IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

HIGHLANDS INSURANCE GROUP, INC., a Delaware corporation and HIGHLANDS INSURANCE COMPANY, a Texas corporation,	:	
Plaintiffs,	:	
v.	:	C.A. No. 17971
HALLIBURTON COMPANY, a Delaware corporation, HALLIBURTON ENERGY SERVICES, INC., a Delaware corporation, and KELLOGG BROWN & ROOT, INC., a Delaware corporation,	:	
Defendants.	:	

MEMORANDUM OPINION

Date Submitted: December 1, 2000
Date Decided: March 21, 2001

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JACOBS, VICE CHANCELLOR

The issue presented in this case is whether the spinoff of a corporate insurance subsidiary resulted in the termination of certain insurance policies previously issued by the former subsidiary. The defendants are companies involved in the oil and gas industry. The plaintiff was the defendants' wholly owned and captive insurance subsidiary. As the result of a spinoff transaction, the relationship between the parent and the insurance subsidiary was severed. Thereafter, the parent began tendering to the (former) insurance subsidiary insurance claims arising out of asbestos losses. The former subsidiary denied coverage, claiming that the insurance policies covering that type of loss had been terminated by the spinoff transaction, or alternatively, that the parent was contractually required to indemnify the former insurance subsidiary for any payments made under the policies. The parties were unable to reach agreement on these issues, and as a consequence the insurance subsidiary filed this action for declaratory and injunctive relief.

All parties have cross-moved for judgment on the pleadings and the parent has also moved to dismiss for failure to state a claim. For the reasons discussed below, the Court concludes that the spinoff transaction terminated the insurance policies at issue. Accordingly, the former insurance subsidiary's motion for judgment on the pleadings will be granted and the

parents company's motion to dismiss and its cross motion for judgment on the pleadings will be denied.

I. FACTS

Highlands Insurance Group, Inc. is a Delaware insurance holding company that through its wholly owned subsidiary, Highlands Insurance Company (collectively "Highlands" or "the plaintiffs"), is primarily engaged in the commercial property and casualty insurance business. Defendants Halliburton Company and Halliburton Energy Services, Inc. (collectively, "Halliburton") are both Delaware corporations. At all relevant times and until 1996, Halliburton owned 100 percent of the stock of Highlands. Co-defendant Kellogg, Brown & Root ("'Brown & Root") is a Delaware corporation that at all times since 1962 was owned either directly or indirectly by Halliburton. [1]

From the time of its incorporation in 1957 until approximately 1970, almost all Highlands insurance policies were written for and at the specific direction of the defendants and other Halliburton affiliates. After 1970, Highlands began writing insurance policies for third party clients, even though Halliburton affiliates remained Highlands' largest customers. Between 1958 and 1986, Highlands issued twenty-nine fixed-premium

[1] Brown & Root, together with Halliburton are sometimes referred to as "the defendants."

general liability policies (the "Fixed Cost Policies") to Brown & Root. These Fixed Cost Policies were "occurrence policies" that provided coverage for liabilities caused by an occurrence during the time the policy was in effect. Under an occurrence policy, a claim may be asserted during the policy period (which typically is one year) or at a contracted-for later time when the losses become manifest.

Beginning in 1987, Highlands issued twelve retrospectively-rated general liability insurance policies (the "Retrospective Policies") to Brown and Root. The Retrospective Policies were also occurrence policies, but the premiums for those insurance policies are adjusted up or down, even after the policy period expires, based on the actual loss experience of the insured both during and after the policy period. Because of this adjustment provision, the Retrospective Policies posed little or no ultimate financial risk to Highlands. In contrast, the Fixed Cost Policies did pose financial risk.

In 1995, Halliburton decided to divest itself of its interest in Highlands in a spinoff transaction wherein Halliburton would distribute its Highlands stock to the Halliburton stockholders (the "Spinoff"). In connection with the Spinoff, the parties executed several documents, one of which was the Distribution Agreement in which Halliburton agreed to indemnify Highlands against certain defined, post-Spinoff, losses. **Also**

executed was an October 10, 1995 Investrnent Agreement, which memorialized a $60 million investment in Highlands that Insurance Partners ("IP") was making, and for which IP would receive approximately 40% of Highlands' common stock.

Other Spinoff-related documents were also created. An Information Statement explaining the transaction, disclosing the transaction's material risks, and describing the post-Spinoff relationship between Halliburton and Highlands, was filed with the United States Securities and Exchange Commission (the "SEC") and also sent to Halliburton stockholders. Aspects of the parties' post-Spinoff relationship were also memorialized in three other agreements: the Insurance Products and Services Agreement (the "IPSA"); the October 10, 1995 Disclosure Letter, which catalogued various items of interest to the parties; and the January 22, 1996 Claims Administration Agreement between Highlands and Brown & Root (the "CAA"), which described the mechanics of how insurance claims by Brown & Root would be processed after the Spinoff

The Spinoff was consummated on January 23, 1996. Thereafter, Brown & Root began tendering to Highlands large numbers of asbestos claims that had been asserted against Brown & Root by persons claiming to have been injured by exposure to asbestos on earlier Brown & Root

construction projects. The parties disagreed on who would ultimately be responsible to pay those claims, which led Highlands to file this action.

II. THE PARTIES' CONTENTIONS AND THE GOVERNING LAW

The pending motions are directed to Highlands' complaint, which asserts seven causes of action, three of which are the basis for Highlands' pending motion for judgment on the pleadings under Rule 12(c).

Highlands' central claim for relief (denominated as its seventh cause of action) is that they are entitled to a declaratory judgment that Highlands has no liability to the defendants for any asbestos claims made against the Fixed Cost Policies. The basis for that claim for declaratory relief is that those policies were either not in effect after October 10, 1995, or were terminated by agreement of the parties at the time the Spinoff closed. Highlands' alternative claim for relief (and its first cause of action) is for a declaratory judgment that under the Distribution Agreement, Highlands is entitled to indemnification from Halliburton for all claims made against the Fixed Cost Policies and the Retrospective Policies. The final claim upon which Highlands' seeks judgment on the pleadings (its second cause of action) is for a declaratory judgment that Halliburton must indemnify Highlands for all asbestos claims under the Fixed Cost Policies, on the

ground that information about those claims was not disclosed in the Exchange File Materials.[2]

Highlands also seeks a mandatory injunction directing Halliburton to assume responsibility for all claims under the Fixed Cost Policies and/or the Retrospective Policies. Additionally, Highlands seeks a declaratory judgment that Brown & Root is liable for breach of contract for nonpayment of premiums due under the Retrospective Policies. Finally, Highlands seeks a declaratory judgment that Brown & Root is equitably estopped from making asbestos-related claims against the Fixed Cost Policies.

Halliburton has moved to dismiss all of Highlands' claims under Court of Chancery Rule 12(b)(6) for failure to state a claim upon which relief can be granted. Alternatively, the defendants have moved for judgment on the pleadings under Court of Chancery Rule 12(c).

The defendants contend that Highlands' first set of claims should be dismissed because the Spinoff documents that are incorporated into Highlands' complaint establish that the Fixed Cost Policies were not terminated by the Spinoff. Nor, defendants argue, does the Distribution

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[2] Annex A to the Distribution Agreement at (ii) defines "Exchange File Material" as: "the Registration Statement, . . . the related Information Statement, ... the related Letter of Transmittal, any related stockholder communication, any other exhibits to any of the foregoing and any amendment or supplement thereto, in each case including all information incorporated by reference therein."

Agreement, read alone or together with the other documents, obligate the defendants to indemnify Highlands for any claims made against the Fixed Cost and Retrospective Policies. The defendants also contend that they cannot be required to indemnify Highlands for the asbestos claims because any failure on their part to disclose pending asbestos claims pre-Spinoff was unintentional. Finally, they argue that Highlands' remaining causes of action must be dismissed as meritless on their face, and that as a consequence of the dismissal of plaintiffs' other claims, Highlands' fifth cause of action (breach of contract by Brown & Root) must be dismissed as well.

Motions under Court of Chancery Rules 12(b)(6) and 12(c) are governed by the same standard: the court accepts all well-pled facts as true and construes any inferences from those facts in the light most favorable to the nonmoving party.[3] A motion to dismiss or for judgment on the pleadings may be granted only where the non-moving party would not be entitled to judgment under any possible set of facts arising out of the allegations of the complaint? By the nature of their motions, the parties agree that the first,

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[3] See Weiss v. Samsonite Corn., Del. Ch., 741 A.2d 366,371 (1999); see also CL Investments, L.P. v. Advanced Radio Telecom Corp., Del. Ch., C.A. No. 17843, Jacobs, V.C., Mem. Op. at 6-7 (Dec. 15, 2000).

[4] Vanderbilt Income & Growth Assocs. v. Arvida/JMB Managers. Inc., Del. Supr., 691 A.2d 609,612 (1996).

second and seventh causes of action may be decided as a matter of law; but they dispute whether the remaining causes of action can be decided at this procedural stage. The defendants argue that the remaining causes of action should either be dismissed or decided in their favor; the plaintiffs contend that their remaining claims are not amenable to resolution without further factual development.

These contentions are next addressed.

III. ANALYSIS

A. The Fixed Cost Policy Claims

The plaintiffs' seventh cause of action seeks a declaration that Highlands is not liable for any claims made against the Fixed Cost Policies, because those policies were either not in effect after October 10, 1995 (the date the Investment Agreement was entered into between Halliburton and IP), or were terminated as a result of the Spinoff. That argument rests on the Investment Agreement, which provides that all insurance policies between any Highlands entity and the Halliburton Group (including Brown & Root), other than policies that were specifically excepted, would automatically terminate at closing. Because neither the Investment Agreement nor the other Spinoff agreements excepts out the Fixed Cost Policies from the

termination provisions, Highlands urges that those policies automatically terminated when the Spinoff closed on January 23, 1996.

The defendants respond that Highlands is not entitled to judgment on this claim, and that the claim must be dismissed. The argument runs as follows: the seventh cause of action is based solely on the Investment Agreement and the Disclosure Letter. Section 3.18 of the Investment Agreement, provides that the termination of certain insurance polices shall occur at the closing of the Spinoff "except as contemplated by any of the Distribution Instruments [defined to include the IPSA]."[5] And the IPSA, defendants contend., clearly identifies the Fixed Cost Policies and provides that Highlands will remain bound by the terms of those policies after the Spinoff.

I disagree. It is undisputed that Sections 3.18 and 6.05 of the Investment Agreement (the "dual termination provisions") expressly provide that all insurance policies between Highlands and the defendants terminate when the Spinoff closes, except for policies that were specifically excepted from the effect of those termination provisions. The defendants do not argue that the Disclosure Letter or the Investment Agreement specifically excepted

[5] Investment Agreement at Section 3.18. Annex A to Investment Agreement at 44 defines the "Distribution Agreements" to include the IPSA.

the Fixed Cost Policies from termination. Therefore, if any such exception exists, it must be found in the IPSA. I find, for the reasons next discussed, that the IPSA contains no exception for the Fixed Cost Policies.

1. The IPSA

The defendants are unable to point to any language in the IPSA or in the schedules thereto that specifically except the Fixed Cost Policies from being terminated at the closing of the Spinoff. The defendants point to Section 3.1 of the IPSA, but that provision only lists, in broad terms, fourteen generic categories of insurance products that Highlands had provided to the defendants at some earlier point in time. Although the Fixed Cost Policies are one of those fourteen categories, that does not establish that Section 3.1 requires the post-Spinoff survival of the Fixed Cost policies. For the Court to so conclude would mean that all insurance policies ever issued by Highlands to Halliburton survived the Spinoff-a result clearly in conflict and at odds with the dual termination provisions of the Investment Agreement, the Distribution Agreement, and the Disclosure Letter.

The provisions that itemize what policies the parties intended to remain in effect after the closing of the Spinoff are found in IPSA Section 3.8 and the schedules attached to the IPSA-not Section 3.1. Section 3.8 relevantly provides:

> The parties agree that best efforts have been made to list all of the Policies in Schedules 1 through 11 and Schedule 13 as attached hereto. ... If any insurance policy, contract, binder or other evidence of insurance or equivalent thereof, whether written or oral, provided by a Highlands Insurer to one or more of the Halliburton Group Companies has inadvertently been omitted from any of the Schedules, it is the intent of the parties hereto that such insurance policy, contract, binder or other evidence of insurance or equivalent thereof be incorporated into this Agreement and be subject to the terms and conditions hereof, notwithstanding any such inadvertent omission.[6]

Section 3.8 requires that for an insurance policy to survive after the Spinoff, the policy must either be listed on one of the specifically denominated schedules, or have been mistakenly omitted from the schedules. The IPSA itself does not operate to cancel any policies; rather, it operates only to keep them in force. Because the Fixed Cost Policies were not listed on any IPSA schedules, they were terminated at the time of the Spinoff by virtue of the dual termination provisions of the Investment Agreement, unless the defendants can show, under Section 3.8 of the IPSA, that despite their best efforts, the relevant policies were inadvertently omitted from the schedule. No facts are alleged from which it can be concluded that despite their best efforts, the parties inadvertently omitted the Fixed Cost Policies from the schedule. To the contrary, the IPSA and the

[6] IPSA § 3.8.

other Spinoff documents all support the conclusion that the Fixed Cost Policies terminated at the closing of the Spinoff.

2. The Information Statement

The Information Statement, which was drafted by Halliburton and signed by its then-President and CEO, Dick Cheney,[7] was intended to explain the Spinoff to the Halliburton stockholders. That document explains in detail the going-forward insurance relationship of Highlands and Halliburton, but does not mention the Fixed Cost Policies. The Information Statement specifically discloses that "substantially all the insurance products written" by Highlands for Halliburton Croup were written under retrospectively rated policies! That disclosure indicates that if the Fixed Cost Policies were intended to survive the closing, the Information Statement would have explained the resulting risks and benefits. Indeed, because the Fixed Cost Policies could have resulted in tens of millions of dollars in future claims, disclosure of their survival (and of any potential liability) would likely have been mandatory. The only way that the Fixed Cost Policies could not have been "material," and therefore not a subject of

[7] After this litigation arose, Mr. Cheney was elected Vice President of the United States.

[8] Information Statement at 43.

mandated disclosure, would be if they no longer would exist after the Spinoff. The record establishes that that was, in fact, the case.

3. The Disclosure Letter

Analysis of the Disclosure Letter yields the same conclusion. The dual termination provisions of the Investment Agreement refer to counterpart sections of the Disclosure Letter, which identified products delivered and services performed by and between the parties before the Spinoff. The dual termination provisions of the Investment Agreement stated that unless such products and services were listed in the counterpart sections of the Disclosure Letter, they would be terminated at the closing of the Spinoff. Despite the high level of specificity used to describe the listed products and services (such as, for example, executive use of the corporate aircraft[9] and computing services'*), no Fixed Cost Policies are listed in the counterpart sections of the Disclosure Letter."

Section 6.05 of the Disclosure Letter is similarly unhelpful to the defendants. It lists no insurance policies, and provides only that certain

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[9] Disclosure Letter at 29.

[10] Disclosure Letter at 30.

[11] Section 3.18 of the Disclosure Letter also refers to the IPSA, stating: "See the Insurance Products and Services Agreement and the attachments thereto," but as previously discussed, nothing in the IPSA exempts the Fixed Cost Policies from termination.

inter-company transfers presently due under particular policies will not be settled at the time of the closing. Because no reference to the survival of the Fixed Cost Policies appears in the Disclosure Letter, it must be concluded that the Disclosure Letter did not except those Policies from termination.

4. The CAA

Lastly, the CAA entered into between Brown & Root and Highlands, sets forth the guidelines those parties were to follow in processing Brown & Root's insurance claims after the Spinoff. The CAA makes no mention of the Fixed Cost Policies. Article II of the CAA, which addresses general liability claims, states that:

> [Brown & Root] is covered by Commercial General Liability and Automobile Liability Insurance Policies issued by Highlands, each with $1,000,000 per occurrence combined single limits. Since these Policies and the Retrospective Rating Plan provide for retrospective premiums, making [Brown & Root] ultimately responsible for the cost of claims thereunder, Highlands and [Brown & Root] hereby amend the Policies so that [Brown & Root] had authority and responsibility with respect to the handling of liability claims which are the subject of this Article II.

The "$1,000,000 per occurrence" policy limits referred to in Article II shows that the above-described Policies were the Retrospective Policies, since the Fixed Cost Policy limits ranged only from $100,000 to $500,000. Article II also provides that Brown & Root, and not Highlands, is ultimately responsible for claims under the policies. If Article II had been referring to

the Fixed Cost Policies, then it would have had to disclose far more detail than presently appears. That is because the administration of the Fixed Cost Policies would have required a specification of procedures that were not needed to administer the Retrospective Policies.

The Spinoff documents, taken together, establish that the Fixed Cost Policies were terminated at the closing of the Spinoff. The plain meaning of those documents permits no different conclusion. The defendants, nonetheless, advance one final argument that they contend establishes that the Fixed Cost Policies survived the Spinoff. I turn to that argument.

5. Forfeiture

The defendants' last argument is that Highlands' first, second and seventh causes of action, if valid, would cause a forfeiture of insurance policies and that "[u]nder Texas law [which governs the policies] an insurer cannot effect a forfeiture of insurance coverage under such polices ... unless it does so in clear and unambiguous terms."[12] The defendants urge that Highlands' pleading does not satisfy that strict standard.

Highlands responds that the defendants' forfeiture argument is irrelevant, because Highlands is not claiming that the defendants forfeited

[12] Defendants' Opening Brief at 9, citing Cartusciello v. Allied Life Ins. Co., 661 S.W.2d 285,287 (Tex. App. 1983); Cruz v. Liberty Mutual Ins. Co, 853 S.W.2d 714,717 (Tex. App. 1993). Although the defendants advance this argument, they do not make it with any specificity.

their policies nor is it advocating any Texas law claims arising out of the insurance policies. Highlands argues that all it is asking this Court to do is enforce Delaware contracts between Delaware corporations that involve an issue of Delaware law. That issue (Highlands contends) is whether, in deciding to conduct the Spinoff, the parties agreed to terminate the Fixed Cost Policies in order to attract the outside investment by IP and to assure Highlands' viability as an independent company. Highlands maintains that the defendants so agreed by entering into the various Spinoff agreements, most importantly the Distribution Agreement, the Investment Agreement, and the IPSA.

I conclude that the defendants' forfeiture argument is irrelevant in this context, because this Court has already found that the parties' clear intent, manifested in the Spinoff documents, was to terminate the Fixed Cost Policies at the closing. Termination is not the same as forfeiture. Although forfeiture has been defined as the "divestiture of specific property without compensation,"[13] that is not what occurred here. In this case, Halliburton negotiated a bilateral contract that called for insurance relationships with Highlands to end by mutual agreement. That, by definition, is not a forfeiture. Highlands is asking this Court to enforce that contract, and the

[13] L&K Realty Co. v. R.W. Farmer Const. Co., Mo. App., 633 S.W.2d 274,279 (1982).

defendants have presented no valid reason why the Court should refrain from doing so. For that reason, the defendants' forfeiture argument has no bearing on the outcome of these motions.[14]

B. The Indemnification Claims

As an alternative to its claim that the Fixed Cost Policies were terminated, Highlands alleges that if the Fixed Cost Policies did not terminate as a result of the Spinoff, then Highlands is entitled to a declaratory judgment that Halliburton must indemnify Highlands for all claims made against the Fixed Cost and Retrospective Policies arising from Brown & Root's operations. The basis for this claim for relief is an indemnity provision in the Distribution Agreement."

The defendants argue that they are not legally obligated to indemnify Highlands and no facts are alleged in the pleadings from which the Court could conclude otherwise. The defendants also argue that the clear terms of

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[14] I do not address the plaintiffs' third cause of action, which seeks a declaratory judgment that Halliburton must indemnify the Highlands plaintiffs for all asbestos claims under the Fixed Cost Policies on the ground that information about those claims was omitted from the Exchange File Materials. Because the Court has already found that the Fixed Cost Policies were terminated by the Spinoff, the issue of indemnification is moot. That is also true for the fourth cause of action, which seeks a mandatory injunction against Halliburton to assume responsibility for all asbestos claims under the Fixed Cost Policies; and also for the sixth cause of action, which seeks a declaratory judgment that Brown & Root is equitably estopped from making claims under the Fixed Cost Policies.

[15] Highlands' second cause of action seeks an implementing injunction that would require Halliburton to assume responsibility for all claims under all of those policies.

the Distribution Agreement are at odds with Highlands' claims. Therefore, defendants urge, Highlands' claims must be either be dismissed under Rule 12(b)(6) or defendants must be granted judgment on the pleadings under Rule 12(c).

Although these claims as pled include both the Fixed Cost Policies and the Retrospective Policies, the parties focus their arguments solely on the Fixed Cost Policies. That is understandable, because the only policies under which Highlands would have been subject to any financial risk were the Fixed Cost Policies.[16] Because the Court has already determined that the Fixed Cost Policies were eliminated by the Spinoff, it does not reach the alternative claim that the defendants are obligated to indemnify Highlands against liabilities that it may incur under those policies.

C. **Extrinsic Evidence**

A separate matter that must be addressed is the defendants' argument that even if the Court concludes that the Spinoff agreements unambiguously terminated Halliburton's and Brown & Root's insurance coverage under the Fixed Cost Policies, Highlands' dismissal motion should be denied because the defendants are entitled to present extrinsic evidence establishing a

[16] The "Retrospective Policies posed relatively little or no ultimate financial risk to the Highlands Plaintiffs, compared to the Fixed Cost Policies." Complaint at ¶ 7.

mutual mistake. The mistake is said to be that when the parties executed the Spinoff agreements, they did not intend for these agreements to extinguish Highlands' insurance obligations under the Fixed Cost Policies. The plaintiffs respond that because the agreements are not ambiguous, no legal basis exists for the Court to consider extrinsic evidence. I agree.

First, in this case there can be no mutual mistake, because as a legal matter Highlands had no independent ability to negotiate the Spinoff agreements. Before the Spinoff Highlands was controlled and 100% owned by Halliburton. Before the Spinoff Halliburton was the only party involved in the negotiation. Therefore, any mistake made would be Halliburton's alone.[17] It is an established rule that a mistake by one contracting party, coupled with ignorance thereof by the other party, is not a "mutual mistake."[18] That result is even more compelled where, as here, there was (legally speaking) no "other" contracting party. Highlands had no input into negotiating or drafting the agreements executed in connection with the Spinoff, and thus, it lacked any ability to change the terms of the Spinoff or to make a "mistake" about what those terms meant. Because in this case no

[17] See generally, Defendants' Answering Brief at 20.

[18] See Home Life Ins. Co. of America v. McCarns, Del. Ch., 16 A.2d 587,589 (1940).

mutual mistake was legally possible, no extrinsic evidence of such a mistake can be considered.

Second, the defendants cannot be heard to argue that the documents are unambiguous, [19] and at the same time argue that they are ambiguous.[20] By entering into agreements with integration clauses, Halliburton stipulated that the contracts are the entire agreements between the'parties and that there were no other agreements.[21] Integration clauses normally bar the use of par01 evidence to vary or contradict a contract.[22]

Third, and finally, parol evidence cannot be used to interpret a contract that facially is unambiguous.[23] This Court has found that the documents are facially unambiguous; indeed, all parties, as earlier noted,

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[19] "[T]he unambiguous terms of the IPSA, the Distribution Agreement, and the Investment Agreement." Defendants' Opening Brief at 7.

[20] Defendant's Reply Brief at 22. "If the Court were to conclude that Highlands' interpretation of the spinoff agreements is reasonable, at a minimum, the agreements are ambiguous because they are capable of being reasonably read in support of conflicting interpretations."

[21] Each of the Agreements contains an integration clause. See, Distribution Agreement at 17; Investment Agreement at 40-41; IPSA at 16; CAA at 13.

[22] See Burgess v. Manufactured Housing Concepts, LLC, Del. Super., C.A. No. 96-02-02S, Graves, J., 1997 WL 364038, *1 (June 17, 1997); Sterling v. Beneficial Nat'l Bank, N.A., Del. Super., C.A. No. 91 C-12-005, Ridgely, J., 1994 WL 315365, *5-6 (April 13, 1994)(aff'd 650 A.2d 1307 (1994)(TABLE)).

[23] Cantor Fitzgerald, L.P. v. Cantor, Del. Ch., 724 A.2d 571,581 (1998).

have so represented.[24] There being no ambiguity to resolve, no extrinsic evidence can be considered.

D. The Breach of Contract Claim

The plaintiffs' fifth cause of action alleges that Brown & Root has breached the Retrospective Policies by failing to pay premiums due thereunder. The defendants have moved to dismiss this claim under Rule 12(b)(6) for failure to state a claim upon which relief may be granted.

The ultimate resolution of this claim centers around which policy covers Brown & Root's asbestos claims. Brown & Root claims that they are covered by the Fixed Cost Policies; Highlands claims that those claims are covered by the Retrospective Policies. That question cannot be resolved at this procedural stage. On this motion all the Court can decide is whether the plaintiffs have met their pleading burden to survive a motion to dismiss under Rule 12(b)(6).[25] Based on the facts as pled, I cannot conclude that the' plaintiffs could not be entitled to relief under any set of circumstances on this claim. For that reason, Brown & Root's motion to dismiss the plaintiffs' breach of contract claim is denied.

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[24] See note 19, supra.

[25] Although Brown & Root has also moved for judgment on the pleadings under Rule 12(c), such relief will not be considered at this juncture because of the highly material factual dispute about which policy covers the asbestos claims.

IV. CONCLUSION

The parties shall confer and submit an Order implementing the rulings made in this Opinion.