listing and definition of "Moving Insurers" in Corning Incorporated's Amended Memorandum of Law (1) in Opposition to the Motion for Partial Summary Judgment Regarding Allocation Filed by Lumbermens Mutual Casualty Company and Joinders and Related Motions, (2) in Support of Corning Incorporated's Cross-Motions for Partial Summary Judgment for Joint and Several Allocation, and (3) in Support of Corning Incorporated's Related Motion for Partial Summary Judgment for Joint and Several Allocation ("Corning's Moving Memo"), p. 2, n.1.

[4] *See* listing and definition of Non-Moving Insurers in Corning's Moving Memo, p. 2, n.2.

[5] Corning Incorporated's Memorandum of Law (1) in Further Support of Corning Incorporated's Cross-Motions for Partial Summary Judgment for Joint and Several Allocation and (2) in Further Support of Corning Incorporated's Related Motion for Partial Summary Judgment for Joint and Several Allocation ("Corning Reply Memo").

[6] *See* listing and definition of "Excess Insurers" in The Excess Insurers' Memorandum of Law in Further Support of Their Motions for Partial Summary Judgment Regarding Allocation and in Opposition to Corning Incorporated's Cross Motion and Related Motion for Partial Summary Judgment for Joint and Several Allocation ("Excess Insurers' Reply"), p. 3, n.1.

[7] "Lumbermens' Reply Memo"; "Hartford Reply Memo"; "Century Reply Memo"; and the "Excess Insurers' Reply. Memo", respectively.

Continental	Mt. McKinley	Travelers (also joins in Hartford's reply)
North River	London Market	Allstate
Westport	Federal	Chartis Companies
Old Republic	Great American	Hudson
Arrowood	Allianz	
Executive Risk Indemnity, Inc. (f/k/a American Excess Insurance Company) ("Executive Risk")	Employers Insurance Company of Wausau ("Wausau")	

Non-Moving Insurers Executive Risk and Wausau did not file motions for partial summary judgment on allocation, but oppose Corning's motion for partial summary judgment as against them and join in the Excess Insurer's reply to Corning's cross-motion.

STANDARD OF LAW

I. Summary Judgment

The proponent of a summary judgment motion "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986); *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). CPLR 3212(b) requires that for a court to grant summary judgment the court must determine if the movant's papers justify holding as a matter of law "that there is no

defense to the cause of action or that the cause of action or defense has no merit." Stated otherwise, the movant bears the burden to dispel any question of fact that would preclude summary judgment. *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985).

If the moving party fails to make a prima facie showing of entitlement to summary judgment as a matter of law, the motion for summary judgment must be denied. *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851, 853 (1985). Where the movant has established a prima facie case, the opposing party has the burden, shown by producing evidentiary proof, that a genuine issue of material fact exists preventing the grant of summary judgment. *Zuckerman*, 49 N.Y.2d at 562. The party opposing summary judgment may not rest upon mere allegations or denials, but must set forth specific facts showing that there is a genuine issue of material fact for trial. *Id.* If there is any doubt as to the existence of a triable issue, summary judgment should be denied. *See, e.g., Rotuba Extruders, Inc. v. Ceppos*, 46 N.Y.2d 223, 231 (1978).

II. Insurance Policy Interpretation

In determining a dispute over insurance coverage, the court must look to the language of the applicable policies. *Fieldston Property Owners Assoc., Inc. v. Hermitage Ins. Co.*, 16 N.Y.3d 257, 264 (2011). The court is to construe the policy's language a manner that "affords a fair meaning to all of the language employed by the parties in the contract and leaves no provision without force and affect." *Consolidated Edison Co. of New York, Inc. v. Allstate Ins. Co. et al.*, 98 N.Y.2d 208, 221 (2002) quoting *Hooper*

Assocs., Ltd. v. AGS Computers, Inc., 74 NY2d 487, 493 (1989) (additional citation omitted). The court may not disregard clear provisions in the insurance policies, and the court may not judicially rewrite the policies in order to provide what may be to one person an equitable result. *See Raymond Corp. v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, 5 N.Y.3d 157, 162 (2005) (internal quotations and citation omitted).

Standard principles of contract interpretation apply to the court's interpretation of insurance policies. *See Loblaw v. Employers' Liability Assur. Corp., Ltd.*, 57 N.Y.2d 872, 876 (1982); *see also Vigilant Ins. Co. v. Bear Sterns Co., Inc.*, 10 N.Y.3d 170 (2008).

III. "Pro Rata" Allocation v. "Joint and Several" or "All Sums" Allocation

Pro Rata Allocation

When multiple insurance policies may cover a loss, recovery for the loss can be allocated either under a "pro rata" or a "joint and several," also known as "all sums," theory.

Generally speaking, in pro rata allocation, multiple insurance policies that cover a loss are each responsible for their respective portion of the loss. Pro rata allocation may be completed with the "time on the risk" method, where recovery for the loss covered by the insurance policies is allocated among policies that were in effect during the time of, and covered, the risk that led to the loss. *Consolidated Edison Co. of New York, Inc.*, 98 N.Y.2d at 225. The allocation of the loss to a particular policy is thus considered to be proportionate to the damage suffered during that policy's term.

Under pro rata allocation, the insurance holder bears the burden of seeking recovery from each policy issuer whose policy covers the respective portion of the holder's loss during the policy's effective time period. The insurers bear responsibility only for that portion of the liability corresponding to their insurance policy's or policies' period of coverage. The insured bears the loss if past insurers are insolvent or if the insured has self-insured for any of the relevant time period.

Joint and Several Allocation

In joint and several allocation, also known as all sums allocation, each insurer who issued an insurance policy which covers a loss may bear full responsibility for the loss, up to the monetary limit of each policy. Thus, depending on policy limitations and the nature of the injury or injuries, the insurance holder may recover the totality of its loss from one provider whose insurance policy was in effect at the time of, and covered, the loss. That provider may then seek contribution from the other insurance policies which covered the loss.

Under joint and several allocation, the insured may recover its full loss from one insurer, or few insurers, and the burden rests on the insurance provider(s) to obtain contribution from the remaining covering policies. The insurer bears the cost if other insurers are insolvent or otherwise incapable of paying.

Under elemental contract theory, the shifting of burdens in recovery may bear correlation to the price of the insurance policy.

Determination

It is up to the court to determine which of the two methods of allocation is proper under the particular circumstances of the case. *See Olin Corp. v. Insurance Co. of North America*, 221 F.3d 307, 321-25 (2d Cir. 2000). The language of the relevant insurance policies will be paramount in the court's determination. *Raymond Corp.*, 5 N.Y.3d at 162; *Consolidated Edison Co. of New York, Inc.*, 98 N.Y.2d at 221.

ANALYSIS

"[C]ollecting all the indemnity from a particular policy presupposes ability to pin an accident to a particular policy period." *Consolidated Edison Co. of New York, Inc.*, 98 N.Y.2d at 224 (citation omitted). Pro rata allocation, if allowed by the contract language, acknowledges the fact that there is uncertainty as to what actually transpired during any particular policy period." *Id.*

Further, pro rata allocation places the burden on the insured, the chooser of the insurance, for any inability of its consecutive insurers to pay for coverage. To state otherwise would be to allow an insured to select one policy with expansive coverage from a known and established insured, while choosing a lesser policy for other time periods, safe in the knowledge that it would always be able to recover for its loss to the maximum extent of the policy from the established insurer for any continuous injury of which the quality insurer was shown to have covered. *See Olin Corp.*, 221 F.3d at 323. The insurer would therefore bear the burden of the insured's choice, a choice in which the insurer played no part.

Additionally, pro rata insurer forces the burden upon the insured for choosing to self-insure. *See id.*; *see Owens-Illinois, Inc. v. United Ins. Co.*, 138 N.J. 437, 479 (1994) ("When periods of no insurance reflect a decision by an actor to assume or retain a risk, as opposed to periods when coverage for a risk is not available, to expect the risk-bearer to share in the allocation is reasonable.").

In contrast, "joint and several allocation is not consistent with the language of [] policies providing indemnification for 'all sums'" of liability that resulted from an accident or occurrence 'during the policy period.'" .

The court notes that it does not find the Delaware Chancery court's decision in *Viking Pump v. Century Indemnity Co.*, 2 A.3d 76 (Del. Ch. 2009) as decisive in this case, as apparently argued by Corning, to the extent that *Viking Pump* finds for joint and several allocation. In that case, the Delaware court correctly noted that the New York Court of Appeals has not adopted a definite position upon whether pro rata or joint and several allocation applies to multiple insurance policies covering the same loss. The court noted, again correctly, if somewhat derisively, that the Court of Appeals has found that the issue is to be governed by the language of the policies at issue. *Id.* at 114-15. After turning its derision to federal court allocation decisions which interpreted New York law and held for pro rata distribution, *id.* at 116-7, the Delaware court returned to critiquing the Court of Appeals in its decision in *Continental Casualty Co. v. Allstate Ins. Co.*, 98 N.Y.2d 208, 223-25 (2002).

Viking Pump took issue with the *Continental Casualty Co.* court's interpretation of the policy language of that case that stated: "for all sums which the insured shall be obligated to pay by reason of the liability" and a limitation that "[t]his policy applies only to 'occurrences' ... happening during the policy period." *Viking Pump*, 2 A.3d at 117 (quoting *Continental Casualty Co.*, 98 N.Y.2d at 222). The Court of Appeals found that the quoted policy language mandated pro rata allocation. The *Viking Pump* court, despite mocking the Second Circuit's inclusion of a public policy element in *Olin Corp.*, *see Viking Pump*, 2 A.3d at 116, then expressed its wonderment that the Court of Appeals, in "determining that the particular policy in question required the application of the pro rata approach . . . did not engage in an extended public policy analysis (or even any at all)." *Viking Pump*, 2 A.3d at 118; *see also id.* at 119.

The *Viking Pump* court found that in the policies it considered the "during the policy period" language therein allowed for a situation similar to a personal injury plaintiff choosing to sue one tortfeasor of multiple, a situation in which joint and several liability is well-established. *Id.* Specifically, the court found that under the "during the policy period" language, pro rata allocation would necessarily read out the policies' non-cumulation and prior insurance provisions, thereby rewriting the parties' agreements. *Id.* at 119-21. The court paid particular focus to the policies' anti-stacking provisions, which prevent an insured from a recovering from multiple policies in order to obtain a greater recovery per occurrence than a single policy would allow. The court then found that:

> the words "during the policy period" simply require that the insured's liability for the claim in question be attributable to an occurrence during the policy period; that is, that the tort plaintiff have suffered an injury in fact during the policy period that has resulted in the insured's liability.

Id. at 123. The court ultimately found that the policy language at issue, including non-cumulation and prior insurance provisions, warranted joint and several allocation.

This court understands the methodology of examining policy language as shown in the *Viking Pump* decision, but disagrees with the Delaware court's finding. *Viking Pump* ignores established New York precedent, is not controlling on this court and is limited to the facts and policy language of that case itself. This court notes that no New York court has adopted the interpretation of policy language in, or holding of, *Viking Pump* to find joint and several allocation, and this court does not find it decisive now. However, as is clear in the *Viking Pump* decision, the language of the parties' contracts is of primary importance, and will be closely examined in the policies in this matter.

I. Primary Insurance Coverage

To reiterate, the insurance policies at issue cover the time period from 1962 through 1985, and consist of primary, umbrella and excess comprehensive general liability coverage. Lumbermens and Century are the primary insurers.[8] Corning purchased approximately 129 excess insurance polices through 37 insurance companies. *See* Corning Moving Memo, p. 27; *see also* Tessler Affirm.,[9] ¶¶ 3-143.

---

[8] One additional primary insurer, Home, has become insolvent.

[9] Affirmation of Edward Tessler in Support of Corning Incorporated's Opposition to the Motion for Partial Summary Judgment Regarding Allocation Filed by Lumbermens Mutual Casualty Company and Related Joinders and Motions; Corning Incorporated's Cross-Motions

A. Lumbermens (Motion Seq. No. 98)

Lumbermens issued eleven primary comprehensive general liability insurance policies to Corning from January 1, 1972 through April 1, 1985. Revich Affirm.,[10] ¶ 7, Exs. I through S; Tessler Affirm., Exs. 60-72.

1. *Non-Cumulation and Other Insurance Language*

Corning offers a primary argument for joint and several allocation based on alleged "non-cumulation" or "non-stacking" provisions in the primary and excess insurance policies. *See* Corning's Memo, p. 31 *et seq.* Corning contends that the Lumbermens' policies contain non-stacking provisions which, when read with the policies as a whole, mandate joint and several allocation. The court disagrees with Corning's assertion.

Non-stacking, or non-cumulation, provisions prevent an insured from recovering greater liability than that for which was contracted. The provisions are designed such that an insured may not obtain coverage for the same injury under multiple policies, thereby obtaining greater coverage than the amount of liability coverage contracted for in a single policy. *See, e.g., Hiraldo v. Allstate Ins. Co.*, 5 N.Y.3d 508 (2005).

Corning contends that the primary, first layer excess and all of the upper layer excess policies at issue contain non-cumulation language. Corning argues that, in

---

for Partial Summary Judgment for Joint and Several Allocation; and in Support of Corning Incorporated's Related Motion for Partial Summary Judgment for Joint and Several Allocation ("Tessler Affirm.").

[10] Affirmation of Ira Revich in Support of Lumbermens' Motion for Partial Summary Judgment as to Allocation ("Revich Affirm.").

exchange for the insurers' limit of liability across multiple policies in excess of their duty to provide coverage for an injury confined to a single period, the non-cumulation language in the policies allow Corning to recover all coverage available in a single year as if the injury occurred in that year alone. Corning's Memo, pp. 31-33.

The relevant representative language in the Lumbermens' policies states, in endorsements:[11]

> Condition 6, Other Insurance, is deleted and replaced in its entirety by:
>
> Other Insurance: If the insured has other valid and collectible insurance, other than insurance specifically in excess hereof, with any other insurance covering a loss also covered by this policy, the insurance afforded by this policy shall be in excess of and shall not contribute with such other insurance. If the insured has any other policy or policies of insurance with the company covering a loss also covered by this policy (other than insurance in excess hereof), the insured shall elect which policy shall apply and the company shall be liable under the policy so elected and the company shall not be liable under any other policy.[12]

This type of clause shown in the policies is defined by *Consolidated Edison Co. of New York, Inc., supra*, as an "other insurance" clause. These clauses apply when multiple policies cover the same injury during the same time period. *Consolidated Edison Co. of New York, Inc.*, 98 N.Y.2d at 223. The endorsements function as a bar to multiple

---

[11] The court notes that, incredibly, Lumbermens and some other parties have quoted policy language in their memorandums of law without citing to particular policies or directing the court to where those particular policies may be found in the mass of exhibits presented. Such poor citation form has presented the court with needless delay in searching across multiple policies for the alleged quotes language in a repeated chase from policy to policy. In the future, any failure to cite any quoted or referred to language will lead to the immediate rejection of submitted papers.

[12] Tessler Affirm.: Ex. 60, Endorsement ("Endors.") 17; Exs. 61-65, Endors. 15; Ex. 66, Endors. 11; Ex. 67, Endors. 10; Exs. 68, 69, Endors. 30; Ex. 70, Endors. 31.

recoveries for the same injury during the same time period. This is exemplified in the language of the endorsements, none of which reach out of its policy's time period.

First, the endorsement language contemplates that if two insurers have issued a policy covering a loss covered by the Lumbermens' policy in effect at the time of loss, the Lumbermens' policy will act as an excess policy:

> If the insured has other valid and collectible insurance . . . with any other insurance covering a loss also covered by this policy, the insurance afforded by this policy shall be in excess of and shall not contribute with such other insurance.

Second, if two Lumbermens' policies apply to a loss, the insured is required to choose which Lumbermens policy will apply:

> If the insured has any other policy or policies of insurance with the company covering a loss also covered by this policy . . . the insured shall elect which policy shall apply and the company shall be liable under the policy so elected and the company shall not be liable under any other policy.

The endorsement language regarding "Other Insurance" applies only to policies in effect during each particular policy's covering period. The provision does not mandate joint and several allocation, and to adopt pro rata allocation would not render the language "mere surplusage" (*see* Corning's Memo, pp. 33-34), but would instead effect the intent of the policy's language of limiting multiple recovery for the same injury in the same policy period. *See, e.g., Consolidated Edison Co. of New York, Inc.*, 98 N.Y.2d at 223 ("Such clauses apply when two or more policies provide coverage during the same period, and they serve to prevent multiple recoveries from such policies."). This reasoning applies to all policies at bar in this action.

In contrast, the clauses the Delaware court reviewed in *Viking Pump* expressly considered an injury occurring outside of the time limitations of each policy. *See Viking Pump*, 2 A.3d at 121 (non-cumulation clauses stating, or in substantially similar language: "[i]f 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"). The Delaware court found that this policy language thus necessitated joint and several allocation to provide for full recovery under the policies. Upon the policy language at bar, *Viking Pump* is distinct from the Lumbermens' policy language and lends no support for Corning's argument for joint and several allocation thereunder.

2. *"All Sums", "During the Policy Period," and "Bodily Injury" Policy Language*

Corning contends that the Lumbermens' policies inclusion of the phrase "all sums" requires each policy to pay the total amount attributable to an injury, so long as some portion of the injury was attributable to the covered policy period. Corning argues that the "all sums" phrase, even if it were to be combined with the phrase "during the policy period," suffices to find for joint and several allocation. Corning's Memo, pp. 37-38.

Corning further alleges that any "during the policy period" language which could be used for an argument towards pro rata distribution was present in the base form policies' definition of "bodily injury," but was expressly removed by the insured and insurer with addendums to the policies. Corning argues that while some of the original pre-printed policy forms' definition of "bodily injury" contained "during the policy

period language," that definition of bodily injury was specifically replaced with a new definition of "Personal Injury." Corning notes that the personal injury definition in the addendums does not contain the phrase "during the policy period." Corning argues on this basis that without the "during the policy period" phrase, no language in the policies allows for pro rata allocation. Corning contends that Lumbermens has agreed to provide coverage for "all sums" resulting from an injury, including loss that takes place outside of the policy period, should any portion of the injury have been incurred during the policy period. *Id.*, pp. 38-39; 46-47

In opposition, Lumbermens acknowledges that the "during the policy period" language was removed from its policies, but asserts that Corning's interpretation of the definition of bodily injury in the Lumbermens' policies is incomplete and unreasonable. Lumbermens argues that the "bodily injury" definition change in the identical endorsements of the policies shows that coverage available under the policies exists for "bodily injury," as defined in the endorsements' "personal injury" section, only during the policy period. Lumbermens' Memo, pp. 13-19. Lumbermens contends that under Corning's incorrect argument, no coverage would be afforded for the Corhart claims under the pre-April 1, 1977 Lumbermens' policies.

The court agrees that to adopt Corning's definitive version of the change in the policy "bodily injury" policy language would be to read out coverage for the Corhart claims under the pre-1977 Lumbermens' policies. The court will strive to give effect to

every part of a contract of insurance, and thus may not adopt Corning's interpretation. *See, e.g., Northville Industries Corp. v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, 89 N.Y.2d 621, 632-33 (1997).

The Lumbermens' policies replaced the form definition of "Bodily Injury" via endorsement:

> "Bodily Injury" is deleted and replaced in its entirety by:
>
> "Personal Injury" means, (1) bodily injury, sickness, disease, disability, shock, mental anguish and mental injury; ...
>
> (It is further agreed that the above definition replaces "bodily injury" wherever it appears throughout the policy except in Nuclear Energy Liability Exclusion (Broad Form)).[13]

Coverage Part 7 – Comprehensive General Liability Insurance of the Lumbermens' policies states:

> The company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of A. bodily injury or B. property damage to which this insurance applies, caused by an occurrence...[14]

As "bodily injury" was replaced by "personal injury," *supra*, for coverage to be reached, under this clause an "occurrence" must be present which caused "personal injury." For Lumbermens' policies incepting prior to April 1, 1977, Lumbermens asserts that no definition of "occurrence" that applies to personal injury exists. The definition of "occurrence" for those policies states:

---

[13] Tessler Affirm.: Ex. 60, Endors. 17; Exs. 61-65, Endors. 15; Ex. 66, Endors. 11; Ex. 67, Endors. 10; Exs. 68, 69, Endors. 30; Ex. 70, Endors. 31.

[14] Tessler Affirm., Exs. 60-70.

"Occurrence" is deleted and replaced *in its entirety* by:

> "Occurrence", as respects Coverage B, property damage liability, means an accident, including injurious exposure to conditions, which results, during the policy period, in property damage neither expected nor intended from the standpoint of the insured.[15]

Lumbermens contends that this endorsement changes the term "occurrence" in Coverage Part 7 in its entirety, and therefore removes the term from the coverage for personal injury. Lumbermens asserts, on this basis, that under Corning's interpretation, the only coverage afforded the Corhart claims under the pre-1977 policies would be under the "Personal Injury Coverage Part," which does not provide coverage for the type of injury stemming from the Corhart claims. Lumbermens' Reply Memo, pp. 16-17. Lumbermens thus asserts that Corning's interpretation of the Lumbermens' policies, apparently extrapolating the pre-1977 to all of the policies, is unreasonable. *Id.*

Lumbermens argues that the only reasonable interpretation of the Lumbermens policies at issue, and the only interpretation that would give effect to and provide coverage for the Corhart claims for all policy periods, is to find that coverage for "bodily injury" was intended to fall within the definition of and coverage for "personal injury." Lumbermens contends this is the only possible interpretation, particularly after the endorsements to each Lumbermens' policy changing the definition of "bodily injury" and removing the definition of "occurrence" from bodily injury pre-1977. Lumbermens' Reply Memo, p. 17-18. Lumbermens argues that coverage must be found for bodily

---

[15] Tessler Affirm., Ex. 60, Endors. 17; Exs. 61-64 (emphasis added in all).

injury under the personal injury coverage part of the policies, as "bodily injury" has become an enumerated "personal injury."

The court finds that, giving effect to the language of the policies and providing the full amount of coverage for which the parties contracted, coverage for the Corhart claims is found within Coverage Part 14 of the Lumbermens' policies, coverage for personal injury. Personal injury has been defined to include "bodily injury," and bodily injury is asserted in the Corhart Claims. Reading the endorsements otherwise would be to withhold coverage based on a lack of occurrence and to withhold coverage as falling without the definition of "personal injury." Finding the Corhart claims within Coverage Part 14 further mandates that the injury must have occurred "during the policy period" for coverage to attach. Pro rata allocation of the indemnity loss under the Lumbermens' policies is therefore appropriate. *Consolidated Edison Co. of New York, Inc.*, 98 N.Y.2d at 224.

3. *Lumbermens' and Corning's Further Arguments*

The court has considered the Lumbermens' and Corning's further arguments for and against granting summary judgment on the issue of allocation. The court finds that the policy language before the court is sufficient to grant the requested declarations, and therefore finds the parties' arguments without merit.

B. Century (Motion Seq. No. 109)

Century issued three primary insurance policies and seven excess insurance policies to Corning.

Century issued three primary policies to Corning. McDonald Affirm., Exs. A-C.[16] Each policy defines the terms "policy period" and "occurrence." The policy period definition limits coverage only to accidents, occurrences or personal injury which occurs during the policy period." McDonald Affirm., Ex. A, p. COR 01740, § IV (stating that the policy applies "only to accidents which occur during the policy period") ("accidents" amended to include "occurrences", p. COR01754); Ex. B, p. COR 01826, § IV; Ex. C (stating that the policy applies "only to occurrences which occur during the policy period"), p. THICIL00067927, § IV (stating that the policy applies "only to personal injury . . . which occurs during the policy period").

Century's policies further define "occurrence" such that the policies cover losses only which arise during the effective policy period. McDonal Affirm., Ex. A, p. COR01754 ("'Occurrence' means an event, or continuous or repeated exposure to conditions, which unexpectedly causes injury during the policy period."); Ex. B, p. COR01831 ("'occurrence' means either an accident happening during the policy period or a continuous or repeated exposure to conditions which unintentionally causes injury to or destruction of property during the policy period.") (applying to property damage

---

[16] Affirmation of John B. McDonald in Support of Century's Motion for Partial Summary Judgment ("McDonald Affirm.").

coverage); Ex. C, p. THICIL00067929 ("'occurrence" . . . means an accident, including injurious exposure to conditions, which results, during the policy period, in property damage") (applying to property damage coverage).

Century asserts that its excess policies either contain the same language or follow form to policies with the same limiting language. McDonald Affirm., Exs. D-J.

Corning, in opposition to Century's motion and in support of its own motion, first contends that "non-cumulation" clauses mandate all sums allocation. The court, as per the reasoning stated in section I.A.1, *supra*, does not agree with Corning's argument. The clauses within Century's policies are near carbon-copies of the policies illustrated above. *See* McDonald Affirm., Ex. A, p. COR01753; Ex. B, p. COR01833; Ex. C, p. THICIL00067933. The clauses in Century's policies act as those clauses recited above in Corning's policies, and for the same reasons the court finds that the policies support pro rata allocation, and do not mandate joint and several allocation.

The court finds that, upon examination of Century's primary policies, all of which define coverage to accrue during the policy period, and Century's excess policies, all of which follow form, a declaration for pro rata allocation is required. *Raymond Corp.*, 5 N.Y.3d at 162; *Consolidated Edison Co. of New York, Inc.*, 98 N.Y.2d at 224 (citing *Olin Corp.*, 221 F.3d at 323).

II. Umbrella and Excess Insurance Coverage

1. Continental (Motion Seq. No. 99)

Continental Casualty Company and the Continental Insurance Company (collectively, "Continental") join in Lumbermens' argument for allocation and move separately for partial summary judgment on the issue of allocation of indemnity and defense costs. Continental moves for pro rata allocation.

Continental issued five insurance policies at issue in this litigation, spanning the period from 5/4/67 - 5/4/70 (the "67-70 policy") and 4/1/80 through 4/1/84 (the "80-84 policies"). The 67-70 policy limits coverage to "injury or destruction taking place during this policy period." Ray Aff.,[17] Ex. 1, p. COR0855. Similarly, the 80-84 policies contain language stating "[t]his policy applies only to personal injury, property damage and advertising injury happening during the policy period." Ray Aff., Ex. 2, p. COR00884; Ex. 3, p. COR00909; Ex. 4, p. COR 00895; and Ex. 5, p. 6 of exhibit (unnumbered).

As per the reasoning *supra*, the language of the Continental insurance policies dictates that the policies provide coverage for personal injury caused by an occurrence that takes place within the policy period. Pro rata allocation on a time on the risk basis is therefore appropriate. *See Raymond Corp.*, 5 N.Y.3d at 162; *Consolidated Edison Co. of New York, Inc.*, 98 N.Y.2d at 224 (citing *Olin Corp.*, 221 F.3d at 323).

---

[17] Affidavit of Amina Ray in Support of Continental's Joinder and Motion for Partial Summary Judgment Regarding Allocation ("Ray Aff.").

2. Mt. McKinley (Motion Seq. No. 100)

Mt. McKinley Insurance Company, formerly known as Gibralter Casualty Insurance Company, and Everest Reinsurance Company, formerly known as Prudential Reinsurance Company (collectively, "Mt. McKinley"), move for partial summary judgment for pro rata, time on the risk allocation for indemnity costs for which the Mt. McKinley policies may cover. Mt. McKinley takes no position as to the allocation of defense costs.

Mt. McKinley issued six insurance policies to Corning, during the period from 1980 to 1985. One Mt. McKinley policy is a first-layer umbrella policy, in effect from 4/1/80 to 4/1/81 (Alvarez Affirm., Ex. A),[18] while the remaining five policies are high-layer excess liability policies in effect from 4/1/80 to 4/1/85. Alvarez Affirm., Exs. B-F.

Mt. McKinley accurately notes that its first-layer umbrella policy contains limitations that Mt. McKinley will be responsible, when the applicable or retained limit is reached, for personal injury due to an "occurrence." An occurrence is defined as required to incur within the policy period. Mt. McKinley Memo, p. 2; Alvarez Affirm. Ex. A, pp. 1-3.

Mt. McKinley's excess liability policies incorporate the terms and conditions of the underlying umbrella policies, except as specifically limited. *See* Alvarez Affirm.,

---

[18] Affirmation of Fred L. Alvarez in Support of Mt. McKinley's Motion for Partial Summary Judgment on Allocation ("Alvarez Affirm.").

Exs. B-F. From 1981 to 1983, the Mt. McKinley excess policies followed Northbrook Excess and Surplus Insurance Company and Northbrook Indemnity Company (collectively, "Northbrook") policies. From 1983 to 1985, Mt. McKinley's policies followed those of New England Reinsurance Corporation ("New England Re") policies. Both the Northbrook and New England Re policies also included language in which, with respect to personal injury, "occurrence" is defined as an accident, event or continuous or repeated exposure to conditions which results in injury "during the policy period." Mt. McKinley Memo, pp. 2-3.

Mt. McKinley joins in Sections III of the Lumbermens' Memo (*see supra*) and IV of the Chartis Memo. *See infra*. Mt. McKinley contends that, as per its policies' language, it is only obligated to cover losses on a pro rata, time-on-the-risk basis. Mt. McKinley Memo, p.3. The court agrees.

The language of the Mt. McKinley umbrella and excess insurance policies dictates that the policies provide coverage for personal injury caused by an occurrence that takes place within the policy period. Pro rata allocation on a time on the risk basis is therefore appropriate. *See Raymond Corp.*, 5 N.Y.3d at 162; *Consolidated Edison Co. of New York, Inc.*, 98 N.Y.2d at 224 (citing *Olin Corp.*, 221 F.3d at 323).

3. Travelers (Motion Seq. No. 101)

Travelers Casualty and Surety Company, formerly known as The Aetna Casualty and Surety Company ("Travelers") join in Lumbermens' argument for allocation and

move separately for partial summary judgment on the issue of allocation of indemnity costs. Travelers, as with all other insurers, moves for pro rata allocation.

Travelers issued nine policies to Corning between 1973 and 1984 (the "Travelers Policies"). Kupec Aff.,[19] Exs. 1-9. Each of the policy contains language stating that: "Aetna Casualty will indemnify the INSURED against EXCESS NET LOSS arising out of an accident or occurrence during the policy period, subject to the limits of liability stated in Section 1. and to all of the terms of this policy." *Id.*, Section 2, Indemnity Agreement, in all policies (emphasis in original). "Excess net loss" is loss in excess of underlying coverage which the policy covers. *Id.*

The language of the Travelers excess insurance policies dictates that the policies provide coverage for personal injury caused by an occurrence that takes place within the policy period. Pro rata allocation on a time on the risk basis is therefore appropriate. *See Raymond Corp.*, 5 N.Y.3d at 162; *Consolidated Edison Co. of New York, Inc.*, 98 N.Y.2d at 224 (citing *Olin Corp.*, 221 F.3d at 323).

4. North River (Motion Sequence No. 102)

The North River Insurance Company ("North River") joins in limited sections of Lumbermens' memorandum of law in support of its motion for summary judgment (North River Memo, pp. 9-10), refers the court to the memoranda of law of Chartis and GEICO, and moves partial summary judgment on the issue of allocation of indemnity and

---

[19] Affidavit of Kenneth Kupec ("Kupec Aff.").

defense costs. North River, with all other insurers, moves for pro rata, time on the risk allocation.

North River issued seven third or fourth layer excess umbrella policies to Corning during the period from March 15, 1974 through April 1, 1980. Each North River policy contains provisions which mandate that the policies are subject to the same terms, definitions, exclusions and conditions as are contained in the policies underlying the North River policies' layer of coverage, with exceptions not related to provision of coverage. Roberts Affirm.,[20] Exs. D-J.

Underlying policies include The Home Insurance Company ("The Home"), American Home Insurance Company ("American Home") and Aetna Casualty & Surety Company ("Aetna") (North River Policy Nos. XS 3452 and JU0470); The Home, Hartford Accident & Indemnity Company ("Hartford"), Aetna and National Union Fire Insurance Company of Pittsburgh, Pennsylvania ("National Union") (North River Policy No. JU0282); The Home, Hartford, Aetna and National Union (North River Policy No. XS 4410); City Insurance Company ("City"), Hartford, Aetna and National Union (North River Policy No. XS 4430); City and National Union (North River Policy No. JU0651); and City, National Union and North River (North River Policy No. JU0652).

As is shown elsewhere in this decision, losses covered by the underlying policies above which North River attaches are to be allocated on a pro rata basis. Those not

---

[20] Affirmation of Stephen T. Roberts in Support of North River Insurance Company's Motion for Relief Related to Lumbermens Mutual Casualty Company's Motion for Partial Summary Judgment as to Allocation ("Roberts Affirm.").

specifically considered, such as the City policy, contains language limiting coverage to those losses occurring "during the policy period." Roberts Aff., Ex. J, p. COR02659, "5. Occurrence"; *see also* Ex. H., The Home policy, p. COR02496, "5. Occurrence"; Ex. I, The Home policy, p. COR00415252, "5. Occurrence."

For these reasons, and as shown as necessary for the underlying policies, pro rata allocation on a time on the risk basis is appropriate for the North River policies. *See Raymond Corp.*, 5 N.Y.3d at 162; *Consolidated Edison Co. of New York, Inc.*, 98 N.Y.2d at 224 (citing *Olin Corp.*, 221 F.3d at 323).

5. London Market (Motion Sequence No. 103)

Certain Underwriters at Lloyd's, London and Certain London Market Insurance Companies (the "London Market Insurers") join in limited sections of Lumbermens' memorandum of law in support of its motion for summary judgment (London Market Memo, pp. 6-7), refers the court to the memoranda of law of the Chartis Companies and GEICO, and moves partial summary judgment on the issue of allocation of indemnity and defense costs. The London Market Insurers move for pro rata, time on the risk allocation.

The London Market Insurers provided one first-layer umbrella policy, covering the period from 2/1/62 to 2/1/65 (the "LM Policy 61576"). LM Policy 61576 defines "occurrence" as meaning:

> an accident or a happening or event or a continuous or repeated exposure to conditions which unexpectedly and unintentionally results in personal injury, property damage or advertising liability during the policy period. All such exposure to substantially the same general conditions existing at or emanating from one premises' location shall be deemed one occurrence.

Roberts London Market Affirm.,[21] Ex. D, p. LMINY000009, "5. Occurrence." The policy provided coverage for personal injuries arising out of each occurrence. *Id.* at LMINY000382. It further required that the underlying insurance referenced in the policy's declarations be maintained throughout the policy period. *Id.* at LMINY000015.

The London Market Insurers also provided second- and third-layer umbrella policies covering the period from 1962 to 1965, LM Policies 61577 and 64249. Both policies contain coverage provisions substantially similar to LM Policy 61576. Roberts London Market Affirm., Ex. E, p. LMINY000076; Ex. F, p. LMINY000101. The policies also require that underlying insurance be maintained, and that the policies are subject to the terms, definitions, exclusions and conditions of the underlying policies. Roberts London Market Affirm., Ex. E., p. LMINY000077; Ex. F, p. LMINY000102.

Further, the London Market Insurers provided four second-, third-, and fourth-layer excess policies for the period from 4/1/80 to 4/1/85. London Markets Memo, pp. 4-5. These policies all contain substantial similar provisions as to coverage, maintenance requirements of underlying coverage and statements that the policies are subject to the same terms, definitions, exclusions and conditions as in the underlying policies. *See* Roberts London Market Affirm, Exs. G-J.

The London Market Insurers claim argue that LM Policy 61576 contains specific language requiring that injury take place during the policy period. The London Market

---

[21] Affirmation of Stephen T. Roberts in Support of London Market Insurers' Motion for Relief Related to Lumbermens Mutual Casualty Company's Motion for Partial Summary Judgment as to Allocation ("Roberts London Market Affirm.").

Insurers further argue that their policies in effect from 1981 to 1985 all incorporate the terms and conditions of underlying policies, all of which contain identical or substantially similar "during the policy period" wording.

As is shown throughout this decision and the consideration of the policies within, the insurance policies in this action, and with particular importance placed on the Primary Insurers' policies, either contain "within the policy period" language or follow form to policies that contain that language. Such is the case here. Pro rata allocation on a time on the risk basis is appropriate for the London Market Insurers' policies. *See Raymond Corp.*, 5 N.Y.3d at 162; *Consolidated Edison Co. of New York, Inc.*, 98 N.Y.2d at 224 (citing *Olin Corp.*, 221 F.3d at 323).

5. Hartford (Motion Sequence No. 104)

Hartford Accident and Indemnity Company, First State Insurance Company and New England Reinsurance Corporation (collectively, "Hartford") move for partial summary judgment on the issue of allocation of defense and indemnity costs. As with all parties but for Corning, Hartford moves for pro rata allocation on a time-on-the-risk basis.

Hartford issued eleven excess policies to Corning for policy periods from 2/1/77 through 4/1/85. Hartford contends that its policies, either directly or through the policies to which they follow form, each provide coverage ultimate net loss resulting from a personal injury caused by an occurrence. Hartford argues that its issued policies define both "personal injury" and "occurrence" as happening "during the policy period." *See*

Hartford Memo, pp. 3-5 (citing Zwick Aff.,[22] Ex. 13, p. COR00382). Hartford thus claims that under the terms of the bargain in the contract between the parties, Corning agreed to coverage during the policy period, and Hartford has no obligation for bodily injury outside of the policies' covered terms.

The court has reviewed the Hartford policies provided and the policies to which the Hartford policies follow form. *See* Hartford Rule 19a Statement, ¶¶ 2-10. The court is satisfied that all Hartford policies or policies to which Hartford follows form either contain "during the policy period" language substantially similar. For this reason, the court finds that pro rata allocation on a time on the risk basis is appropriate for Hartford's policies. *See Raymond Corp.*, 5 N.Y.3d at 162; *Consolidated Edison Co. of New York, Inc.*, 98 N.Y.2d at 224 (citing *Olin Corp.*, 221 F.3d at 323).

6. Allstate (Motion Sequence No. 105)

Allstate Insurance Company, solely in its capacity as successor-in-interest to Northbrook Excess & Surplus Insurance Company, formerly Northbrook Insurance Company, Firemen's Fund Insurance Company ("FFIC") and American Centennial Insurance Company ("ACIC") (collectively, "Allstate") move for partial summary judgment on the issue of allocation. Allstate joins in the Chartis Companies motion for partial summary judgment on allocation, *infra*, and, in support of Allstate's motion, incorporates by reference the Chartis Companies' and the London Market Insurers' memoranda of law.

---

[22] Affidavit of Frederick W. Zwick in Support of Hartford's Motion for Partial Summary Judgment as to Allocation ("Zwick Aff.").

Allstate Insurance Company, FFIC and ACIC collectively issued nine excess insurance policies to Corning. Buckley Affirm.,[23] ¶¶ 4-12. Allstate contends that each of the policies it issued, and the policies to which its own policies follow form, are substantially similar to the policies identified in the Chartis Companies' motion for partial summary judgment on allocation. Allstate requests summary judgment based on the reasoning in the Chartis Companies' motion.

The court has examined the policies at issue in Allstate's motion, and is satisfied that the policies at issue both contain language requiring that the loss occur "during the policy period" and follow form to policies that contain substantially similar language. The court therefore finds that pro rata allocation on a time on the risk basis is appropriate for Allstate's policies. *See Raymond Corp.*, 5 N.Y.3d at 162; *Consolidated Edison Co. of New York, Inc.*, 98 N.Y.2d at 224 (citing *Olin Corp.*, 221 F.3d at 323).

7. Westport (Motion Sequence No. 106)

Westport Insurance Corporation (formerly known as Puritan Insurance Company, formerly known as The Manhattan Fire & Marine Insurance Company) ("Westport") moves for partial summary judgment on the issue of allocation. Similarly to the above, Westport moves for a declaration that pro rata allocation is to be applied on a time-on-the-risk basis. Westport adopts the arguments of the Chartis Companies in support of its motion.

---

[23] Affirmation of Michael E. Buckley in Support of Allstate's, FFIC's and ACIC's Motion for Partial Summary Judgment Regarding Allocation ("Buckley Affirm.").

Westport issued one excess policy to Corning. Westport's policy covered the period from 4/1/80 through 4/1/81, and follows form to Gibralter Casualty Company umbrella liability policy GMU 00036. Shelley Affirm.,[24] ¶ 3, Ex. 1, p. WPT 000183. The Gibralter Casualty Company policy limits coverage to an occurrence during the policy period. Tessler Affirm., Ex. 71, p. COR 00659 "D. Occurrence."

Upon the above language, and the arguments stated by the Chartis Companies, the court therefore finds that pro rata allocation on a time on the risk basis is appropriate for Westport's policy. *See Raymond Corp.*, 5 N.Y.3d at 162; *Consolidated Edison Co. of New York, Inc.*, 98 N.Y.2d at 224 (citing *Olin Corp.*, 221 F.3d at 323).

8. Federal (Motion Sequence No. 107)

Federal Insurance Company ("Federal") moves for partial summary judgment on the issue of the allocation of defense and indemnity costs. Federal moves for a declaration that pro rata allocation is to be applied on a time-on-the-risk basis. Federal adopts the arguments of the Chartis Companies in support of its motion.

Federal issued two excess policies to Corning. Federal Memo, pp. 1-2. The Federal policies follow form to umbrella policies issued by The Home Insurance Company (policy no. 4764156) and New England Reinsurance Corporation (policy no. 688127).

The court has examined The Home Insurance Company (policy no. 4764156) (Tessler Affirm., Ex. 122) and New England Reinsurance Corporation (policy no.

---

[24] Affirmation of William P. Shelley in Support of Westport Insurance Corporation's Motion for Partial Summary Judgment on Allocation ("Shelley Affirm.").

688127). Tessler Affirm., Ex. 48. Both policies of which the Federal policies follow form clearly state that coverage attaches for personal injury due to occurrences within the policy period. The court therefore finds that pro rata allocation on a time on the risk basis is appropriate for Federal's policies. *See Raymond Corp.*, 5 N.Y.3d at 162; *Consolidated Edison Co. of New York, Inc.*, 98 N.Y.2d at 224 (citing *Olin Corp.*, 221 F.3d at 323).

9. The Chartis Companies (Motion Sequence No. 110)

AIU Insurance Company ("AIU"), American Home Assurance Company ("American Home") and National Union Fire Insurance Company of Pittsburgh, PA ("National Union") (collectively, the "Chartis Companies") next move for partial summary judgment on the allocation of indemnity and defense costs. The Chartis Companies' brief in support of their request for a declaration of pro rata, time-on-the-risk allocation is joined by multiple other insurers. *See infra*.

The Chartis Companies issued eight policies to Corning. Reinertsen Aff.,[25] Exs. A-H. AIU policies 75-102036 and 75-102037 follow form to Northbrook Excess & Surplus Insurance Company umbrella policy 63 007-7746. *See* Reinertsen Aff., Exs. A, B; Tessler Affirm., Ex. 11. AUI policies 75-102134 and 75-102135 follow form to Northbrook Indemnity Company umbrella policy 900-090. *See* Reinertsen Aff., Ex. C, p. AIGDC003922; Ex. D, p. AIGDC003924; Tessler Affirm., Ex. 12. AIU policy 75-102273 follows form to New England Re policy 688127. *See* Reinertsen Aff., Ex. E, p. AIGDC003927; Tessler Affirm., Ex. 48.

---

[25] Affidavit of Stephanie Reinertsen in Support of the Chartis Companies' Motion for Partial Summary Judgment Regarding Allocation ("Reinertsen Aff.").

American Home policy CE3437412 follows form to Home policy HEC4764156. *See* Reinertsen Aff., Ex. F, p. COR02237; Ex. I (Home policy HEC4764156)).

National Union policy 1224848 follows form to Gibralter Casualty Company umbrella policy GMU 00036. *See* Reinertsen Aff., Ex. G; Tessler Affirm., Ex. 71. National Union policy 9910581 follows form to Northbrook Excess & Surplus Insurance Company policy 900-090. *See* Reinertsen Aff., Ex. H, p. COR00469; Tessler Affirm., Ex. 12.

The court has examined the policies at issue and the policies to which the Chartis Companies' policies follow form. The policies the Chartis Companies follow clearly state that coverage attaches for personal injury due to occurrences within the policy period. The court therefore finds that pro rata allocation on a time on the risk basis is appropriate for the Chartis Companies' policies. *See Raymond Corp.*, 5 N.Y.3d at 162; *Consolidated Edison Co. of New York, Inc.*, 98 N.Y.2d at 224 (citing *Olin Corp.*, 221 F.3d at 323).

10. Old Republic (Motion Sequence No. 112)

Old Republic Insurance Company ("Old Republic") next moves for partial summary judgment regarding the allocation of indemnity and defense costs. Old Republic joins in partially joins in Lumbermens' and the Chartis Companies' motions for partial summary judgment on allocation in support of its own motion. Old Republic Memo, pp. 4-5.

Old Republic issued one high-level excess policy to Corning, covering the period from 4/1/81 to 4/8/82. Jacobs Affirm.,[26] Ex. B. The Old Republic policy follows form to Northbrook Excess & Surplus Insurance Company policy 63 007-746. Tessler Affirm., Ex. 11. Policies issued by Hartford, the Chartis Companies and Hudson also follow form to this Northbrook policy. The Northbrook policy attaches coverage for personal injury resulting from an occurrence during the policy period. Tessler Affirm., Ex. 11, p. ALLSTATE00728.

Upon the language in the Old Republic policy, Jacobs Affirm., Ex. B, and the Northbrook policy to which the Old Republic follows form, Tessler Affirm, Ex. 11, the court finds that the language of the policies dictates that pro rata allocation on a time on the risk basis is appropriate for Old Republic's policy. *See Raymond Corp.*, 5 N.Y.3d at 162; *Consolidated Edison Co. of New York, Inc.*, 98 N.Y.2d at 224 (citing *Olin Corp.*, 221 F.3d at 323).

11. Great American (Motion Sequence No. 113)

Great American Insurance Company ("Great American") is the next movant for partial summary judgment regarding allocation of indemnity and defense costs. As with all movants in this decision but for Corning, Great American moves for pro rata, time-on-the-risk allocation.

---

[26] Affirmation of Timothy F. Jacobs in Support of Old Republic's Motion for Partial Summary Judgment [sic] Partial Joinder of Chartis Insurance Companies' Motion for Summary Judgment and Partial Joinder of Lumbermens Mutual Casualty Company's Motion for Partial Summary Judgment ("Jacobs Affirm.") (untabbed, see Part 3 Rules for further submissions).

Great American issued one excess insurance policy to Corning, covering the time period from 4/29/74 through 2/1/77. Firriolo Affirm.,[27] Ex. D. The coverage provided in the Great American policy followed form to that of the underlying insurance coverage. *Id.*, Ex. D, p. COR00847. In a well-posited statement of facts and affirmation, Great American tracks through the policies to which its policy follows form, culminating in Home Insurance Company policy HEC 476156. Great American Rule 19a Statement, ¶¶ 5-10; Jacobs Affirm., ¶¶ 11-20; Tessler Affirm., Ex. 122 (Home Insurance Company policy HEC 476156). Federal also follows form to the Home Insurance Company policy. That policy contains language that defines the coverage as including personal injury caused by an occurrence, and occurrence as incurred during the policy period. Tessler Affirm., Ex. 122, pp. COR02451.

Upon the language of the Great American policy and the Home Insurance Company policy, the court finds that pro rata allocation on a time on the risk basis is appropriate for Great American's policy. *See Raymond Corp.*, 5 N.Y.3d at 162; *Consolidated Edison Co. of New York, Inc.*, 98 N.Y.2d at 224 (citing *Olin Corp.*, 221 F.3d at 323).

12. Hudson (Motion Sequence No. 114)

Hudson Insurance Company ("Hudson") is the next excess insurer moving for partial summary judgment on the issue of the allocation of indemnity and defense costs.[28]

---

[27] Affirmation of Robert P. Firriolo in Support of Great American Insurance Company's Motion for Partial Summary Judgment as to Allocation ("Firriolo Affirm.").

[28] Hudson expressly disclaims any duty to defend.

As with all above insurers, Hudson requests a declaration for pro rata, time-on-the-risk allocation.

Hudson issued two excess liability policies to Corning. Each policy provided, as with other excess and umbrella policies at bar, coverage for losses attributable to an occurrence. Ross Affirm.,[29] Ex. A, p. COR00731; Ex. B, COR00740. Both policies follow form to Northbrook Excess & Casualty Insurance Company policy 63-007-746. Ross Affirm., Ex. A, p. COR733; Ex. B, p. COR00742; Tessler Affirm., Ex. 11 (Northbrook Excess & Casualty Insurance Company policy). The Northbrook policy attaches coverage for personal injury resulting from an occurrence during the policy period. Tessler Affirm., Ex. 11, p. ALLSTATE00728.

Policies issued by Hartford, the Chartis Companies and Old Republic also follow form to this Northbrook policy. Hudson joins in the arguments presented by the Chartis Companies and Hartford in support of the parties' respective motions for partial summary judgment.

Upon the language of the Hudson policies and the Northbrook Excess & Casualty Insurance Company policy to which the Hudson policies follow form, the court finds that pro rata allocation on a time on the risk basis is appropriate for Hudson's policies. *See Raymond Corp.*, 5 N.Y.3d at 162; *Consolidated Edison Co. of New York, Inc.*, 98 N.Y.2d at 224 (citing *Olin Corp.*, 221 F.3d at 323).

---

[29] Affirmation of David M. Ross in Support of Hudson Insurance Company's Related Motion for Partial Summary Judgment as to Allocation ("Ross Affirm.").

13. Arrowood (Motion Sequence No. 115)

Arrowood Indemnity Company, formerly known as Royal Indemnity Company ("Arrowood") moves for partial summary judgment regarding the allocation of indemnity and defense costs. Arrowood seeks a finding that indemnity and defense costs are to be allocated on a pro rata, time-on-the-risk basis. Arrowood joins in and adopts the memoranda of law in support of partial summary judgment submitted by the Chartis Companies and Hartford in support of its motion.

Arrowood issued one excess liability insurance policy to Corning, covering the period from 4/1/83 to 4/1/84. Proctor Aff.,[30] Ex. A. The Arrowood policy follows form to First State Underwriters Agency of New England Reinsurance Corporation umbrella policy 688127. *Id.*, p. 3; Tessler Affirm., Ex. 48. The Chartis Companies, Allianz and Federal also follow form to the New England Re policy. The New England Re policy contains specific language that it covers personal injury caused by an occurrence which occurs during the policy period. Tessler Affirm., Ex. 48, pp. COR00379, COR00382.

Upon the language of the New England Re policy to which the Arrowood policy directly follows form, the court finds that pro rata allocation on a time on the risk basis is appropriate for Arrowood's policy. *See Raymond Corp.*, 5 N.Y.3d at 162; *Consolidated Edison Co. of New York, Inc.*, 98 N.Y.2d at 224 (citing *Olin Corp.*, 221 F.3d at 323).

---

[30] Affidavit of Trent Proctor in Support of Arrowood's Motion by Order to Show Cause for Partial Summary Judgment on Allocation ("Proctor Aff.").

14. Allianz (Motion Sequence No. 117)

Finally, Allianz Insurance Company ("Allianz") moves for partial summary judgment regarding indemnity. As with the other insurers, Allianz moves for a declaration that pro rata allocation, on a time-on-the-risk basis, applies to the policy it issued.

Allianz issued one excess umbrella policy to Corning that covered the period from 4/1/83 to 4/1/84. Arcovio Affirm.,[31] Ex. A. The Allianz policy provides coverage for personal injury due to an occurrence. The policy follows form to the same New England Re policy 688127 referenced above with regard to the Chartis Companies, Federal and Arrowood. The New England Re policy contains specific language that the policy covers personal injury caused by an occurrence which occurs during the policy period. Tessler Affirm., Ex. 48, pp. COR00379, COR00382.

Upon the language of the New England Re policy to which the Allianz policy directly follows form, the court finds that pro rata allocation on a time on the risk basis is appropriate for Allianz's policy. *See Raymond Corp.*, 5 N.Y.3d at 162; *Consolidated Edison Co. of New York, Inc.*, 98 N.Y.2d at 224 (citing *Olin Corp.*, 221 F.3d at 323)

---

[31] Affirmation of Robert A. Arcovio in Support of Allianz's Joinder and Related Motion for Partial Summary Judgment as to Allocation ("Arcovio Affirm.") (untabbed – see Part 3 rules for further submissions to this court).

The court has considered other joinders and oppositions and finds those argument encompassed in the decision above and therefore unnecessary to specifically address.

III. Defense Cost Allocation

An insurer's duty to defend arises when the insurer has knowledge of facts establishing that a reasonable possibility exists that the insurer's issued policy to the insured may provide coverage for loss to the insured. The duty to defend is a broader duty than an insurer's duty to indemnify. *Continental Casualty Co., et al. v. Rapid American Corp., et al.*, 80 N.Y.2d 640, 648, 655 (1993) ("*Rapid American*"). If the policy language allows for the coverage of defense costs, then this is the litigation insurance that the insured has purchased. *Id.* at 655. Moreover, if "any of the claims against an insured arguably arise from covered events, the insurer is required to defend the entire action." *Fieldston Property Owners Assoc., Inc.*, 16 N.Y.3d at 264-65 (citations omitted); *see BP A.C. Corp. v. One Beacon Ins. Group*, 8 N.Y.3d 708, 714 (2007).

Despite the arguments of the parties focusing on the duty to defend, the question at bar is not the duty to defend itself, but the allocation of payment therefor. The court makes no finding in this decision about whether any one party has a duty to defend another or the contours of that duty. Rather, the question here is only the method of the allocation of the defense costs: joint and several or pro rata.

New York law allows both all sums and pro rata distribution of defense costs amongst successive insurers. *See Rapid American*, 80 N.Y.2d at 655 ("[w]hen more than one policy is triggered by a claim, pro rata sharing of defense costs may be ordered, but we perceive no error or unfairness in declining to order such sharing, with the understanding that the insurer may later obtain contribution from other applicable policies."); *see also Atlantic Mut. Ins. Co. v. Greater New York Mut. Ins. Co.*, 241 A.D.2d 427, 427 (1st Dep't 1997). New York courts often assess pro rata allocation of defense costs where policies provide successive coverage to the insured. *See Atlantic Mut. Ins. Co.*, 241 A.D.2d at 427; *Atlantic Mut. Ins. Co. v. American Motorists Ins. Co.*, 181 A.D.2d 519, 519 (1st Dep't 1992). Again, language in the applicable policies, if present, will be determinative. *See Raymond Corp.*, 5 N.Y.3d at 162; *Aetna Cas. & Sur. Co. v. National Union Fire Ins. Co. of Pittsburgh, PA,* 228 A.D.2d 385, 386-87 (1st Dep't 1996).

The court does not find the applicable policy language ambiguous. The court therefore does not agree with Corning's argument that summary judgment on the issue is premature. *See* Corning's Moving Memo, pp. 23-26.

A. Primary Insurers

The Primary Insurers argue, as with coverage, for pro rata allocation of defense costs. Corning contends and requests a declaration that the Primary Insurers have a joint and several obligation to defend Corning, and that it is therefore entitled under the

policies and applicable case law to a complete defense from each triggered primary policy. Corning argues that each of the policies the Primary Insurers sold it contain defense provisions that entitle Corning to a complete defense against Corhart Claims. Corning further argues that because no language in the Primary Insurers' policies quantify or limit the Primary Insurers' defense obligations based on other insurance policies, pro rata allocation of defense costs may not be found, and joint and several allocation is appropriate.

i. *Lumbermens*

Lumbermens sold Corning eleven primary insurance policies from 1972 to 1985. Corning's Moving Memo, p. 14. Lumbermens argument focuses on its contention that the policies it issued contain deductible liability endorsements ("DLEs") that eliminate or radically alter its duty to defend Corning. Lumbermens' Reply Memo, pp. 19-21. Lumbermens allege that the DLEs were emplaced in recognition of Corning's decision to self-insure during time periods relevant to this action. *Id.*, p. 19. Lumbermens argues that to hold for joint and several allocation of defense costs would ignore Corning's decision to insure and defend itself, would obviate controlling DLEs and would thus disregard the agreed-upon nature of Corning's insurance program with Lumbermens.

Corning argues that the DLE provisions Lumbermens cite have (a) been cancelled and superseded by subsequent endorsements and (b) pertain only to deductible amount and how that amount is reached. Corning contends that whether or when a deductible has been reached, the issue of allocation of defense costs will remain.

First, the court notes, as pointed out by Corning, that the January 1, 1972 – April 1, 1974 language in the two policies which Lumbermens appears to cite may be superseded by later amendment to the policy. Corning's Reply Memo, p. 8 and n.7. However, the differences are immaterial for the issue before the court of allocation.

Second, Lumbermens' argument that its responsibility for defense costs is eliminated or altered by the DLEs is without basis to the instant dispute. The issue before the court is not when defense costs are levied, but how defense costs are allocated. Lumbermens may raise its case against its alleged duty to defend in a separate motion.

ii. *Century*

Century sold Corning three primary insurance policies from 1962 to 1969.

Century asserts that New York courts have held for pro rata allocation of defense costs where damages are alleged to occur from injuries spread over multiple policy periods. Century Reply Memo, p. 15. Century further argues that the course of the parties' conduct supports its claim for pro rata allocation. Century argues that defense costs have been apportioned pro rata under three separate Corhart Claims handling agreements. *See id.*, p. 16-17; McDonald Supp. Affirm.[32], Exs. B, C and D.

Corning has demonstrated that the handling agreements between the parties reserved all rights and were without prejudice. Corning's Reply Memo, p. 10-12;

---

[32] Supplemental Affirmation of John B. McDonald in Further Support of Century's Motion for Partial Summary Judgment ("McDonald Supp. Affirm.").

McDonald Supp. Affirm., Exs. B, C and D. The court may therefore not rely upon the parties' alleged course of conduct with regard to distribution of defense costs.

B. Excess and Umbrella Insurers

Certain primary and/or excess insurers join in the argument of Lumbermens and Century or argue separately for pro rata allocation of defense costs. For example, nonexhaustively, Continental and Old Republic join with Lumbermens' motion,[33] the Chartis Companies request a decision on the allocation of defense costs "as required by New York Law"[34] and Hartford argues separately, though similarly, for pro rata allocation of defense costs. Hartford's Memo, pp. 3-5. Others disavow any duty to defend. *See, e.g.*, North River's Memo, p. 9.

Again, the court makes no finding on duty to defend. Should any sharing of costs be allocated to the excess or umbrella insurers, the allocation is to be completed as below.

C. Determination

The court finds that the language of the policies mandates neither joint and several nor pro rata allocation. *See Raymond Corp.*, 5 N.Y.3d at 162; *see also Rapid American*, 80 N.Y.2d at 655. The issue is thus decided as per equity and the facts of the case.

Corning has elected, but makes no argument that it has been forced,[35] to self-insure certain risks and amounts during relevant time periods. Corning does not contend that

---

[33] Continental's Memo, p. 4; Old Republic's Memo, pp. 4-5.

[34] Chartis Companies' Memo, p. 22-24.

[35] *Cf. Stonewall Ins. Co. V. Asbestos Claims Mgmt. Corp.*, 73 F.3d 1178 (2d Cir. 1995), *op. mod. on denial of reh.* by 85 F.3d 49 (1996).

any issue exists as to whether injuries were sustained and Corhart Claims incurred during the period of self-insurance. *Cf. Rapid American*, 80 N.Y.2d at 656. Further, to hold for joint and several allocation would be to force a current insurer to pay for that portion of the defense costs attributable to Home, the insolvent primary level insurer. The insurer would then be forced to litigate with Corning as to Corning's own liability for defense costs, as well as the issue of Home's portion of costs. *See Olin Corp.*, 221 F.3d at 323; *see Owens-Illinois, Inc.*, 138 N.J. at 479. All of these situations constitute a needless waste of resources. Defense costs in this 2002 case are already substantial, and stand to multiply. As evidenced by the age of this case, compensation for these great defense costs could be years in coming and be a substantial burden to the insurer during that waiting time.

Upon these facts, joint and several allocation does not comport with fairness to be found in the benefit of the bargain to which Corning agreed with its respective primary insurers.

In this matter involving successive policies covering the same risk, with self-insurance and an insolvent insurer present during the relevant time periods, and additionally with the time of incurring liability unsettled, pro rata allocation is appropriate. *See Continental Casualty Co. v. Allstate Ins. Co.*, 98 N.Y.2d 208, 223-25 (2002). The court finds that "time on the risk" pro rata allocation is proper for the defense costs for which the primary insurers are to bear. The court further finds that the insured need not wait until the conclusion of the claims and/or this action to be provided

defense costs. Rather, the parties are to provide defense costs on an ongoing basis. Should the parties require assistance in this method or implementation of this provision, this court will assist upon motion, and may further evaluate the matter.

The court has considered the remainder of Corning's arguments towards the primary insurers, including its argument that Lumbermens' motion is premature, and finds them without merit. Corning's cross-motion and motion for summary judgment are both denied.

ORDER

Accordingly, it is hereby

ORDERED that the motions for partial summary judgment on the issue of indemnity (loss) and defense cost allocation by Lumbermens Mutual Casualty Company (Motion Sequence No. ("MSN") 98); Century Indemnity Company, as successor to CCI Insurance Company, as successor to Insurance Company of North American and California Union Insurance Company, and Westchester Fire Insurance Company, as successor to International Insurance Company (MSN 109); Continental Casualty Company and the Continental Insurance Company (MSN 99); The North River Insurance Company (MSN 102); Certain Underwriters at Lloyd's, London and Certain London Market Insurance Companies (MSN 103); Hartford Accident and Indemnity Company, First State Insurance Company and New England Reinsurance Corporation

(MSN 104);Allstate Insurance Company, solely in its capacity as successor-in-interest to Northbrook Excess & Surplus Insurance Company, formerly Northbrook Insurance Company, Firemen's Fund Insurance Company and American Centennial Insurance Company (MSN 105); Westport Insurance Corporation (MSN 106); Federal Insurance Company (MSN 107); AIU Insurance Company, American Home Assurance Company and National Union Fire Insurance Company of Pittsburgh, PA (collectively, the "Chartis Companies") (MSN 110); Old Republic Insurance Company (MSN 112); Great American Insurance Company (MSN 113); Hudson Insurance Company (MSN 114); Arrowood Indemnity Company, formerly known as Royal Indemnity Company (MSN 115); and Allianz Insurance Company (MSN 117) is GRANTED, and it is hereby

ADJUDGED and DECLARED that pro rata allocation of indemnity (loss) and defense costs is to be in effect across all primary, excess and umbrella policies issued from the entities in the paragraph immediately above in effect in this matter, and allocation is to be executed as per time on the risk, and it is further

ORDERED that the motions for summary judgment on the issue of indemnity cost allocation by Mt. McKinley Insurance Company, formerly known as Gibralter Casualty Insurance Company, and Everest Reinsurance Company, formerly known as Prudential Reinsurance Company (MSN 100); Travelers Casualty and Surety Company, formerly known as The Aetna Casualty and Surety Company (MSN 101); is GRANTED, and it is hereby

ADJUDGED and DECLARED that pro rata allocation of indemnity costs is to be in effect across all excess and umbrella policies issued from the entities in the paragraph immediately above in effect in this matter, and allocation is to be executed as per time on the risk, and it is further

ORDERED that the cross-motion and motion for summary judgment by Corning Incorporated (MSN 116) is DENIED; and it is further

ORDERED that motion sequence number 108 (MSN 108) has no supporting papers and is DENIED.

This constitutes the Decision and Order of the Court.

Dated: New York, New York
September 7, 2012

ENTER

Hon. Eileen Bransten